EDITED BY

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The Oxford Handbook *of* INTERNATIONAL REFUGEE LAW

THE OXFORD HANDBOOK OF

INTERNATIONAL REFUGEE LAW

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Edited by
CATHRYN COSTELLO,
MICHELLE FOSTER,
and
JANE McADAM

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Foreword

I learnt about the denial of human rights and lack of justice before I knew what those concepts meant, legally. As refugees, the circumstances we are born into are shaped by powers beyond our reach. Yet *we* live the consequences of persecution and displacement and the laws purportedly used to provide pathways to protection.

The circumstances I was born into—as a Kurd whose family escaped genocide—shaped my interest in equality, justice, and human rights very early on. My family's history of resistance in the face of persecution and oppression instilled in me the importance of standing up for what is right, even when your life is on the line.

As the daughter of human rights activists, an ingrained passion for equality and justice inspired me to pursue a career in law. I wanted to understand the power of law to create positive change. So, I decided to dedicate my career to helping others find their voice and access justice, as a lawyer.

In Pakistan, I was denied an education because of my refugee status. And in New Zealand, when I was in high school, a careers adviser told me I 'should consider other options' because law school would be too difficult for *someone like me*—a refugee with no history of education in the family. People like me did not finish school, let alone end up at university. All our lives, we are trained to survive. Being a refugee means that our existence is based on trying to survive just another day and to reach safety. That's all we ever dreamed of. Wanting more than safety and survival seemed ungrateful. And there I was, 'Rêz the ungrateful refugee', dreaming of things that were not for me—going to law school.

To me, it was not just about studying law. It was all the barriers, the stereotypes, and the assumptions that I wanted to crush. To prove that we, refugees, could dream bigger than the constraints of our identities and experiences allowed. It was about taking back control of our own lives and, one day, hopefully, being able to influence the laws that apply to people who are displaced, as I once was.

As a refugee, going through the legal processes of refugee status determination, identification, credibility assessments, and asylum proceedings can be disempowering and frustrating. We are subject to laws and systems that were not created *for us* or *by us*. While it is referred to as 'refugee protection', in many ways it epitomizes a system that is often designed to protect *against us*. To keep us out.

Theoretically, seeking asylum is recognized, internationally, as a right; however, in practice, many asylum seekers are treated as criminals. The political discourse on refugees has shifted from seeing us as '*at* risk', to '*a* risk'. Paradoxically, a system designed to protect some of the most vulnerable people in the world can make us feel even more vulnerable and helpless, further exacerbating the pain of fleeing from our homes.

We find ourselves tasked with navigating the complexities of legal systems—often in languages foreign to us—to reach some semblance of protection afforded under the Refugee Convention as recognized refugees. Yet, disappointingly, successfully navigating these systems does not always result in any guarantees. Access to education, employment, and living a somewhat dignified life in the host country remain everyday uncertainties, as does the prospect of being resettled in a third country. With UNHCR figures indicating that less than one per cent of the world's refugees are resettled annually, the chances are slim.

My family was told it would be six months before we were resettled. It ended up being nine years. Being born as a refugee in a camp, I was at one point one of the statistics referred to in UNHCR's annual global trends reports about the number of displaced people worldwide. But I am also part of another statistic: the one per cent of refugees who complete higher education. While there are many scholars, like me, who also happen to have lived experiences of displacement, refugee voices are still largely unheard in refugee research and scholarship.

While many of the Refugee Convention's drafters were themselves refugees, and drew directly on their personal experiences of displacement, today we see a considerable lack of refugee engagement on issues that impact us. From decision-making outcomes to research that has the potential to influence law and policy related to the predicament faced by refugees, it is imperative that refugees play a key role.

Refugee situations have increased in scope, scale, and complexity, and this necessitates new and innovative methods for protection, assistance, and solutions. While the *status quo* continues to work for some issues, large-scale refugee movements and protracted refugee situations persist around the world, indicating that things must change.

My parents fled for my safety and took me to the opposite side of the world, yet I made my way right back to where they started. I am currently based in the Kurdish region of Iraq working as part of an international team of lawyers gathering evidence of the targeted genocidal campaign carried out by ISIS against the Yezidis, including mass executions, kidnappings, torture, sexual violence, and other egregious human rights abuses. This evidence will be used to build cases in collaboration with relevant European and Iraqi/Kurdish authorities to prosecute the perpetrators.

Finding the best responses and solutions for the complex issues facing the millions of displaced people across the globe requires strong evidence-based research and a commitment to translating findings into impact. It requires input from those with lived experiences of displacement for policies to be developed that are closer to the reality on the ground. Participation begets solutions.

Refugee participation is not only an 'ethical imperative'; it can also contribute to changes in policy, the development of law, and durable solutions that are innovative, sustainable, and more impactful. The importance of reflecting the perspectives of those with lived experiences of displacement has been highlighted in many fora. However, a number of obstacles still hinder the participation of refugee scholars. We need to develop more effective measures for redressing the imbalance in legal scholarship to include refugee voices. We must do better.

There are many avenues for better incorporating refugee perspectives into academic research in a more genuine and systematic way. Refugees are not homogeneous, and neither are our voices. Refugees belong to many different national, social, religious, and ethnic groups, and inevitably have varying opinions and beliefs. Therefore, no one scholar could ever represent a comprehensive 'refugee voice'. As such, scholarship should endeavour to seek input from scholars representing diverse views, and include different nationalities, ethnicities, and backgrounds.

We need to create scholarship identified by people currently displaced to address current and future challenges associated with forced displacement. To achieve these goals, this requires a prioritization and orientation towards capacity-building and co-designing, to ensure that it can provide a platform for scholars with displacement experiences. Leading and emerging scholars can facilitate research, training, and scholarship opportunities which result in specific deliverables, and ensure genuine and effective participation and involvement of refugees in academic work which has the potential to impact and respond to challenges and opportunities relating to us.

The *Handbook*'s approach is pivotal. As the editors note in their introductory chapter, it reflects a range of approaches—from doctrinal analysis of the law, through to critiques of foundational practices and underlying assumptions. As the editors explain, the *Handbook* does not simply 'recount the *status quo*' but also challenges it, and in so doing, sets the future research agenda for international refugee law. It is critical that this next phase incorporates a more balanced consideration of refugee voices. The methodological challenges this entails should not prevent the legal community from championing meaningful refugee participation in scholarship.

With unprecedented numbers of displaced people, we need to work together—now more than ever—to come up with practical, effective responses to displacement through multidimensional, multidisciplinary, and intersectional approaches. The call for 'nothing about us, without us' is not merely a call to engage with refugees in consultations and research, then to write about us. It is a call to make space for us to use our skills, perspectives, and experiences to contribute to scholarship directly. After all, we—refugees—are the experts of our lives and the issues affecting us, and we should be treated as such.

Rêz Gardî, Hewlêr, Kurdistan Region of Iraq, October 2020

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A volume of this scale requires many pairs of keen eyes. We are grateful to our editorial assistants who undertook meticulous copyediting and proofing: Hannah Gordon at Melbourne Law School, Dr Sean Lau at Harvard Law School, and Dr Yulia Ioffe, formerly at the University of Oxford, now at Queen Mary. Yulia took on a multifaceted role—an Assistant Editor in all but name, as well as a contributor to the *Handbook*. Her expertise on general international law, the rights of the child, and refugee law, were frequently called upon, as well as her editorial skills.

Over two days in July 2019, we had the privilege to host a workshop in the beautiful surroundings of All Souls College, Oxford, with the generous support of Emeritus Fellow Professor Guy S Goodwin-Gill. The College staff, in particular Irini Hatzimichali, ensured that the event was both efficiently and elegantly run. Our graduate student assistants, Natalie Nguyen, Dr Claire Walkey, and Elspeth Windsor, prepared meticulous notes for authors, which enabled us to share ideas with those who could not be there in person.

The workshop, which was attended by most of the authors, provided an opportunity to discuss and shape the contributions for the *Handbook*. We were deeply grateful to our contributors for the collaborative and generous spirit with which they approached the workshop, and for their willingness to both give and receive feedback so constructively. This collegial approach extended well beyond the workshop, as exemplified by authors' willingness to refine and revise their contributions—in several cases co-authoring chapters in newly established international collaborations—and to engage closely with us as editors to produce excellent scholarship. We are proud to be part of this community of scholars.

We gratefully acknowledge the various institutions and funders that supported the *Handbook*. Cathryn Costello and Michelle Foster's long-standing collaboration was supported by generous funding from the Allan Myers Oxford–Melbourne Law School fund. At Oxford, the Refugee Studies Centre (RSC) staff supported the organization of the workshop, in particular, Tamsin Kelk and Susanna Power. The RSC also supported the work on the *Handbook* via a grant from the Swiss Federal Department of Foreign

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Cathryn Costello, Michelle Foster, and Jane McAdam
Berlin, Melbourne, and Sydney, October 2020

Contents

List of Abbreviations xvii
Table of Cases xix
Table of Instruments xliii
Contributors lxxiii

Introducing International Refugee Law as a Scholarly Field 1
Cathryn Costello, Michelle Foster, and Jane McAdam

PART I INTERNATIONAL REFUGEE LAW—REFLECTIONS ON THE SCHOLARLY FIELD

1. International Refugee Law in the Early Years 23
Guy S Goodwin-Gill

2. Race, Refugees, and International Law 43
E Tendayi Achiume

3. A Feminist Appraisal of International Refugee Law 60
Adrienne Anderson and Michelle Foster

4. Queering International Refugee Law 78
Nuno Ferreira and Carmelo Danisi

5. The Politics of International Refugee Law and Protection 97
Rebecca Hamlin

6. The Ethics of International Refugee Protection 114
Seyla Benhabib and Nishin Nathwani

7. Refugees as Migrants 134
Idil Atak and François Crépeau

8. The Intersection of International Refugee Law and International Statelessness Law 152
Laura van Waas

PART II SOURCES

9. The Architecture of the UN Refugee Convention and Protocol 171
James C Hathaway

10. The Office of the United Nations High Commissioner for Refugees 186
James Milner and Jay Ramasubramanyam

11. Moving Towards an Integrated Approach of Refugee Law and Human Rights Law 202
Vincent Chetail

12. International Humanitarian Law and Refugee Protection 221
Reuven (Ruvi) Ziegler

13. Customary Refugee Law 240
Hélène Lambert

14. National Constitutions and Refugee Protection 258
Eve Lester

PART III REGIONAL REGIMES

15. Regional Refugee Regimes: Africa 279
Marina Sharpe

16. Regional Refugee Regimes: North America 296
Deborah Anker

17. Regional Refugee Regimes: Latin America 315
José H Fischel de Andrade

18. Regional Refugee Regimes: Middle East 334
Maja Janmyr and Dallal Stevens

19. Regional Refugee Regimes: Europe 352
Evangelia (Lilian) Tsourdi

20. Regional Refugee Regimes: Central Asia 370
Khalida Azhigulova

21. Regional Refugee Regimes: East Asia 389
Osamu Arakaki and Lili Song

22. Regional Refugee Regimes: South Asia 407
Jay Ramasubramanyam

23. Regional Refugee Regimes: Southeast Asia 423
Vitit Muntarbhorn

24. Regional Refugee Regimes: Oceania 441
Michelle Foster and Anna Hood

PART IV ACCESS TO PROTECTION AND INTERNATIONAL RESPONSIBILITY-SHARING

25. The Sharing of Responsibilities for the International Protection of Refugees 463
Madeline Garlick

26. Protection at Sea and the Denial of Asylum 483
Violeta Moreno-Lax

27. Extraterritorial Migration Control and Deterrence 502
Thomas Gammeltoft-Hansen and Nikolas Feith Tan

28. The Evolution of Safe Third Country Law and Practice 518
Luisa Feline Freier, Eleni Karageorgiou, and Kate Ogg

29. Smuggling of Migrants and Refugees 535
Andreas Schloenhardt

30. Human Trafficking and Refugees 553
Catherine Briddick and Vladislava Stoyanova

31. Refugee Status Determination 569
Bruce Burson

32. Asylum Procedure 588
Álvaro Botero and Jens Vedsted-Hansen

33. Credibility, Reliability, and Evidential Assessment 607
Gregor Noll

PART V THE SCOPE OF REFUGEE PROTECTION

34. The International and Regional Refugee Definitions Compared 625
Tamara Wood

35. UNRWA and Palestine Refugees 643
Susan M Akram

36. Complementary Protection 661
Jane McAdam

37. Temporary Protection and Temporary Refuge 678
Jean-François Durieux

38. The Internal Protection Alternative 695
Bríd Ní Ghráinne

39. Exclusion 711
Geoff Gilbert and Anna Magdalena Bentajou

40. Women in Refugee Jurisprudence 728
Catherine Dauvergne

41. Refugee Children 745
Jason Pobjoy

42. Sexual Orientation and Gender Identity in Refugee Claims 761
Jenni Millbank

43. Protecting Refugees with Disabilities 778
Mary Crock

44. Stateless Refugees 797
Hélène Lambert

45. Conflict Refugees 815
Cornelis (Kees) Wouters

46. Displacement in the Context of Climate Change and Disasters 832
Jane McAdam

47. Internal Displacement 848
Walter Kälin

PART VI REFUGEE RIGHTS AND REALITIES

48. The Right to Asylum 867
María-Teresa Gil-Bazo and Elspeth Guild

49. National Constitutions and the Right to Asylum 883
Stephen Meili

50. *Non-refoulement* 899
Penelope Mathew

51. Non-penalization and Non-criminalization 917
Cathryn Costello and Yulia Ioffe

52. The Right to Liberty 933
Eve Lester

53. The Right to Work 952
Cathryn Costello and Colm Ó Cinnéide

54. The Right to Education 971
Sarah Dryden-Peterson and Hania Mariën

55. The Right to Family Reunification 988
Frances Nicholson

56. The Digital Transformation of Refugee Governance 1007
Kristin Bergtora Sandvik

PART VII THE END OF REFUGEEHOOD—CESSATION AND DURABLE SOLUTIONS

57. Cessation 1029
Georgia Cole

58. Refugee Naturalization and Integration 1046
Fatima Khan and Reuven (Ruvi) Ziegler

59. Reimagining Voluntary Repatriation 1064
Marjoleine Zieck

60. Resettlement 1080
Susan Kneebone and Audrey Macklin

61. Onward Migration 1099
Katy Long

PART VIII ACCOUNTABILITY FOR DISPLACEMENT AND REFUGEE RIGHTS VIOLATIONS

62. Restitution and Other Remedies for Refugees and Internally Displaced Persons 1119
Megan Bradley

63. The Responsibility of Armed Groups Concerning Displacement 1138
Ben Saul

64. The Accountability of International Organizations in Refugee and Migration Law 1157
Jan Klabbers

65. Border Crimes as Crimes against Humanity 1174
Itamar Mann

Index 1191

List of Abbreviations

Treaties and Other Instruments

Cartagena Declaration	Cartagena Declaration on Refugees (adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico, and Panama, 22 November 1984)
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13
CERD	Convention on the Elimination of All Forms of Racial Discrimination (adopted 7 March 1966, entered into force 4 January 1969) 660 UNTS 195
CRC	Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3
ECHR	European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms, as amended) (4 November 1950)
EU Charter of Fundamental Rights	Charter of Fundamental Rights of the European Union
EU Qualification Directive (original)	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] OJ L304/12
EU Qualification Directive	Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted (recast) [2011] OJ L337/9
Global Compact for Migration	Global Compact for Safe, Orderly and Regular Migration, UNGA res 73/195 (19 December 2018)
Global Compact on Refugees	Global Compact on Refugees, UN doc A/73/12 (Part II) (2018)

ICCPR	International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171
ICESCR	International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3
New York Declaration	New York Declaration for Refugees and Migrants, UNGA res 71/1 (19 September 2016)
OAU Convention	Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45
Protocol	Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267
Refugee Convention	Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137
UDHR	Universal Declaration of Human Rights, UNGA res 217A (III) (adopted 10 December 1948)

Abbreviations

AJIL	American Journal of International Law
CJEU	Court of Justice of the European Union
CUP	Cambridge University Press
EJML	European Journal of Migration and Law
EU	European Union
ExCom	Executive Committee of the High Commissioner's Programme
ICLQ	International and Comparative Law Quarterly
IDPs	internally displaced persons
IJRL	International Journal of Refugee Law
ILA	International Labour Organization
IOM	International Organization for Migration
JRS	Journal of Refugee Studies
MLR	Modern Law Review
NGO	non-governmental organization
OUP	Oxford University Press
RSQ	Refugee Survey Quarterly
UNGA	UN General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNRWA	United Nations Relief Work Agency
UNSC	UN Security Council
UNTS	United Nations Treaty Series

Table of Cases

International Bodies

International Court of Justice

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) [2007] ICJ Rep 43 . . . 241n8
Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar) (Order) 23 January 2020, General List No 178, ICJ. 257n150, 421
Avena and Other Mexican Nationals (Mexico v United States of America) (Merits) [2004] ICJ Rep 12 . . . . . 924n57
Barcelona Traction, Light and Power Company, Limited, Case Concerning (Belgium v Spain) (Second Phase) [1970] ICJ Rep 3 . . . . . 255n138, 1163n30
Colombian–Peruvian Asylum Case (Merits) [1950] ICJ Rep 266 . . . . . 320n18
Corfu Channel Case (UK v Albania) (Merits) [1949] ICJ Rep 4 . . . . . 483n5, 491n78, 930n97
Effect of Awards of Compensation Made by the UN Administrative Tribunal (Advisory Opinion) [1954] ICJ Rep 47 . . . . . 1167n50
Gabčíkovo-Nagymaros Project (Hungary/Slovakia) [1997] ICJ Rep 7 . . . . . 920n18, 920n19
Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt (Advisory Opinion) [1980] ICJ Rep 73 . . . . . 1160n11
Jadhav Case (India v Pakistan) (Merits) [2019] ICJ Rep 1 . . . . . 924n56, 924n57, 924n58
Jurisdictional Immunities of the State (Germany v Italy, Greece intervening) [2012] ICJ Rep 99 . . . . . 1162n24
Legal Consequences for States of the Continued Presence of South Africa in Namibia (Advisory Opinion) [1971] ICJ Rep 16. . . . . 211n35
Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] ICJ Rep 136. . . . . 657n84
Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226 . . . . . 246n55
Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits) [1986] ICJ Rep 14. . . . . 240n3, 244n38, 244n40, 247n59, 247n60, 247n63, 919n14, 919n15
North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands) [1969] ICJ Rep 3 . . . . . 240n2, 244, 246n54, 255n138
Nottebohm (Liechtenstein v Guatemala) (Second Phase) [1955] ICJ Rep 4 . . . . 802n31, 1047n12
Pulp Mills on the River Uruguay (Argentina v Uruguay) [2010] ICJ Rep 14. . . . . 919n17
Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion) [1949] ICJ Rep 174. . . . . 1160n14
Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion) [1951] ICJ Rep 15 . . . . . 930n97, 1162n21

United States Diplomatic and Consular Staff in Tehran (United States of America v Iran) [1980] ICJ Rep 3 . . . . . 255n138

International Criminal Court

Decision on the Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute, Case No ICC-RoC46(0)-01/18 (Pre-Trial Chamber I, 6 September 2018) 439n71
Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of Myanmar, Case No ICC-01/19 (Pre-Trial Chamber III, 14 November 2019) 438n70

International Criminal Tribunals for the Former Yugoslavia and for Rwanda

Prosecutor v Ljube Boškoski and Joran Tarčulovski, Case No IT-04-82-A, ICTY (19 September 2010) 716n20
Prosecutor v Ntakirutimana and Ntakirutimana, Case No ICTR-96-10-A and ICTR-96-17-A, ICTR (13 December 2004) 720n47
Prosecutor v Šainović, Pavković, Lazarević and Lukić, Case No IT-05-87A, ICTY (23 January 2014) 720n50
Tadić (Duško) aka 'Dule', Case No IT-94-1-AR72, ICTY (2 October 1995) 229 . . . . . 233n76, 716n23, 716n25

International Tribunal for the Law of the Sea

The 'Camouco' Case (Panama v France) [2000] ITLOS Rep 10 . . . . . 487n43
The 'Hoshimaru' Case (Japan v Russia) [2005–2007] ITLOS Rep 18 . . . . . 487n43
The 'Monte Confurco' Case (Seychelles v France) [2000] ITLOS Rep 86 . . . . . 487n43
The M/V 'Norstar' Case (Panama v Italy) (10 April 2019, not yet reported) . . . 485n19, 514n81
The M/V 'Saiga' (No 2) Case (St Vincent and the Grenadines v Guinea) [1999] ITLOS Rep 10 . . . . . 487n44

Permanent Court of Arbitration

Guyana v Suriname [2007] 30 RIAA 128 . . . . . 487n41

Permanent Court of International Justice

Certain German Interests in Polish Upper Silesia (Merits) (1926) PCIJ Series A, No 7 . . . . . 919n16
Nationality Decrees in Tunis and Morocco Case (1923) PCIJ Series B, No 4 . . . . . 803n37

United Nations Committee against Torture

Abdussamatov v Kazakhstan, UN doc CAT/C/48/D/444/2010 (11 July 2012) . . 386n67, 386n70
Aemei v Switzerland, UN doc CAT/C/18/D/34/1995 (9 May 1997) 665n41
Alan v Switzerland, UN doc CAT/C/16/D/21/1995 (13 May 1996) 700n35
Ayas v Sweden, UN doc CAT/C/21/D/097/1997 (12 November 1997) 700n35
EA v Sweden, UN doc CAT/C/61/D/690/2015 (11 August 2017) 85n50

Haydin v Sweden, UN doc CAT/C/21/D/101/1997 (16 December 1998) 700n35
JHA v Spain, UN doc CAT/C/41/D/323/2007 (21 November 2008) 507n34, 511n60
KSY v The Netherlands, UN doc CAT/C/30/D/190/2001 (15 May 2003) 85n50
MBB v Sweden, UN doc CAT/C/22/D/104/1998 (21 June 1999) 567n112
SS v Netherlands, UN doc CAT/C/30/D/191/2001 (19 May 2003) 704n59, 704n60
Tapia Paez v Sweden, UN doc CAT/C/18/D/39/1996 (28 April 1997) 210n29, 665n41

United Nations Committee on the Elimination of Discrimination against Women

MNN v Denmark, UN doc CEDAW/C/D/2011 (15 August 2013) 209n27
Zheng v The Netherlands, UN doc CEDAW/C/42/D/15/2007 (14 November 2008) 568n117

United Nations Committee on the Rights of the Child

AL v Spain, UN doc CRC/C/81/D/16/2017 (31 May 2019). 1004n95
DD v Spain, UN doc CRC/C/80/D/4/2016 (1 February 2019) 755n73
IAM (on behalf of KYM) v Denmark, UN doc CRC/C/77/D/3/2016
(25 January 2018) 756n75
JAB v Spain, UN doc CRC/C/81/D/22/2017 (31 May 2019). 1004n95
NBF v Spain, UN doc CRC/C/79/D/11/2017 (27 September 2018) 1004n95
YB and NS v Belgium, UN doc CRC/C/79/D/12/2017 (27 September 2018) 1003n91

United Nations Human Rights Committee

A v Australia, UN doc CCPR/C/59/D/560/1993 (30 April 1997) 217n53, 941n72, 941n75
Aden and Hassan v Denmark, UN doc CCPR/C/126/D/2531/2015
(25 July 2019) 995n47, 996n50
Bakhtiyari v Australia, UN doc CCPR/C/79/D/1069/2002 (6 November 2003). 993n33
BL v Australia, UN doc CCPR/C/112/D/2053/2011 (7 January 2015). 666n51
C v Australia, UN doc CCPR/C/76/D/900/1999 (13 November 2002). 942n83
El Dernawi v Libya, UN doc CCPR/C/90/D/1143/2002 (20 July 2007) 993n35
FKAG and Others v Australia, UN doc CCPR/C/108/D/2094/2011
(26 July 2013). 940n60, 943n88
GT v Australia, UN doc CCPR/C/61/D/706/1996 (4 December 1997). 665n39
Gueye and Others v France, UN doc CCPR/C/35/D/196/1985 (3 April 1989) 217n56
Israil v Kazakhstan, UN doc CCPR/C/103/D/2024/2011 (1 December 2011) 386n66, 386n68, 386n69
Judge v Canada, UN doc CCPR/C/78/D/829/1998 (13 August 2003) 665n39
Kwok v Australia, UN doc CCPR/C/97/D/1442/2005 (23 November 2009) 217n54
Madafferi v Australia, UN doc CCPR/C/81/D/1011/2001 (26 August 2004) 989n5
Ngambi and Nebol v France, UN doc CCPR/C/81/D/1179/2003
(16 July 2004) 993n33, 996n49
Nystrom v Australia, UN doc CCPR/C/102/D/1557/2007 (1 September 2011). 806n88
Pillai v Canada, UN doc CCPR/C/101/D/1763/2008 (9 May 2011) 675n126
Q v Denmark, UN doc CCPR/C/113/D/2001/2010 (1 April 2015) 159n40
Stewart v Canada, UN doc CCPR/C/58/D/538/1993 (1 November 1996) 668n76
Teitiota v New Zealand, UN doc CCPR/C/127/D/2728/2016
(24 October 2019). 455n86, 669n81, 838n49, 843n84

Van Alphen v The Netherlands, UN doc CCPR/C/39/D/305/1988 (23 July 1990) 941n71
Warsame v Canada, UN doc CCPR/C/102/D/1959/2010 (1 September 2011) 806n58, 989n6
Winata and Li v Australia, UN doc CCPR/C/72/D/930/2000 (16 August 2001). 996n48
Zwaan-de Vries v The Netherlands, UN doc CCPR/C/29/D/182/1984 (9 April 1987) 218n57

United Nations War Crimes Commission

Case No 9, Trial of Bruno Tesch and Two Others (1–8 March 1946) UNWCC, 1 LRTWC 93 . . . . .720n48
Case No 10, The United States of America v Alfried Krupp and Others (Trials of War Criminals before the Nuremberg Military Tribunals, 1948) 720n49
Case No 58, Trial of Krupp von Bohlen and Others (17 November 1947–30 June 1948) UNWCC, 10 LRTWC 69 . . . . .720n49

Regional Bodies

African Commission on Human and Peoples' Rights

African Institute for Human Rights and Development (on behalf of Sierra Leonean Refugees in Guinea) v Guinea, Comm No 249/2002, 20th Annual Activity Report of the Af Cm HPR (2005–6) 288n56, 288n65
Civil Liberties Organisation v Nigeria, Comm No 129/94, 9th Annual Activity Report of the Af Cm HPR (1995) 289n72
Doebbler (Curtis Frances) v Sudan, Comm No 235/2000, 27th Annual Activity Report of the Af Cm HPR (2009) 211n32, 289n70
Good v Republic of Botswana, Comm No 313/05, 28th Activity Report of the Af Cm HPR (2010) 599n61
Media Rights Agenda v Nigeria, Comm No 224/98, 14th Annual Activity Report of the Af Cm HPR (2000–1) 601n77
Modise (John K) v Botswana Comm No 97/93, 10th Annual Activity Report of the Af Cm HPR (2000) 159n40, 288n60, 288n64
Monim (Elgak), Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v Sudan, Comm No 379/09 (10 March 2015). 880n79
Organisation mondiale contre la torture, Association Internationale des juristes démocrates, Commission internationale des juristes, Union interafricaine des droits de l'Homme v Rwanda, Comm Nos 27/89, 46/91, 49/91, 99/93, 10th Annual Activity Report of the Af Cm HPR (1996–7) 288n65, 599n61, 880n77
Rencontre Africaine pour la defence des droits de l'homme (RADDHO) v Zambia, Comm No 71/92, 10th Annual Activity Report of the Af Cm HPR (2000) . . 289n71, 961n56
Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan, Comm Nos 279/2003, 296/2005, 28th Annual Activity Report of the Af Cm HPR (2009) 855n52
Union interafricaine des droits de l'homme and others v Angola, Comm No 159/96, 11th Annual Activity Report of the Af Cm HPR (1997) 289n71

African Committee of Experts on the Rights and Welfare of the Child

African Centre of Justice and Peace Studies (ACJPS) and People's Legal Aid Centre (PLACE) v The Government of the Republic of Sudan, No 005/com/001/2015 (2018) 159n40, 291n83
Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on behalf of Children of Nubian Descent in Kenya v The Government of Kenya, No 002/com/002/2009 (2011) 291n83

African Court on Human and Peoples' Rights

Anudo Ochieng Anudo v United Republic of Tanzania, App No 02/2015 Af Ct HPR (2018) 159n40, 516n90
Michelot Yogogombaye v Senegal, App No 001/08 Af Ct HPR (2008) 291n81
Request for Advisory Opinion by the Centre for Human Rights of the University of Pretoria and the Coalition of African Lesbians, App No 002/2015 Af Ct HPR (2017) 290n80

Court of Justice of the European Union

A, B and C v Staatssecretaris van Veiligheid en Justitie (Joined Cases C-148/13, C-149/13 and C-150/13) (CJEU, 2 December 2014) 88n75, 771n53
A and S v Staatssecretaris van Veiligheid en Justitie (Case C-550/16) (CJEU, 12 April 2018) 1005n99
Abdulla v Bundesrepublik Deutschland (Joined Cases C-175/08, C-176/08, C-178/08, and C-179/08) [2010] ECR I-01493 . . . . 355n25, 702n47, 704n59, 704n60, 704n61, 706n74, 1038–9, 1041
Alo & Osso v Region Hannover (Joined Cases C-443/14 and C-444/14) (CJEU, 1 March 2016) 1061n120
Arslan v Czech Republic (Case C-534/11) (CJEU, 30 May 2013) 935n15
BMM and Others v Belgium (Joined Cases C-133/19, C-136/19 and C-137/19) (CJEU, 16 July 2020) 1004n93
Bolbol (Nawrus) Bevándorlási és Állampolgársági Hivatal (Case C-31/09) [2010] ECR I-05539 . . . . 650n50
Bundesrepublik Deutschland v B and D (Joined Cases C-57/09 and 109/09) [2010] ECR I-10979 . . . . 722n59, 722n60
Bundesrepublik Deutschland v Y and Z (Joined Cases C-71/11 and C-99/11) (CJEU, 5 September 2012) 364n110
Centre public d'action sociale d'Ottignies-Louvain-la-Neuve v Moussa Abdida (Case C-562-13) (CJEU, 18 December 2014) 726n78
CK v Republika Slovenija (Case C-578/16 PPU) (CJEU, 16 February 2017) 359n71
Commission v Council (Case 22/70) [1971] ECR 263 . . . . 1160n14
Commission v Poland (Temporary Mechanism for the Relocation of Applicants for International Protection) (Joined Cases C-715/17, C-718/17 and C-719/17) (CJEU, 2 April 2020) 360n83
Diakité v Commissaire Général aux Réfugiés et aux Apatrides (Case C-285/12) (CJEU, 30 January 2014) 228–9, 358n57

E v Staatssecretaris van Veiligheid en Justitie (Case C-635/17) (CJEU, 13 March 2019) 999n70
El Hassani v Minister Spraw Zagranicznych (Case C-403/16) (CJEU, 13 December 2017) 1001n81
El Kott (Mostafa Abed El Karem) and Others v Bevándorlási és Állampolgársági Hivatal (Case C-364/11) (CJEU, 19 December 2012) 650n51, 650n52, 651
Elgafaji and Elgafaji v Staatssecretaris van Justitie (Case C-465/07) [2009] ECR I-921. . . . . 228n50, 358n57, 672n103, 881n82
European Parliament v Council of the EU (Case C-540/03) (CJEU, 27 June 2006) 994n43, 1000n77
F v Bevándorlási és Állampolgársági Hivatal (Case C-473/16) (CJEU, 25 January 2018) 88n73, 772n54
FMS and Others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság (Joined Cases C-924/19 PPU and C-925/19 PPU) (CJEU, 14 May 2020) 524n51
Germany v Y and Z (Joined Cases C-71/11 and C-99/11) (CJEU, 5 September 2012) 612n25, 674n120
Halaf v Darzhavna agentsia za bezhantsite pri Ministerski savet (Case C-528/11) (CJEU, 17 December 2011). 880n81
Halaf v Darzhavna agentsia za bezhantsite pri Ministerskia savet (Case C-528/11) (CJEU, 30 May 2013) 522n37
HN v Minister for Justice, Equality and Law Reform (Case C-604/12) (CJEU, 8 May 2014) 926n74
Jawo v Bundesrepublik Deutschland (Case C-163/17) (CJEU, 19 March 2019). 522n34
Jafari and Jafari (Case C-646/16) (CJEU, 26 July 2017) 523n38
K and B v Staatssecretaris van Veiligheid en Justitie (Case C-380/17) (CJEU, 7 November 2018). 1000n73, 1000n78
K v Staatssecretaria van Veilgheid en Justitie, HF v Belgische Staat (Joined Cases C-331/16 K and C-366/16) (CJEU, 2 May 2018). 715n17
Khachab v Subdelegacion del Gobierno en Alava (Case C-558/14) (CJEU, 21 April 2016) 994n43
M v Ministerstvo vnitra, X and Y v Commissaire général aux réfugiés et aux apatrides (Joined Cases C-391/16, C-77/17 and C-78/17) (CJEU, 14 May 2019) 675n129, 714n15, 726n80
M'Bodj v État belge (Case C-542/13) (CJEU, 18 December 2014) 358n57, 839n59
Mercredi (Barbara) v Richard Chaffe (Case C-497/10) [2010] ECR I-14358 . . . . 709n95
Minister van Buitenlandse Zaken v K and A (Case C-153/14) (CJEU, 9 July 2015). 1001n80
Minister voor Immigratie en Asiel v XYZ (Joined Cases C-199/12 to 201/12) (CJEU, 7 November 2013) 88n77, 765n16, 769n39, 769n42
MP (Sri Lanka) v Secretary of State for the Home Department (Case C-353/16) [2018] 1 WLR 5585 . . . . 839n59
NF, NG and NM v European Council (Cases T-192/16, T-193/6 and T-257/16) (CJEU, 28 February 2017) 367n134, 524n45
NF, NG and NM v European Council (Joined Cases C-208/17 P to C-120/17) (CJEU, 12 September 2018) 367n135, 524n45

NS v Secretary of State for the Home Department and ME and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform (Joined Cases C-411/10 and C-493/10) [2011] ECR I-13905 . . . . 359n71, 363n105, 522n32, 880n80
Republik Griechenland v Grigorios Nikiforidis (Case C-135/15) [2016] ECR 703 . . . . . . 709n95
Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein (Case C-120/78) [1979] ECR 649 . . . . 521n25
Slovakia and Hungary v Council (Joined Cases C-643/15 and C-647/15) (CJEU, 6 September 2017) 481n68
SM v Entry Clearance Officer, UK Visa Section (Case C-129/18) (CJEU, 26 March 2019) 1004n92
TB v Bevandorlasi es Menekultugyi Hivatal (Case C-519/18), (CJEU, 12 December 2019) 998n65
UK and Ireland v Council (Case C-84/94) [1996] ECR I-5793 . . . . 354n16

European Committee of Social Rights

International Commission of Jurists (ICJ) and European Council for Refugees and Exiles (ECRE) v Greece, European Committee of Social Rights, Complaint No 173/2018 (23 May 2019) 364n114

European Court of Human Rights

A v United Kingdom (2009) 49 EHRR 29 . . . . 941n75
Abdolkhani and Karimnia v Turkey, App No 30471/08 (ECtHR, 22 September 2009) . . 366n125, 1167n51
Abdolkhani v Turkey, App No 50213/08 (ECtHR, 27 July 2010) 603n88
Abdulaziz, Cabales and Balkandali v United Kingdom (1985) 7 EHRR 471 . . . . 994n39
Abu Zubaydah v Lithuania, App No 46454/11 (ECtHR, 31 May 2018) 667n62
ADT v United Kingdom (2000) 31 EHRR 803 . . . . 928n87
Ahmed v Malta, App No 55352/12 (ECtHR, 23 July 2013) 943n87
AL (XW) v Russia, App No 44095/14 (ECtHR, 29 October 2015) 664n36
Al Nashiri v Romania, App No 33234/12 (ECtHR, 31 May 2018) 667n62, 667n64, 667n66
Amuur v France (1996) 22 EHRR 533 . . . . 511n58, 524n53, 906n41, 941n74
Bader and Kanbor v Sweden, App No 13284/04 (ECtHR, 8 November 2005) . .362n99, 664n36
Bah v United Kingdom, App No 56328/07 (ECtHR, 27 September 2011) 964n77
Bahaddar v The Netherlands (1998) 26 EHHR 278 . . . . 85n52
Biao v Denmark, App No 38590/10 (ECtHR, Grand Chamber, 24 May 2016) 54n68
Bonger v The Netherlands, App No 10154/04 (ECtHR, 15 Sept 2005) 567n112
Boultif v Switzerland (2001) 33 EHRR 50 . . . . 991n19
Budayeva v Russia, App Nos 15339/02, 21166/02, 20058/02, 11673/02, and 15343/02 (ECtHR, 20 March 2008) 839n55, 841n69
Butt v Norway, App No 47017/09 (ECtHR, 4 December 2012) 991n23
Chahal v United Kingdom (1997) 23 EHRR 413 . . . . 85n51, 210n29, 604n96, 665n42, 703n52, 722n57
Chowdury and Others v Greece, App No 21884/15 (ECtHR, 30 March 2007) 566n107, 568n119
CN and V v France, App No 67724/09 (ECtHR, 11 October 2012) 555n13
Collins and Akaziebie v Sweden, App No 23944/05 (ECtHR, 8 March 2007) 611n20

Čonka v Belgium (2002) 34 EHRR 54 . . . . . 604n97
Cyprus v Turkey (2002) 35 EHRR 30 . . . . . 856n56
D v United Kingdom (1997) 24 EHRR 423 . . . . . 839n58, 840n63, 902n22
Doğan v Turkey, Apps No 8803–8811/02, 8813/02, and 8815–8819/02 (ECtHR, 29 June 2004) 856n58
Drozd and Janousek v France and Spain (1992) 14 EHRR 745 . . . . . 667n63
Dudgeon v United Kingdom (1982) 4 EHRR 149 . . . . . 928n87
El Ghatet v Switzerland, App No 56971/10 (ECtHR, 2016) 991n24
El-Masri v Macedonia (2013) 57 EHRR 25 . . . . . 667n62, 667n66
F v United Kingdom, App No 17341/03 (ECtHR, 22 June 2004) 667n64, 670n88
Gebremedhin v France (2010) 50 EHHR 29 . . . . . 212n36, 604n98
Geleri v Rumania, App No 33118/05 (ECtHR 15 February 2011) 44 . . . . . 724n73
Genovese v Malta (2014) 58 EHHR 25 . . . . . 159n40
GR v The Netherlands, App No 22251/07 (ECtHR, 2012) 1001n80
Guzzardi v Italy (1981) 3 EHRR 333 . . . . . 935n17, 935n21
Hakizimana v Sweden, App No 37913/05 (ECtHR, 27 March 2008) 611n20
Hilal v United Kingdom (2001) 33 EHRR 2 . . . . . 704n63
Hirsi Jamaa and Others v Italy (2012) 55 EHRR 21 . . . . . 53n62, 147n147, 492n96, 498–9, 507, 507n35, 511n56, 561n64, 602n78, 905, 911
HL v United Kingdom (2005) 40 EHRR 32 . . . . . 941n74
Hode and Abdi v United Kingdom, App No 22341/09 (ECtHR, 6 November 2012) . . . 671n98
Husayn (Abu Zubaydah) v Poland, App No 7511/13 (ECtHR, 24 July 2014) 667n66
Hussein v The Netherlands and Italy, App No 27725/10 (ECtHR, 2 April 2003) 605n106
Ilias and Ahmed v Hungary, App No 47287/15 (ECtHR, Grand Chamber, 21 November 2019) 91n97, 363n103, 524n47, 524n51, 906n41, 937n36, 942n79
IM v France, App No 9152/09 (ECtHR, 2 February 2012) 603n91, 604
Ireland v United Kingdom (1979–80) 2 EHRR 25 . . . . . 665n44
J v Austria, App No 58216/12 (ECtHR, 17 January 2017) 664n31
Jabari v Turkey, App No 40035/98 (ECtHR, 11 July 2000) 212n36, 363n104, 1167n51
Jama v Malta, App No 10290/13 (ECtHR, 26 November 2015) 942n76
Jeunesse v The Netherlands (2015) 60 EHRR 17 . . . . . 991n23, 991n24, 1004n94
JK and Others v Sweden, App No 59166/12 (ECtHR, Grand Chamber, 2016) 611n20
JK v Sweden (2017) 64 EHRR 15 . . . . . 603n92
JR and Others v Greece, App No 22696/16 (ECtHR, 25 January 2018) 524n50
KAB v Sweden, App No 886/11 (ECtHR, 5 September 2013) 695n4, 700n35
Kanagaratnam v Belgium (2012) 55 EHRR 26 . . . . . 942n76
Kaplan and Others v Norway, App No 32504/11 (ECtHR, 24 July 2014) 991n23
Kebe v Ukraine, App No 12552/12 (ECtHR, 12 January 2017) 368n142
Khlaifia and Others v Italy, App No 16483/12 (ECtHR, 15 December 2016) 53n62, 524n50, 942n79, 946n113
Krasniqi v Austria, App No 41697/12 (ECtHR, 25 April 2017) 724n73
Labsi v Slovakia, App No 33809/08 (ECtHR, 15 May 2012) 724n67, 724n72
Loizidou v Turkey, App No 15318/89 (ECtHR, 28 July 1998) 856n59, 1132
MA and Others v Lithuania, App No 59793/17 (ECtHR, 11 December 2018) 93n111
MA v Cyprus, App No 41872/10 (ECtHR, 23 July 2013) 363n104
Maaouia v France (2000) 33 EHRR 42 . . . . . 363n108, 724n71
Mamatkulov v Turkey (2005) 41 EHRR 494 . . . . . 667n63, 668n67

Mayeka and Mitunga v Belgium (2006) 46 EHRR 23 . . . . .943n87, 994n40
MC v Bulgaria (2005) 40 EHRR 20 . . . . 564n92
ME v Sweden, App No 71398/12 (ECtHR, 26 June 2014). 89n81
Medvedyev v France (2010) 51 EHHR 39 . . . . 485n18
Mikolenko v Estonia, App No 10664/05 (ECtHR, 8 September 2009) 942n79
MN and Others v Belgium, App No 3599/18 (ECtHR, Grand Chamber, 5 May 2020) . . 912n92
MO v Switzerland, App No 41282/16 (ECtHR, 20 June 2017) 664n31
Modinos v Cyprus (1993) 16 EHRR 485 . . . . 928n87
MS v Belgium, App No 50012/08 (ECtHR, 31 January 2012) 914, 915, 933n5
MSS v Belgium and Greece (2011) 53 EHRR 2 . . . . 215n50, 360n78, 363n102, 522n31, 567n111, 598n54, 598n56, 602n78, 602n82, 603n89, 840n63, 915n109, 964n76
Mugenzi v France, App No 52701/09 (ECtHR, 10 July 2014) 999n69
Musa v Malta (2015) 60 EHRR 23. . . . . .935n15
Muskhadzhiyeva v Belgium, App No 41442/07 (ECtHR, 19 January 2010) 943n87
Müslim v Turkey (2006) 42 EHRR 16 . . . . 598n54
N v Finland, App No 38885/02 (ECtHR, 26 July 2005) 616n39
N v United Kingdom (2008) 47 EHHR 39 . . . . 840n60
NA v Finland, App No 2524418 (ECtHR, 14 November 2019) 915n105
ND and NT v Spain, App Nos 8675/15 and 8697/15 (ECtHR, Grand Chamber, 13 February 2020) 53n62, 600n66
Niedzwiecki v Germany, App No 58453/00 (ECtHR, 25 October 2005). 964n77
Niemietz v Germany, App No 13710/88 (ECtHR, 16 December 1992) 963n69
Norris v Ireland (1988) 13 EHRR 186 . . . . 928n87
Nunez v Norway (2011) 58 EHRR 7 . . . . 991n18, 991n23
OM v Hungary, App No 9912/15 (ECtHR, 5 July 2016) 91n96, 601n73
Öneryildiz v Turkey (2005) 41 EHRR 20 . . . . 839n54
Opuz v Turkey (2010) 50 EHRR 28 . . . . 564n92
Osman v United Kingdom, App No 23452/94 (ECtHR, Grand Chamber, 28 Oct 1998). 565n98
Othman (Abu Qatada) v United Kingdom, App No 8139/09 (ECtHR, 9 May 2012). . . . 363n100, 524n48, 667n63, 667n66, 668n67
Ould Barar v Sweden (1999) 28 EHRR CD 213. . . . . 664n31, 667n61
Pajić v Croatia, App No 68453/13 (ECtHR, 23 February 2016) 997n63
Paposhvili v Belgium, App No 41738/10 (ECtHR, Grand Chamber, 13 December 2016) 840n60, 903n23
Popov v France, App Nos 39472/07 and 39474/07 (ECtHR, 19 January 2012) 672n108
Rahimi v Greece, App No 8687/08 (ECtHR, 5 April 2011) 605n109
Rana v Hungary, App No 40888/17 (ECtHR, 16 July 2020) 94n114
Rantsev v Cyprus and Russia (2010) 51 EHRR 1. . . . . . 562n75, 566, 566n104, 566n106, 964n74
Raza v Bulgaria, App No 31465/08 (ECtHR, 11 February 2010) 724n72
Rodrigues da Silva and Hoogkamer v The Netherlands (2006) 44 EHRR 729 . . . . 991n23
Saadi v Italy (2008) 49 EHRR 30 . . . . 210n29, 362n98, 364n109, 602n78, 724n70
Saadi v United Kingdom (2008) 47 EHRR 17. . . . . 938n43
Salah Sheekh v The Netherlands (2007) 45 EHRR 50 . . . . . . 700n35, 703n56, 704n59, 704n60, 706n74, 707n80, 840n63
Sargsyan v Azerbaijan, App No 40167/06 (ECtHR, Grand Chamber, 16 June 2015). . . . 856n59

Šekerović and Pašalić v Bosnia and Herzegovina, App No 5920/04 and 67396/09 (ECtHR, 15 September 2011) . . . 856n55
Selmouni v France, App No 25803/94 (ECtHR, Grand Chamber, 28 July 1999) . . . 666n47
Sharifi v Italy and Greece, App No 16643/09 (ECtHR, 21 October 2014) . . . 599, 599n63
SHH v United Kingdom (2013) 57 EHRR 18 . . . 669n79, 700n35, 839n59, 840n60, 840n63
Sidabras v Lithuania (2004) 42 EHRR 104 . . . 963n70
Siliadin v France (2006) 43 EHHR 16 . . . 555n13
Soering v United Kingdom (1989) 11 EHRR 439 . . . 209n27, 362n97, 363n100, 664n35, 666n53, 667n60, 667n63, 900n11
Soldatenko v Ukraine, App No 2440/07 (ECtHR, 23 October 2008) . . . 368n142
SS and Others v Italy, App No 21660/18 (ECtHR, pending) . . . 500n161, 911n77
Sufi and Elmi v United Kingdom (2012) 54 EHHR 9 . . . 228n44, 700n35, 704n59, 704n64, 706n74, 708n88, 708n90, 839n58, 840n63
Taddeucci and McCall v Italy, App No 51362/09 (ECtHR, 30 June 2016) . . . 997n63
Tanda-Muzinga v France, App No 2260/10 (ECtHR, 10 July 2014) . . . 999n69, 1002n84
Tarakhel v Switzerland (2015) 60 EHRR 28 . . . 522n35, 604n102, 605n106, 672n108
Tatishvili v Greece, App No 26452/11 (ECtHR, Grand Chamber, 31 July 2014) . . . 943n87
Thimothawes v Belgium, App No 39061/11 (ECtHR, 4 April 2017) . . . 605n106, 942n76
TI v United Kingdom, App No 43844/98 (ECtHR, 7 March 2000) . . . 520n16, 598n54
Tomic v United Kingdom, App No 17837/03 (ECtHR, 14 October 2003) . . . 667n63
Tuquabo-Tekle and Others v The Netherlands, App No 60665/00 (ECtHR, 1 December 2005) . . . 991n22, 994n40
Üner v The Netherlands (2007) 45 EHRR 14 . . . 667n64, 991n20
Vilvarajah v United Kingdom (1992) 14 EHRR 248 . . . 598n56
X v Sweden, App No 36417/16 (ECtHR, 9 January 2018) . . . 602n80
Xhavara v Italy and Albania, App No 39473/98 (ECtHR, 11 January 2001) . . . 507n34, 511n57
Yefimova v Russia, App No 39786/09 (ECtHR, 19 February 2013) . . . 667n63
Yöyler v Türkey, App No 26973/95 (ECtHR, 24 July 2015) . . . 855n52
Z and T v United Kingdom, App No 27034/05 (ECtHR, 28 February 2006) . . . 666n49, 666n50, 667n65, 668n68, 668n70
ZA and Others v Russia, App No 61411/15 (ECtHR, Grand Chamber, 21 November 2019) . . . 906n41

Inter-American Court and Commission of Human Rights

Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v Colombia, Inter-American Court of Human Rights Series C No 270 (20 November 2013) . . . 855n52, 856n54
Barrios Family v Venezuela, Inter-American Court of Human Rights Series C No 237 (24 November 2011) . . . 855n52
Benito Tide Méndez and Others v Dominican Republic, Inter-American Court of Human Rights Series C No 64/12 (29 March 2012) . . . 53n67
Bulacio v Argentina (Case of), Inter-American Court of Human Rights Series C No 100 (18 September 2003) . . . 605n107
Castillo-Páez v Peru (Reparations and Costs), Inter-American Court of Human Rights Series C No 43 (27 November 1998) . . . 329–30n60

Cuban Nationals and 8 Haitian Nationals Detained in the Bahamas, Inter-American Commission on Human Rights Report No 6/02, Admissibility Petition No 12.071 (27 February 2002) 328n50
Doe (John) and Others v Canada, Inter-American Commission on Human Rights Report No 78/11, Case No 12.586 (21 July 2011). 147n84, 531n113
Expelled Dominicans and Haitians v Dominican Republic (Case of), Inter-American Court of Human Rights Series C No 282 (28 August 2014) 53n67, 605n110
Fornerón and Daughter v Argentina, Inter-American Court of Human Rights Series C No 242 (27 April 2012) 997n58
Gelman v Uruguay, Inter-American Court of Human Rights Series C No 221 (24 February 2011) 992n28
Girls Yean and Bosico v Dominican Republic (Case of), Inter-American Court of Human Rights Series C No 130 (8 September 2005) 159n40
Gonzalez and Others ('Cotton Field') v Mexico, Inter-American Court of Human Rights Series C No 205 (16 November 2009). 567n116
Hacienda Brasil Verde Workers v Brazil (Case of), Inter-American Court of Human Rights Series C No 318 (20 October 2016) 555n13, 562n75, 565, 566
Haitian Center for Human Rights v United States, Inter-American Commission on Human Rights Report No 51/96, Case No 10.675 (13 March 1997) 328n48, 507n34, 511n59, 910n66, 910n73
The Institution of Asylum and Its Recognition as a Human Right in the Inter-American System of Protection (Interpretation and Scope of Articles 5, 22.7 and 22.8 in relation to Article 1(1) of the American Convention on Human Rights), Inter-American Court of Human Rights, Advisory Opinion OC-25/18 Series A No 25 (30 May 2018). 329n56, 598n58, 879n71, 904n29
Juridical Condition and Rights of the Undocumented Migrants, Inter American Court of Human Rights, Advisory Opinion OC-18 Series A No 18 (17 September 2003). 271n94, 330n63, 602n81, 946n113, 962n62
Lucero (García) v Chile (Case of), Inter-American Court of Human Rights Series C No 267 (28 August 2013) 1121
Mapiripán Massacre v Colombia (Case of), Inter-American Court of Human Rights Series C No 134 (15 September 2005) 330n61, 330n62, 671n98, 855n52, 857n70
Mortlock v United States, Inter-American Commission on Human Rights Report No 63/08, Case No 12.534 (25 July 2008) 298n11, 664n38, 840n61
Pacheco Tineo Family v Bolivia, Inter-American Commission of Human Rights Report No 136/11, Case No 12.474 (31 October 2011) 595n43, 599n59, 992n28
Pacheco Tineo Family v Bolivia, Inter-American Court of Human Rights Series C No 272 (25 November 2013) 176n23, 254n122, 254n129, 328n54, 601n75, 601n76, 602n83, 603n90, 603n94, 604n101, 605n105, 903n24, 904n29, 992n28
Riffo (Atala) y Niñas v Chile, Inter-American Court of Human Rights Series C No (24 February 2012) 997n63
Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, Inter-American Court of Human Rights, Advisory Opinion OC-21/14, Series A No 21 (19 August 2014). . . 248n70, 600n70, 604n104, 605n105, 662n4, 667n55, 670n92, 901n13, 902n19, 902n21, 903n25, 904n29, 906, 910n67, 911n75, 937n36, 992n29, 997n57

Río Negro Massacres v Guatemala, Inter-American Court of Human Rights Series C No 250 (4 September 2012) 856n57
Roach v United States, Inter-American Commission on Human Rights Report No 3/87, Case No 9647 (22 September 1987) 298n10
Santo Domingo Massacre v Colombia, Inter-American Court of Human Rights Series C No 259 (30 November 2012) 855n52
Undocumented Workers v United States of America, Inter-American Commission on Human Rights Report No 50/16, Case No 12.834 (30 June 2016) 962n63
Vélez Loor v Panama, Inter-American Court of Human Rights Series C No 218 (23 November 2010) 928n85, 929
White and Potter 'Baby Boy' v United States, Inter-American Commission on Human Rights Report No 23/81, Case No 2141 (6 March 1981) 298n9
Wong Ho Wing v Peru, Inter-American Court of Human Rights Series C No 297 (30 June 2015) 665n39, 666n49, 667n60

National Decisions

Australia

0907687 [2010] RRTA 45 . . . . . 790n75
1416486 (Refugee) [2016] AATA 4994 . . . . . 774n67
1419893 (Refugee) [2016] AATA 4338 . . . . . 790n77
1511708 (Refugee) [2019] AATA 2220 . . . . . 790n77
1512766 (Refugee) [2017] AATA 591 . . . . . 448n44
1728413 (Refugee) [2018] AATA 4665 . . . . . 790n77
Al-Amidi v Minister for Immigration and Multicultural Affairs (2000) 177 ALR 506 . . . . . 706n74
Al-Kateb v Godwin (2004) 219 CLR 580 . . . . . 264n46, 922n36, 940n60, 942n78
Appellant S395/2002 v Minister for Immigration and Multicultural Affairs (2003) 216 CLR 473 . . . . . 87n68, 768n34
Applicant A v Minister for Immigration and Multicultural Affairs (1997) 190 CLR 225 . . . . . 174n11, 733n18, 737n41, 738n44, 762n4
AZAAR v Minister for Immigration and Citizenship [2009] FCA 912 . . . . . 736n36
BCI16 v Minister for Immigration and Border Protection [2018] FCA 851 . . . . . 527n73
BHC16 v Minister for Immigration and Border Protection [2019] FCA 1326 . . . . . 774n67
Ceskovic v Minister for Immigration and Ethnic Affairs (1979) 27 ALR 423 . . . . . 1171n73
Chan v Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379 . . . . . 579n64, 786n46, 842n79, 842n80
Chen Shi Hai v Minister for Immigration and Multicultural Affairs (2000) 201 CLR 293 . . . . . 750n30, 786n48
Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs (1992) 176 CLR 1 . . . . . 267n58, 938n43, 942n78
CPCF v Minister for Immigration and Border Protection (2015) 255 CLR 514 . . . . . 244n35, 260n27, 264n46, 510n51, 908n54, 911n83, 933n4, 940n58
DCQ18 v Minister for Home Affairs [2018] FCA 918 . . . . . 529n95
Koe v Minister for Immigration and Ethnic Affairs (1997) 78 FCR 289 . . . . . 805n47

M93 of 2004 v Minister for Immigration and Multicultural and Indigenous Affairs [2006] FMCA 252 . . . . 708n87
Minister for Immigration and Citizenship v SZJGV (2009) 238 CLR 642 . . . . 786n46
Minister for Immigration and Citizenship v SZNCR [2011] FCA 369 . . . . 791n85
Minister for Immigration and Citizenship v SZNVW (2010) 183 FCR 575 . . . . 791n85
Minister for Immigration and Multicultural Affairs v Ibrahim (2000) 204 CLR 1 . . . . 510n51
Minister for Immigration and Multicultural Affairs v Khawar (2002) 210 CLR 1 . . . . 65n34, 253n118, 510n51, 736n34
Minister for Immigration and Multicultural Affairs v Sarrazola (No 2) (2001) 107 FCR 184 . . . . 790n78
Minister for Immigration and Multicultural Affairs v Savvin (2000) 98 FCR 168 . . . . 804n44
Minister for Immigration and Multicultural Affairs v SZRHU (2013) 215 FCR 35 . . . . 527n79
Minister for Immigration and Multicultural Affairs v Thiyagarajah (1997) 80 FCR 543 . . . . 526n58
Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004 (2006) 231 CLR 1 . . . . 610n14, 1036n48
Minister for Immigration and Multicultural and Indigenous Affairs v SGLB (2004) 207 ALR 12 . . . . 793n93
MZXLT v Minister for Immigration and Citizenship (2007) 211 FLR 428 . . . . 527n72
NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 222 CLR 161 . . . . 526n66
NBLC v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 149 FCR 151 . . . . 527n78
Omar v Minister for Home Affairs [2019] FCA 279 . . . . 784n36
Patto v Minister for Immigration and Multicultural Affairs (2000) 106 FCR 119 . . . . 526n64
Plaintiff M47/2012 v Director General of Security (2012) 251 CLR 1 . . . . 718n36
Plaintiff M68/2015 v Minister for Immigration and Border Protection (2016) 257 CLR 42 . . . . 275n136, 451n63, 529n94
Plaintiff M70/2011 v Minister for Immigration and Citizenship (2011) 244 CLR 144 . . . . 529n90
Plaintiff S99/2016 v Minister for Immigration and Border Protection (2016) 243 FCR 17 . . . . 529n95
Plaintiff S156/2013 v Minister for Immigration and Border Protection (2014) 254 CLR 28 . . . . 529n93
Plaintiff S195/2016 v Minister for Immigration and Border Protection (2017) 261 CLR 622 . . . . 275n139, 529n94
Prahastono v Minister for Immigration and Multicultural Affairs (1997) 77 FCR 260 . . . . 787n51
Rajendran v Minister for Immigration and Multicultural Affairs (1998) 86 FCR 526 . . . . 526n63
Randhawa v Minister for Immigration, Local Government and Ethnic Affairs (1994) 52 FCR 437 . . . . 698n18, 699n22
Ruddock v Vadarlis (2001) 110 FCR 491 . . . . 486n36
Secretary, Department of Health and Community Services v JWB and SMB (1992) 175 CLR 218 . . . . 791n80
SZALZ v Minister for Immigration and Indigenous Affairs [2004] FMCA 275 . . . . 787n51
SZATV v Minister for Immigration and Citizenship (2007) 233 CLR 18 . . . . 707n81
SZBBP v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FMCA 143 . . . . 788n64

SZBQJ v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCA 143 . . . . 788n64
SZNBX v Minister for Immigration and Border Protection [2018] FCA 1172 . . . . 527n80, 528n81
SZRTC v Minister for Immigration and Border Protection (2014) 224 FCR 570 . . . . 528n86
SZTAL v Minister for Immigration and Border Protection (2017) 262 CLR 362 . . . . 669n83
SZTFX v Minister for Immigration and Border Protection [2015] FCA 402 . . . . 806n61
SZUNZ v Minister for Immigration and Border Protection (2015) 230 FCR 272 . . . . 805n50
SZVGQ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2018] FCCA 597 . . . . 527n75, 527n76
SZVGQ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2019] FCA 1985 . . . . 527n75
SZVVB v Minister for Immigration and Border Protection [2017] FCA 207 . . . . 528n84
V95/03527 [1996] RRTA 246 . . . . 767n30
V856/00A v Minister for Immigration and Multicultural Affairs (2001) 114 FCR 408 . . . . 527n79
VXAJ v Minister for Immigration and Multicultural Affairs (2006) 198 FLR 455 . . . . 563n83
WAGH v Minister for Immigration and Multicultural and Indigenous Affairs (2003) 131 FCR 269 . . . . 527n71
Wan v Minister for Immigration and Multicultural Affairs (2001) 107 FCR 133 . . . . 672n107

Austria

Decision of 28 April 2000, 96/21/1036–7 . . . . 706n74
Georg K v Ministry of the Interior [1969] 71 ILR 284 (Austrian Admin Court) 718n32
Ra 2014/01/0154 (Austrian Supreme Administrative Court, 21 April 2015) 722n59, 722n61

Bangladesh

Refugee and Migration Movements Research Unit (RMMRU) v Government of Bangladesh, Writ Petition No 10504 of 2016 (Bangladesh Supreme Court, 31 May 2017) 434n47

Belgium

Lusnjani v Belgium and Belgian Representative of the United Nations High Commissioner for Refugees (1988) 77 ILR 417 . . . . 1169n72

Bulgaria

Zuheyr Freyeh Halaf v Darzhavna agentsia za bezhantsite pri Ministerski savet, Sofia City Administrative Court, Judgment No 297 (15 January 2014) 881n84

Canada

Adjei v Canada (Minister of Employment and Immigration), 1989 CarswellNat 40, [1989] 2 FC 680 . . . . 674n124
Ahmed v Canada (Minister of Employment and Immigration), 1993 CarswellNat 294, [1993] FCJ 718 . . . . 707n80
B010 v Canada (Citizenship and Immigration), 2015 SCC 58, [2015] 3 SCR 704 . . . . 921n30

Canada (Attorney General) v Ward, 1993 Carswell Nat 1382, [1993] 2 SCR 689 .... 579n65, 737n40, 738n44
Canada (Minister of Citizenship & Immigration) v Patel, 2008 FC 747, [2008] 2 FCR 196 .... 787n49
Canadian Council for Refugees, Canadian Council of Churches, Amnesty International and John Doe v Her Majesty the Queen, 2007 FC 1262 .... 530n102
Canadian Council for Refugees et al v The Minister of Immigration, Refugees and Citizenship and the Minister of Public Safety and Emergency Preparedness, 2020 FC 770 .... 531n117
Chan v Canada (Minister of Employment and Immigration), [1995] 3 SCR 593 .... 733n19, 734n25
Cheung v Canada (Minister of Employment and Immigration), [1993] 2 FC 314 .... 733n18
Dirshe v Canada (Minister of Citizenship and Immigration), 1997 CarswellNat 1371, [1997] 135 FTR 151 .... 706n74
Elmi v Minister of Citizenship and Immigration, 1999 CarswellNat 390, [1999] FCH 336 .... 695n5, 703n56, 704n59
Ezokola v Canada (Citizenship and Immigration), 2013 SCC 40, [2013] 2 SCR 678 721
Gordon v Goertz, [1996] 2 SCR 27 .... 755n71
Hashmat v Canada (Minister of Citizenship and Immigration), 1997 CarswellNat 791, [1997] FCJ 598 .... 706n74
Jacinthe v Canada (Citizenship and Immigration), 2019 FC 1558, [2019] 313 ACWS (3d) 808 .... 738n45
Khadra Hassan Farah (IRB, 10 May 1994) 752n46
Kim v Canada (Minister of Citizenship and Immigration), 2010 FC 149, [2011] 2 FCR 448 .... 750n34
Li v Canada (Minister for Citizenship and Immigration), 2005 FCA 1, [2005] 3 FCR 239 .... 674n122
Miller v R, 1976 CarswellBC 321, [1977] 2 SCR 680 .... 665n45
The Queen v Canadian Council for Refugees, Canadian Council of Churches, Amnesty International and John Doe, 2008 FCA 229, [2009] 3 FCR 136 .... 530n110
R v Appulonappa, 2015 SCC 59, [2015] 3 SCR 754 .... 922n44
Rasaiah v Canada, 2019 CarswellNat 2109, [2019] FC 632 .... 738n45
Singh v Minister of Employment and Immigration, [1985] 1 SCR 177 .... 300–301, 313
Surajnarain v Canada (Minister of Citizenship and Immigration), 2008 FC 1165, [2008] FCJ 1451 .... 672n106
Suresh v Canada, 2002 SCC 1, [2002] 1 SCR 3 .... 665n41
T93-09636, T93-09638 and T93-09639 (IRB, 26 January 1994) 752n47
Talo v Canada (Minister of Citizenship and Immigration), 2012 FC 478, [2012] 408 FTR 182 .... 563n85
Thabet v Canada (Minister of Citizenship and Immigration), [1998] 4 FC 21 .... 804n44, 806n60
Thirunavukkarasu v Canada (Minister of Employment and Immigration), 1993 CarswellNat 160, [1993] ACF 1172 .... 695n1, 702n45, 703n54, 706n72, 706n74
Thornton v Canada (Citizenship and Immigration), [2019] FC 792, [2019] 306 ACWS (3d) 816 .... 738n45
X, Re, 2003 CanLII 55285 .... 752n46
X, Re, 2014 CarswellNat 5790 .... 807n63

X v Canada, 2001 CanLII 26988 . . . . . 752n45
Yusuf v Canada (Minister of Employment and Immigration), 1991 CarswellNat 368, [1992] 1 FC 629 . . . . . 787n53
Zhu v Canada (Minister of Citizenship and Immigration), 2001 FCT 884, [2001] 16 Imm LR (3d) 227 . . . . . 751n38

Colombia

Case T-573/2015 (4 September 2015) (Constitutional Court of Colombia) 995n46

Denmark

Decisions 178/2011 and 179/2011 (3 February 2012) (Supreme Court of Denmark) 921n26

Ecuador

Judgment No 002-14-Sin-CC, Case No 0056-12-IN and 0003-12-IA (14 August 2014) (Constitutional Court of Ecuador) 513n77, 891n34

Finland

Decision KHO:2017:14 (22 September 2017) (Supreme Administrative Court, Finland) . . . 93n110
Decision KKO:2013:21 (5 April 2013) (Supreme Court of Finland) 923n53

France

Amnesty International France v République Français, App No 1908601/9 (10 May 2019) (Paris Administrative Tribunal) 512n73
Conseil d'Etat, decision nos 363, 181, 363, 182, 5 November 2014 . . . . . 805n47
Cour Nationale du Droit d'Asile, Case 17014970 C, 8 February 2018 . . . . . 88n70
Cour Nationale du Droit d'Asile, Case 17052687 C, 14 May 2018 . . . . . 88n72
Cour Nationale du Droit d'Asile, decision no 10,018,108, 16 November 2011 . . . . . 804n44
Cour Nationale du Droit d'Asile, decision no 11030207 C+, 22 May 2014 . . . . . 807n63
Essayan v Jouve, Tribunal de Grande Instance de la Seine [1962] UNJY 290 . . . . . 1158n7

Germany

BVerfG, Beschl. v. 08.12.2014, 2 BvR 450/11 = NVwZ 2015, 361 . . . . . 923n53, 924n62
BVerfG, Beschl. v. 10.07.1989, 2 BvR 502/86, 2 BvR 1000/86, 2 BvR 961/86, BVerfGE 80, 315 = InfAuslR 1990, 21 . . . . . 702n45
BVerwG, Beschl. v. 31.07.2002, 1 B 128/02, 1 PKH 24/02 = InfAuslR 2002, 455 . . . . . 702n45
BVerwG, Urt. v. 20.02.2013, 10 C 23.12, BVerwGE 146, 67 = ZAR 2013, 339 . . . . . 708n87
BVerwG, Urt. v. 24.02.2011, 10 C 3/10, BVerwGE 139, 109 = NVwZ 2011, 944 . . . . . 704n59
BVerwG, Urt. v. 26.02.2009, 10 C 50/07, BVerwGE 133, 203 = NVwZ-RR 2010, 252 . . . . . 804n44
VG Kassel, Urt. v. 06.06.2018, 1 K 6981/17.KS.A (Juris) 93n106

Greece

Greek Piraeus Administrative Court of Appeal, 12 June 2019, case A401. . . . . 88n73

Hong Kong

C v Director of Immigration [2008] 2 HKC 165. . . . . .247n64
GA v Director of Immigration [2014] 3 HKC 11. . . . . .965n87, 965n88

India

Bogyi v Union of India, Civil Rule No 1847/89, 17 November 1989 (Gauhati High Court) 413n40
Ktaer Abbas Habib Al Qutaifi v Union of India, 1999 CRI LJ 919 . . . . 418n81
Malavika Karlekar v Union of India, Writ Petition (C) No 583 of 1992, 25 September 1992 (Supreme Court) 413n41
National Human Rights Commission (NHRC) v State of Arunachal Pradesh, 1996 SCC (1) 742 . . . . 418n78
Salimullah (Mohammad) v Union of India, Writ Petition (C) No 79 of 2017, 30 August 2017 (Supreme Court) 415n58

Ireland

AAAAD v Refugee Appeals Tribunal and the Minister for Justice, Equality and Law Reform [2009] IEHC 326 . . . . .804n44, 806n60
NVH v Minister for Justice & Equality and Others [2017] IESC 35. . . . . .966n94, 966n96

Italy

Italian Supreme Court, 20 September 2012, decision no 15981 . . . . .87n69
Italian Supreme Court, 26 April 2019, decision no 11312. . . . . 93n107
Italian Supreme Court, 3 December 2019, decision no 2458 . . . . .88n73, 89n84
Tribunal of Palermo (Italy), decision of 31 May 2017. . . . . 82n32
Tribunale di Messina, I Sezione Civile, 316/2017 (14 July 2017) (Italy, Courts of First Instance) 562n74

Kazakhstan

Case No 2-1095/2015 (Cassation Board of the Kostanay City Court, Kazakhstan, 18 November 2015) 382n50

Kenya

Attorney General v Kituo Cha Sheria & 7 Others [2017] eKLR. 293n91, 294n97, 294n100, 982n83
Kituo Cha Sheria v The Attorney General [2013] eKLR 267n63, 268n70, 269n78, 269n79, 269n81, 982n80, 1061n118

Korea

1996 [Nu] 1221 (Supreme Court) 400n83
2014 [InLa] 4 (2014) (Incheon District Court of Korea) 404n119
2014 [Nu] 52093 (2015) (Seoul High Court of Korea) 404n118

Kyrgyzstan

Case No AD-2029/13 (Supreme Court of the Kyrgyz Republic, 10 March 2015) 382n51
Sulaimanov v Prosecutor General's Office of Kyrgyzstan (Court of Cassation, Bishkek City, 1 March 2013) 385n64

Malaysia

Ali Salih Khalaf v Taj Mahal Hotel [2014] 4 ILJ 15 438
Ruwaida Royeda Binti Muhammad Siddiq v Commandant, Immigration Depot Belantik, Criminal Application No: KA-44-81-09/2018 . . . . 435n51, 435n52
Subramaniyam Subakaran v PP [2007] 1 Current Law Journal 470 . . . . 434n44

Mexico

Amparo en Revisión, 353/2019 (16 October 2019) (Ministro José Fernando Franco González Salas) 893n45
Juicio de Amparo 1452/2017 (30 April 2018) (Juan Pablo Gómez Fierro, Juez Cuarto de Distrito en Materia Administrativo) (Decision 1452/2017) 894n47, 895n51, 896n65
Juicio de Amparo 1700/2017 (13 March 2018) (Rodrigo de la Peza López Figueroa, Juez Noveno de Distrito en Materia Administrativa en el Distrito Federal) 896n61, 896n66
Juicio de Amparo Indirecto 115/2018 (15 January 2019) (Jonathan Bass Herrera, Juez Segundo de Distrito del Centro Auxiliar de la Primera Región en Materia Administrativo) 893n41

Nauru

ROD122 v Republic of Nauru [2017] NRSC 39 . . . . 791n85
TTY167 v Republic of Nauru (2018) 93 ALJR 111 . . . . 791n85

The Netherlands

Afdeling Rechtspraak Raad van State (ARRvS) no A-21113, Rechtspraak Vreemdelingenrecht 1981 . . . . 762n3
HR 03 april 2012, NJB 2012, 920 (ECLI:NL:HR:2012:BV7412) 923n51
HR 06 november 2012, RvdW 2012, 1412 (ECLI:NL:HR:2012:BW9266) 921n33
HR 19 juli 2019, 17/04567 (The Netherlands v Mothers of Srebrenica and Others), (ECLI:NL:HR:2019:1284) 1164n37
HR 25 mei 2011, NJB 2011, 1196 (ECLI:NL:HR:2011:BO1587); HR 20 september 2011, NJ 2011, 438 (ECLI:NL:HR:2011:BQ7762) 923n51
HR 28 mei 2013, NJ 2013, 332 m.nt. MJB (ECLI:NL:HR:2013:BY4310) 921n33
RBDHA, 25 mei 2018, NL 17.12618 (ECLI:NL:RBDHA:2018:6308) 88n71
RVS 16 juni 2015, NJB 2015,1353 (ECLI:NL:RVS:2015:2008) 715n17

RVS 18 december 2013, JV 2014, 48 (ECLI:NL:RVS:2013:2423) 769n39
RVS 21 maart 2018, JV 2018, 78 m.nt. HB (ECLI:N:RVS:2018:1002) 95n121

New Zealand

AC (Russia) [2012] NZIPT 800151 .... 740n52
AC (Syria) [2011] NZIPT 800035 .... 663n30
AC (Tuvalu) [2014] NZIPT 800517-520. .... 836n28, 837n37, 839n56, 841n67, 841n68
AD (Tuvalu) [2014] NZIPT 501370 .... 837n37
AF (Kiribati) [2013] NZIPT 900413 .... 454–455, 836n28, 836n35, 837n37, 837n38, 838n46, 843n82
AF (Tuvalu) [2015] NZIPT 800859 .... 837n37
Attorney-General (Minister of Immigration) v Tamil X [2010] NZSC 107 .... 721n52
BG (Fiji) [2012] NZIPT 800091 .... 454n79, 708n87, 840n66, 841n67
Butler v Attorney General [1999] NZAR 205 .... 702n45, 707n81
Hassan v Department of Labour (Immigration) HC Wellington CRI 2006-485-101, 4 April 2007 .... 923n52
R v Zanzoul (No 2) CA297/06, 6 December 2006 .... 923n52
Refugee Appeal No 1/92 Re SA [1992] NZRSAA 5 .... 805n46
Refugee Appeal No 71404/99 [1999] NZRSAA 292 .... 842n80
Refugee Appeal No 71427 [2000] NZRSAA 337 .... 65n34
Refugee Appeal No 71684/99 [1999] NZRSAA 296 .... 702n50, 706n74
Refugee Appeal No 72635 [2002] NZRSAA 344 .... 804n44, 807n63
Refugee Appeal No 74449 [2003] NZRSAA 332 .... 807n63
Refugee Appeal No 76044 [2008] NZRSAA 80 .... 66n39, 698n18
Refugee Appeal No 76083 [2008] NZRSAA 58 .... 752n43
Refugee Appeal No 76374 [2009] NZRSAA 83 .... 836n28
Refugee Appeal No 76478 [2010] NZRSAA 68 .... 563n81
Refugee Appeal Nos 76494 and 76495 (NZRSAA, 23 November 2010) 752n47
Taunoa v Attorney-General [2007] NZSC 70 .... 665n45
Teitiota v The Chief Executive of the Ministry of Business Innovation and Employment [2013] NZHC 3125 .... 836n35, 836n37, 837n37
Teitiota v The Chief Executive of the Ministry of Business, Innovation and Employment [2014] NZCA 173, [2014] NZAR 688 .... 836n33, 836n35
Teitiota v The Chief Executive of the Ministry of Business Innovation and Employment [2015] NZSC 107 .... 837n37

Norway

HR-2014-01323-A, Case No 2014/220 (24 June 2014) (Norwegian Supreme Court) 924n61, 926n79
N1729590817 [2017] Norwegian Immigration Appeals Board, Grand Board 1045n115
Riksadvokaten (2014) 2014/00167-009 AB6007 274 .... 926n80

Papua New Guinea

Namah v Pato [2016] PGSC 13, 12 .... 275n135, 275n138, 451n65, 452n68, 513n78, 515n86

Philippines

GR No 210412 Republic of the Philippines v Karbasi (Supreme Court, 29 July 2015). . . 437n64
GR No 221538 David v Senate Electoral Tribunal and Mary Grace Poe-Llamanzares (Supreme Court, 20 September 2016) 437n65
GR No L–1812 Kookooritchkin v The Solicitor General (Supreme Court, 27 August 1948). 437n62
GR No L–3323 Bermont v The Republic of the Philippines (Supreme Court, 18 July 1951) 437n63

Sierra Leone

Prosecutor v Taylor, Case No SCSL-03-01-A (26 September 2013) 721n51

South Africa

Dawood and Others v Minister of Home Affairs and Others [2000] ZACC 8, 2000 (3) SA 936. . . . . 997n59
Minister of Home Affairs and Others v Watchenuka [2003] ZASCA 142, [2004] 1 All SA 21 (SCA) 271n101, 965n82, 965n84
Radjabu v Chairperson of the Standing Committee for Refugee Affairs and Others [2015] 1 All SA 100 . . . . .631n40, 632n40, 641n104
Ruta v Minister of Home Affairs [2018] ZACC 52, 2019 (2) SA 329 (CC) 882n85
S v Manamela (Director-General of Justice Intervening) [2002] ZACC 5, 2000 (3) SA 1 (CC) 269n80
Somali Association of South Africa v Limpopo Department of Economic Development, Environment and Tourism [2014] ZASCA 143, 2015 (1) SA 151 (SCA) 965n82, 965n85
Union of Refugee Women and Others v Director, Private Sector Industry Regulatory Authority and Others [2006] ZACC 23, 2007 (4) SA 395 (CC). 965n82

Switzerland

Nappi, In re [1952] 19 ILR 375 (Swiss Federal Tribunal) 717n30
Re Pavan [1927–28] Annual Digest of Public International Law Cases 347 . . . . 717n29
SAM v BFF, Swiss Asylum Board (27 November 1992). 721n55
Watin v Ministere Public Federal [1964] 72 ILR 614 (Swiss Federal Tribunal) 717n29

United Kingdom

A v Secretary of State for the Home Department [2005] UKHL 71, [2006] 2 AC 221 . . 942n78
AA-R (Iran) v Secretary of State for the Home Department [2013] EWCA Civ 835. . . . 721n53
AH (Sudan) v Secretary of State for the Home Department [2007] UKHL 49, [2008] AC 678. . . . . 702n45, 704n59, 704n60, 707
Al-Sirri and DD (Afghanistan) v Secretary of State for the Home Department [2012] UKSC 54, [2013] 1 AC 745 . . . . 718n32, 719n38, 722n59
Al-Sirri v Secretary of State for the Home Department [2009] EWCA Civ 222, [2009] Imm AR 115. . . . . 719n38, 719n41
AM (Zimbabwe) v Secretary of State for the Home Department [2020] UKSC 17, [2020] 2 WLR 1152 . . . . 840n60

AM & AM (Armed Conflict: Risk Categories) Somalia CG [2008] UKAIT 00091 . . . . 703n56
AZ (Trafficked Women) Thailand CG [2010] UKUT 118 . . . . 563n84, 563n86
BA v Secretary of State for the Home Department [2004] UKIAT 00256 . . . . 806n61
Bagdanavicius v Secretary of State for the Home Department [2005] UKHL 38, [2005] 2 AC 668 . . . . .674n121
BF (Tirana—gay men) Albania [2019] UKUT 0093 . . . . 93n106
Re Castioni [1891] 1 QB 149. . . . . 717n27
Devaseelan v Secretary of State for the Home Department [2002] UKAIT 00702. . . . .668n69
DM (Majority Clan Entities Can Protect) Somalia v Secretary of State for the Home Department [2005] UKAIT 00150 . . . . 695n5
The Eleanor (1809) Edw 135, 165 ER 1058. . . . . .490n75
EM (Lebanon) v Secretary of State for the Home Department [2008] UKHL 64, [2009] 1 AC 1198 . . . . 672n107
EN (Serbia) and KC (South Africa) v Secretary of State for the Home Department [2009] EWCA Civ 630, [2010] QB 633 . . . . .726n79
Eritrea v Secretary of State for the Home Department [2009] UKAIT 00012. . . . . .726n79
Fornah v Secretary of State for the Home Department [2006] UKHL 46, [2007] 1 AC 412 . . . . 732n17
Gillick v West Norfolk and Wisbech Area Health Authority [1985] UKHL 7, [1986] AC 112. . . . . .791n80
Gurung v Secretary of State for the Home Department [2002] UKIAT 04870 . . . . 714n14
HD (Trafficked Women) Nigeria CG [2016] UKUT 00454 . . . . 563n77
HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department [2010] UKSC 31, [2011] 1 AC 596 . . . . 89n83, 762n6, 768n35, 769n40
HJ (Iran) v Secretary of State for the Home Department [2009] EWCA Civ 172, [2009] Imm AR 600 . . . . 768n32
HS (Palestinian—Return to Gaza) [2011] UKUT 124 (IAC). 806n56
Islam v Secretary of State for the Home Department Immigration Appeal Tribunal, ex p Shah [1999] UKHL 20, [1999] 2 AC 629 . . . . 65n34, 175n17, 579n64, 706n74, 721n54, 736n34, 736n35, 740n52, 762n4, 788n58
Januzi v Secretary of State for the Home Department [2006] UKHL 5, [2006] 2 AC 426 . . . . 698n17, 699n22, 702n51, 707n81
JM v Secretary of State for the Home Department [2008] UKIAT 00065 . . . . 767n31
JS (Sri Lanka) v Secretary of State for the Home Department [2010] UKSC 15, [2011] 1 AC 284 . . . . 714n14, 719n38, 725n77
KA (Afghanistan) v Secretary of State for the Home Department [2012] EWCA Civ 1014, [2013] 1 WLR 615 . . . . 748n18
Kacaj v Secretary of State for the Home Department [2001] UKAIT 00018 . . . . .674n121
Lazarevic v Secretary of State for the Home Department [1997] EWCA Civ 1007, [1997] 1 WLR 1107. . . . . 805n55
LC (Albania) v Secretary of State for the Home Department [2017] EWCA Civ 351, [2017] 1 WLR 4173 . . . . 89n83, 95n120
MA (Ethiopia) v Secretary of State for the Home Department [2009] EWCA Civ 289. . . . . .808n69
MA (Palestinian Territories) v Secretary of State for the Home Department [2008] EWCA Civ 304. . . . . 806n56, 806n57

Othman (aka Abu Qatada) v Secretary of State for the Home Department [2007] UKSIAC 15/2005 . . . . 718n34
PN v Secretary of State for the Home Department [2019] EWHC 1616 (Admin) 93n109, 767n25
QX v Secretary of State for the Home Department [2020] EWHC 1221 (Admin), [2020] 3 WLR 914 . . . . 724n71
R (Adam) v Secretary of State for the Home Department [2005] UKHL 66, [2006] 1 AC 396 . . . . 840n66
R (European Roma Rights Centre) v Immigration Officer at Prague Airport [2004] UKHL 55, [2005] 2 AC 1, 54 . . . . 253n118, 510n51, 513n77, 561n67
R (Hoxha) v Special Adjudicator [2005] UKHL 19, [2005] 1 WLR 1063 . . . . 1030n4
R (Limbuela) v Secretary of State for the Home Department [2005] UKHL 66, [2006] 1 AC 396 . . . . 965n91
R (on the Application of) ABC (A Minor) (Afghanistan) v Secretary of State for the Home Department [2011] EWHC 2937 (Admin) 752n51
R (on the Application of Lord Carlile of Berriew QC and others) v Secretary of State for the Home Department [2014] UKSC 60, [2015] AC 945 . . . . 724n68
R (on the Application of ZO (Somalia) and Others) (Respondents) v Secretary of State for the Home Department [2010] UKSC 36 . . . . 966n92
R (Rostami) v Secretary of State for the Home Department [2013] EWHC 1494 (Admin), [2014] Imm AR 56 . . . . 966n92
R (ST, Eritrea) v Secretary of State for the Home Department [2012] UKSC 12, [2012] 2 AC 135 . . . . 174n16, 180n44
R (Ullah) v Special Adjudicator [2004] UKHL 26, [2004] 2 AC 323 . . . . 666n49, 667n56, 667n65, 668n69
R v Mateta [2013] EWCA Crim 1372, [2014] 1 WLR 1516 . . . . 923n50
R v Secretary of State for the Home Department, ex p Adan [2000] UKHL 67, [2001] 2 AC 477 . . . . 839n58, 1169n65
R v Secretary of State for the Home Department, ex p Bugdaycay [1986] UKHL 3, [1987] AC 514 . . . . 1169n67
R v Uxbridge Magistrates Court, ex p Adimi [1999] EWHC Admin 765, [2000] 3 WLR 434 . . . . 921n33, 923n50, 924n55
RA (AP) v Secretary of State for the Home Department [2011] CSOH 68 . . . . 751n39
Revenko v Secretary of State for the Home Department [2000] EWCA Civ 500, [2001] QB 601 . . . . 804n44
Saad v Secretary of State for the Home Department [2001] EWCA Civ 2008 . . . . 805n54
Secretary of State for the Home Department v MA (Somalia) [2018] EWCA Civ 994, [2019] 1 WLR 241 . . . . 1038n59
Secretary of State for the Home Department v MS (Somalia) [2019] EWCA Civ 1345, [2019] 3 WLR 705 . . . . 710n98
Secretary of State for the Home Department v SMR [2018] UKUT PA/05912/2017 . . . . . . 93n106
SXH v Crown Prosecution Service [2017] UKSC 30, [2017] 1 WLR 1401 . . . 921n33, 926n77, 926n78
T v Secretary of State for the Home Department [1996] UKHL 8, [1996] AC 742 . . . . 717n28, 717n30
TD and AD (Trafficked Women) (CG) [2016] UKUT 00092 . . . . 563n77

Tekle v Secretary of State for the Home Department [2008] EWHC 3064 (Admin), [2000] 2 All ER 193. . . . . .966n92
Turani v Secretary of State for the Home Department [2019] EWHC 1586 (Admin). 1095n116, 1095n121
VV v Secretary of State for the Home Department [2007] UKSIAC 59/2006. . . . . 718n36
ZH (Tanzania) (FC) v Secretary of State for the Home Department [2011] UKSC 4, [2011] 2 AC 166 . . . . 672n107

United States of America

American Baptist Churches v Thornburgh, 760 F Supp 796 (ND Cal 1991) 305
Barr v East Bay Sanctuary Covenant, No 19A230 588 (11 September 2019) 533n130
Bolanos-Hernandez v INS, 767 F 2d 1277 (9th Cir, 1984) 305n51
Chen v Holder, 604 F3d 324 (7th Cir, 2010) 708n87
East Bay Sanctuary Covenant v Trump, 909 F 3d 1232 (9th Cir, 2018) 307n68
El Assadi v Holder, 418 Fed App'x 484 (6th Cir, 2011). 805n47
Fedosseeva v Gonzales, 492 F 3d 840 (7th Cir, 2007) 804n44
Fong Yue Ting v United States 14 US 698 (1893) 947n127
Fuentes-Colocho v Holder, 584 Fed Appx 505 (9th Cir, 2014) 751n42
Fuentes-Colocho v United States Attorney General (19 November 2013) 751n42
Haile v Gonzales, 421 F 3d 493 (7th Cir, 2005) 808n68
Haile v Holder, 591 F 3d 572 (7th Cir, 2010) 807n66, 808n69
Hernandez-Montiel v INS, 225 F 3d I084 (9th Cir, 2000) 762n6
Immigration and Naturalization Service v Elias-Zacarias, 502 US 478 (1992) 740n53
Innovation Law Lab v Wolf, 951 F 3d 1073 (9th Cir, 2020) 533n132
INS v Cardoza-Fonseca, 480 US 421 (1987) 304–5, 307n68, 842n79, 842n80
INS v Stevic, 467 US 407 (1984) 579n64
Jennings v Rodriguez, 138 S Ct 830 (2018) 938n43, 940n60
Kovac v Immigration and Naturalization Service, 407 F 2d 102 (9th Cir, 1969) 788n55
Matter of AB, 27 I&N Dec 316 (AG 2018) 734n26
Matter of Acosta, 19 I&N Dec 211 (BIA 1985) 737n42
Matter of AEM, I&N Dec 3338 (BIA 1998) 702n45
Matter of E-F-H-L-, 26 I&N Dec 319 (BIA 2014). 313n109
Matter of E-F-H-L-, 27 I&N Dec 226 (AG 2018) 313n110
Matter of H, 21 I&N Dec 337 (BIA 1996). 706n74
Matter of Kasinga, 21 I&N Dec 357 (BIA 1996). 732n17
Matter of X (United States Executive Office for Immigration Review) (9 August 2011) 563n83, 563n86
Orantes-Hernandez v Thornburgh, 919 F 2d 549 (9th Cir, 1990) 305n51
Salaam v INS, 229 F 3d 1234 (9th Cir, 2000). 751n40
Sale v Haitian Centers Council, 509 US 155 (1993). 248n74, 264n46, 267n58, 311n97, 494n104, 507, 510n51, 908n51, 940n58
Shaughnessy v United States ex rel Mezei, 345 US 206 (1953) 942n78
SMSR v Trump (10 December 2018) (no 1:18-CV-02838-RDM) 192n31
Stserba v Holder, 646 F 3d 964 (6th Cir, 2011) 807n66

Tchoukhrova v Gonzales, 404 F 3d 1181 (3rd Cir, 2005) 790n76
UT v Barr, No 120CV00116 (DDC, 15 January 2020) 533n131
Wolf v Innovation Law Lab, No 19A960 (US Supreme Court, 11 March 2020). 533n133
Zadvydas v Davis, 533 US 678 (2001). 941n72

Venezuela

Caso No 0014-19-IN (19 March 2019) 880n76

Table of Instruments

International and Regional Instruments

1259 BC

Treaty of Kadesh 3, 868

1598

Edict of Nantes 115

1889

Montevideo Treaty on International Penal Law (adopted 23 January 1889) OAS Official Records, OEA/Ser.X/7
- Art 15 319
- Art 16 319
- Art 17 319
- Art 18 319

1919

Treaty of Versailles 24

1920

Covenant of the League of Nations 24
- Art 11 . . . . 25n10
- Art 23 . . . . 25n10, 26n23
- Art 23(f) 26
- Art 24 . . . . 35n86
- Art 25 . . . . 25n10, 26n18

1921

Treaty of Riga 28–9

1922

Arrangement with regard to the Issue of Identity Certificates to Russian Refugees (adopted 5 July 1922, entered into force 16 November 1922) 13 LNTS 237 31

1923

Treaty of Lausanne (adopted 24 July 1923, entered into force 6 August 1924) 28 LNTS 11 643

1926

Arrangement relating to the Issue of Identify Certificates to Russian and Armenian Refugees (adopted 12 May 1926) 84 LNTS 2004 . . . . 34, 625n1

Convention to Suppress the Slave Trade and Slavery (adopted 25 September 1926, entered into force 7 March 1927) 60 LNTS 253
- Art 6 . . . . 1155n114

1928

Arrangement relating to the Legal Status of Russian and Armenian Refugees (adopted 30 June 1928) 89 LNTS 53 . . . . 34, 36

Havana Convention on Asylum (adopted 20 February 1928, entered into force 21 May 1929) OAS Official Records, OEA/Ser.X/I 319, 320

1930

Convention on Certain Questions relating to the Conflict of Nationality (adopted 12 April 1930, entered into force 1 July 1937) 179 LNTS 89 . . . . 158, 1054

1933

Convention relating to the International Status of Refugees (adopted 28 October 1933,

entered into force 13 June 1935)
159 LNTS 199 . . . . 36n93, 37–8
Art 1 . . . . 37n97
Art 2 . . . . .37, 37n108
Art 3 . . . . .37, 37n109
Art 4 . . . . 37n103
Art 5 . . . . 37n103
Art 6 . . . . 37n104
Art 7 . . . . 37n105
Art 14 . . . . 37n107
Arts 8–12 . . . . 37n106
Montevideo Convention on Political Asylum (adopted 26 December 1933, entered into force 28 March 1935) OAS Official Records, OEA/Ser.X/I 320
Art 1 319
Art 2 319
Art 3 319
Montevideo Convention on the Rights and Duties of States (adopted 26 December 1933, entered into force 26 December 1934) 165 LNTS 19
Art 1 . . . . 843n88

1936

Provisional Arrangement concerning the Status of Refugees from Germany (adopted 4 July 1936, entered into force 4 August 1936)
171 LNTS 75 . . . . .38n115, 809
Art 2 . . . . .38n116
Art 4 . . . . .37n118
Arts 5–7 . . . . .38n117

1938

Convention concerning the Status of Refugees coming from Germany (adopted 10 February 1938, entered into force 26 October 1938)
192 LNTS 59 . . . . 572n21
Art 1 . . . . .37n119
Arts 2–4 . . . . 39n120
Art 5 . . . . .39n121, 39n126
Arts 6–13 . . . . 39n122
Art 9 . . . . 39n126
Art 10 . . . . 39n126

1939

Montevideo Treaty on Asylum and Political Refuge (adopted 4 August 1939) OAS Official Records, OEA/Ser. X/I. . . .319–20
Additional Protocol to the Provisional Arrangements and to the Convention Signed at Geneva on July 4th, 1936 and February 10th, 1938, Respectively, Concerning the Status of Refugees Coming from Germany (adopted 14 September 1939) 198 LNTS 141 . . . . 39n127

1940

Montevideo Treaty on International Penal Law (adopted 19 March 1940) OAS Official Records, OEA/Ser.X/1 320

1943

Agreement for United Nations Relief and Rehabilitation Administration (adopted 9 November 1943)
Art I(2) 1076n81

1944

Convention on Civil Aviation (adopted 7 December 1944, entered into force 4 April 1947) 15 UNTS 295
Art 37 . . . . 504n14

1945

Charter of the United Nations (adopted 24 October 1945) 1 UNTS XVI . . 119, 120, 263, 274, 289, 812–3, 938
Art 1(3) 205, 465
Art 1C 813
Art 2(4) 236n95
Art 7(2) 648n42
Art 22 . . . . .648n42
Art 39 231
Art 55 465
Art 56 465
Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945)

Art 38 . . . . . 241n14
Art 38(1)(c) 918n6, 929

1946

Constitution of the International Refugee Organization (adopted 15 December 1946, entered into force 20 August 1948) 18 UNTS 3 . . . . . 63n21, 408n8, 573n24, 1076–7
preamble 1085n46
Art 1(1) 1076n87, 1077n89
Art 1(b) 1076n86
Art 2(1) 1077n90
Art 2(1)(a) 1076n86
Art 10 . . . . . 1085n45
Art 21 418–9

1947

United Nations Partition Plan for Palestine, UNGA res 181 (29 November 1947) 646

1948

American Declaration of the Rights and Duties of Man, OAS Res XXX adopted by the Ninth International Conference of American States (1948) reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System OEA/Ser L V/II.82 Doc 6 Rev 1 at 17 (1992) 297, 323, 326, 895n55, 902n20, 961n59
Art I 664
Art XVII 910–1
Art XXVII 324, 328, 329, 912
Charter of the Organization of American States (adopted 30 April 1948, entered into force 13 December 1951) 119 UNTS 3 (as amended)
Art 45(b) 961
Universal Declaration of Human Rights, UNGA res 217A (III) (adopted 10 December 1948) . . 119, 263, 274, 289, 918, 938
Art 2 541
Art 7 876
Art 10 877
Art 12 1011
Art 13 148
Art 13(2) 873, 1103
Art 14 . . . . . 199, 254, 256, 351, 505, 873, 874, 878, 933n2
Art 14(1) 288n64, 872n27, 874, 875, 876, 878
Art 14(2) 718
Art 15 . . . . . 158, 810, 843
Art 16(1) 989n3
Art 16(3) 989n2
Art 23(1) 952, 955
Art 26 . . . . . 974n23

1949

Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1949, entered into force 12 January 1951) 78 UNTS 277 . . . . . 421nn1
Art II(c) 1155n113
Art II(e) 1155n113
Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 . . . . 221, 223n11, 231, 246, 716
Art 1 . . . . . 224n24, 238, 239
Art 2 . . . . . 222n7, 230
Art 3 . . . . . 222n8, 229, 230, 238, 239, 245, 716, 1146n40, 1150–1
Art 49(3) 238n114
Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85 . . . . . 221, 223n11, 231, 245, 246, 716
Art 1 . . . . . 224n24, 238, 239, 245
Art 2 . . . . . 222n7, 229, 230
Art 3 . . . . . 222n8, 229, 230, 238, 239, 245, 716, 1146n40, 1150–1
Art 50 . . . . . 238n114

Geneva Convention (III) relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 . . . . 221, 223n11, 231, 246, 716
Art 1 . . . . 224n24, 238, 239, 245
Art 2 . . . . 222n7, 229, 230
Art 3 . . . . .222n8, 229, 230, 238, 239, 245, 716, 1146n40, 1150–1
Art 4A(1) 233
Art 4A(2) 233
Art 4A(3) 233
Art 4A(6) 233
Art 12 . . . . 237n107, 1150n67
Art 118 . . . . 237n103
Art 129 . . . . .238n114
Art 130 . . . . 1155n115
Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 . . . . 221, 223n11, 231, 246, 657n86, 716
Art 1 . . . . 224n24, 237, 238, 239, 245
Art 2 . . . . 222n7, 229, 230
Art 3 . . . . .222n8, 229, 230, 238, 239, 245, 716, 1146n40, 1150–1
Art 4(1) 233n73
Art 4(2) 233n75
Art 4(3) 233n74
Art 35(1) 234n83, 1146n44
Art 44 . . . . 224n22, 1146n42
Art 45 245
Art 45(3) 237n100
Art 45(3)–(4) 1150n67
Art 45(4) 224n24, 236, 236n98
Art 48 . . . . 234n84
Art 49 . . . . .224n21, 850, 1147n51
Art 49(1) 234n78
Art 49(1)–(3) 1146n43
Art 49(2) 234n80
Art 49(5) 245
Art 70 . . . . 1146n42
Art 70(2) 224n22, 235, 1146n42
Art 73 . . . . 224n22
Art 146(3) 238n114
Art 147 . . . . 1150n115
Statute of the Council of Europe (adopted 5 May 1949, entered into force 3 August 1949) 87 UNTS 103
Art 3 . . . . 352n2
Art 4 . . . . 352n2

1950

Agreement between the Governments of India and Pakistan regarding Security and Rights of Minorities (adopted 8 April 1950) 412n29
Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)) (adopted 4 November 1950, entered into force 3 September 1953) ETS 5 . . . . . . 79, 342, 523n38, 687, 900–1
Art 1 . . . . 564n92
Art 2 . . . . .85, 524n49, 664, 724, 902
Art 3 . . . . 85, 245, 363, 524, 525, 594, 598, 599, 610n15, 610n16, 611n20, 664n34, 666, 670, 676, 724, 855n53, 902–3, 905, 911, 912, 943n87, 964, 965
Art 4 . . . 562n75, 568, 664n31, 667, 901, 964
Art 5 . . . . 91, 520n11, 524, 667, 724, 901, 941n70
Art 5(f) 274n130
Art 6 . . . . 363, 667, 724, 901
Art 8 . . . . 89, 520n13, 524n49, 602, 667, 724, 855n53, 856n56, 901, 953, 963, 964, 966, 990, 991, 1004
Art 8(2) 666n48
Art 9 . . . . .666, 667, 990n14
Art 10 724
Art 12 . . . . 990n14
Art 13 . . . . 524n49, 564n92, 568, 594, 598, 599, 604, 610n15, 724
Art 14 . . . . 963, 964
Art 32 724
Art 33 . . . . 610n16
Art 46 . . . . 364n116

Protocol No 4
Art 2(2) 561n68
Art 4 . . . . 600, 905
Protocol No 7
Art 1 724
Art 1(2) 724
Statute of the Office of the United Nations High Commissioner for Refugees, UNGA res 428 (V) (14 December 1950) (UNHCR Statute) . . . 30n51, 38n119, 187, 188, 196, 201, 432, 578n56, 592n19, 645, 646, 649, 714n11, 718, 1064n1
Art 8 . . . . 944n96
Chapter I 1066, 1067, 1082–3
Chapter II 1066, 1067n17
Treaty of Peace and Friendship between India and Nepal 1950
Art 7 . . . . 527n75

1951

Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 . . . . 1, 2, 3, 4, 7, 8, 10, 11, 12, 14, 41, 42, 60, 64, 72, 75, 78, 79, 84, 87, 99, 102–4, 106, 110, 112, 114, 119, 120–1, 126–7, 128, 132, 138, 139, 148, 150, 152, 158, 160, 171, 172, 173, 175n19, 176, 187, 190, 191, 194, 195, 202, 203, 204, 205, 206, 213, 220, 239, 240, 241, 246, 247, 250, 253, 256, 257, 258–9, 270, 279, 281, 282, 283, 285, 293, 297, 303, 304–5, 309, 317, 321, 323, 324, 331, 332, 335, 336, 339, 340, 343, 358, 366, 367, 370, 371, 373, 377, 379, 381, 388, 391, 395, 399, 400, 405, 408, 409, 411, 413, 417, 426, 429, 430, 434, 437, 443, 445, 446, 448, 465, 467, 468, 478, 479, 494, 509, 511, 520–1, 523, 525, 526, 527, 529, 530, 531, 532, 536, 540, 542, 560, 574, 578, 581–2, 588, 596, 597, 605, 617, 622, 630, 638, 639, 640, 642, 644, 662, 663, 670, 677, 678, 679, 680, 681, 682, 687, 694, 695, 696, 697, 700, 703, 705, 709, 728, 750, 751, 754, 760, 762, 779, 798, 810, 811, 816, 820–8, 829, 836, 837, 869, 871, 872, 883, 885, 886, 887, 888, 895n55, 899, 904, 949, 976, 981, 984, 1011, 1025, 1048, 1058, 1075, 1079, 1087, 1090, 1098, 1123
preamble 185n66, 520n19
Art 1 . . . . 56n87, 158n31, 179n39, 208n24, 346, 590, 592n19
Art 1A 707
Art 1A(1) 1042
Art 1A(2) 49–50, 61n3, 61n6, 63, 81n25, 89n88, 154n9,174, 198, 226, 237, 401, 428, 625, 627–8, 650, 698n21, 712n2, 713, 715, 719, 725, 726, 727, 749, 768, 784, 785, 797, 798, 801, 804, 805, 814, 822, 824, 854, 903, 1036n48, 1037, 1038, 1039, 1042, 1043, 1045, 1066n10, 1103n16, 1140
Art 1B 335, 365n123
Art 1B(1) 581n81, 628n17
Art 1C 854, 859, 1029, 1030, 1031, 1036, 1037n55, 1045, 1066n10
Art 1C(1) 1049n26, 1111n57
Art 1C(1)–(4) 1031–4
Art 1C(3) 1047, 1096n125
Art 1C(5) 712n2, 913n96, 1030, 1031, 1034–44, 1045, 1049n26, 1082n17, 1096n127
Art 1C(5)–(6) 1069n30
Art 1C(6) 913n96, 1031, 1034, 1038n58, 1044, 1082n17
Art 1D 14, 645, 646, 649–50, 651
Art 1F 109, 209, 393, 591, 675, 712–8, 719, 720, 721, 722–3, 724n73, 725, 726, 727, 741, 752, 854, 903, 1151n71
Art 1F(a) 223, 226, 713, 715, 718
Art 1F(b) 285–6, 717, 718, 723
Art 1F(c) 713, 718, 723, 725
Art 2 . . . . 346, 723, 1053n55
Arts 2–33 702
Arts 2–34 . . . . 146, 305n51
Art 3 . . . . 51, 52, 182n51, 217, 218, 675n129, 812n97, 911
Arts 3–34 . . . . 285, 714
Art 4 . . . . 182n51, 207n19, 286, 675n129, 746n10, 876n57

Art 5 . . . . 177, 178, 182n51, 212, 346, 959, 960, 1050n30
Art 6 . . . . 182n51, 183n54, 437, 960n50
Art 7 . . . . 177n29, 876n57, 919
Art 7(1) 182n51
Art 8 . . . . 182n51, 183n55, 335, 979n62
Art 9 . . . . 179–80, 226, 589, 712n3, 909n64, 919, 938, 947n122, 979n62
Art 12 . . . . 182n51, 335
Art 12(1) 335
Art 12(2) 725
Arts 12–33 . . . . 712n2
Art 13 . . . . 182n51, 207n18, 854, 911
Art 13–24 . . . . 876n57
Art 15 . . . . 207n18, 800, 854, 959
Art 16 . . . . 675n129
Art 16(1) 182n51, 218
Art 16(2) 207n19
Art 17 . . . . 218n61, 335, 800, 959, 960, 1061n117, 1082n20
Art 17(2) 979n62
Art 17(2)(c) 746n10
Arts 17–19 . . . . 268n67, 270n90, 294, 854
Art 18 . . . . 218n61, 959, 1061n117
Art 19 . . . . . . 218n61, 263n35, 959, 1061n117
Art 20 . . . . 182n51, 335
Art 21 . . . . 854, 1062
Art 22 . . . . 182n51, 675n129, 975–6
Art 22(1) 207n19, 335, 979n62
Art 22(2) 854
Art 23 . . . . 207n19, 218, 335, 959, 1062
Art 24 . . . . 207n19, 218, 335, 959
Art 25 . . . . 216, 1062
Art 26 . . . . 149, 218, 219, 268n65, 269, 275n133, 287, 335, 922, 935, 1060–1, 1109
Arts 26–30 . . . . 876n57
Art 27 . . . . . . 182n51, 216, 1016, 1062, 1082n19
Art 28 . . . . 216, 335, 712n3, 947n122, 959, 1062, 1082n18, 1109n50, 1110
Art 29 . . . . 182n51, 216
Art 30 . . . . 216, 335, 1082n21
Art 31 . . . . . . 15, 147, 181n47, 208n24, 268n66, 275n133, 486n32, 507, 544, 549, 589, 675n129, 800, 918–26, 932, 935, 938, 946n117, 1104, 1105
Art 31(1) 182n51, 216, 562, 920, 921, 922
Art 31(2) 182n51, 217, 923, 1082n14
Art 32 . . . . 675n129, 712, 713, 714, 725, 727, 905, 906, 947n122, 1046n2, 1151n71
Art 32(2) 263n35, 724
Art 33 . . . . 147, 182n51, 208n24, 249n75, 254, 286n48, 434, 506, 507, 510, 519, 610n15, 629n25, 636, 675n129, 726, 800, 905, 906, 908, 909, 910, 947n122
Art 33(1) 50, 243–4, 249n75, 708, 714, 874, 900, 900n6, 906, 910, 933n5, 1066n11, 1150n66
Art 33(2) 147, 209, 675, 712–3, 714, 717, 718, 719, 723, 725, 727, 874, 903, 905, 910, 1151n71
Art 34 . 182n51, 437, 812n97, 812n99, 876n57, 1030, 1046, 1047, 1051–2, 1059
Art 35 . . . . 76n108, 146–7, 189, 287, 380n39, 711, 944n96, 1082, 1082n14
Art 35(1) 1068n26
Art 35(2) 287
Art 38 . . . . 146, 585, 711
Art 42 357
Art 42(1) 174, 900n5
Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons (25 July 1951) UN doc A/CONF.2/108/Rev.1 . . . . 646n24, 646n27, 746n11, 799n12, 875, 990
Constitution of the International Organization for Migration (adopted 19 October 1953, entered into force 30 November 1954) (as amended)
Art 1(1) 1079n96

1952

Convention on Citizenship for Arab Residents of Arab States Other than Their Native Countries (adopted 23 September 1952, entered into force 5 January 1956) 342

1954

Caracas Conventions on Diplomatic Asylum (adopted 28 March 1954, entered into force 29 December 1954) 1438 UNTS 129 . . . . 320, 321, 324

Convention relating to the Status of Stateless Persons (adopted 28 September 1954, entered into force 6 June 1960) 360 UNTS 117 . . . . 154, 158, 159, 160, 427, 444, 649, 797, 799, 1044n109, 1045
Art 1 . . . . 153n4, 644n3, 843n86
Art 1(1) 802
Art 1(2) 645n19, 646
Art 32 . . . . 812n99, 843n87

1956

Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (adopted 7 September 1956, entered into force 30 April 1957) 266 UNTS 4
Art 3 . . . . 1155n114
Art 5 . . . . 1155n114
Art 6 . . . . 1155n114

1957

Agreement relating to Refugee Seamen (adopted 23 November 1957, entered into force 20 August 1964) 506 UNTS 125 196

1961

Convention on the Reduction of Statelessness (adopted 30 August 1961, entered into force 13 December 1975) 989 UNTS 175 . . . . 153, 158, 159, 184n59, 390, 427, 444n18, 646–7, 797, 800, 843, 1055
Art 1 164
Art 1(1) 803
Art 8 . . . . 843n87
European Social Charter (adopted 18 October 1961, entered into force 26 February 1965) ETS No 035 . . . . 962, 963

1964

ILO Convention No 122 Employment Policy (adopted 9 July 1964, entered into force 5 July 1966) 569 UNTS 65 . . . . 952n2

1965

Casablanca Protocol on the Treatment of Palestinian Refugees (adopted 11 September 1965) 338, 653, 658n90

1966

Bangkok Principles on Status and Treatment of Refugees 245n44, 251n100, 336, 340, 340n44, 340n45, 340n46, 340n47, 340n48, 340n50, 340n51, 390, 414, 1055
Art I 428
Art II 428
Art III 428
Art IV 429
Art IX 429
Art VI 429
Art VII 429
Art VIII 429
Art X 429
International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 . . . . .79, 119, 147, 149, 281, 337, 444, 545, 546, 658n90, 753, 807, 808, 872, 891
Art 2 . . . . 1143n20, 1187n74
Art 4 . . . . 825n4
Art 4(1) 179n37
Art 6 . . . . .239n117, 386, 422n118, 426, 444n15, 506n25, 599, 664
Art 7 . . . . 85, 239n117, 245, 386, 422n118, 426, 444n13, 444n14, 506n25, 599, 610n16, 664, 666, 943n87
Art 9 . . . . .217, 520n12
Art 9(1) 941n69, 941n70
Art 10(1) 217, 943n86
Art 12 . . . . .148, 269, 509, 918n8, 935, 1048–9, 1103
Art 12(1) 219, 294, 941n69, 1143n19
Art 12(2) 547n64, 561n68, 876, 1109n50, 1143n19
Art 12(3) . . . 219, 947n122, 1060n114, 1143n22
Art 12(4) . . .166, 214, 806, 1069n33, 1143n19
Art 13 . . . . 199, 219n63, 426, 947n122
Art 14 . . . . 218, 599

Art 17 . . . . .993, 1011
Art 17(1) 989n4, 1143n19
Art 23 . . . . 212, 520n13, 993, 1143n19
Art 23(1) 989n2
Art 23(2). 989n3
Art 24 993
Art 24(3) 843n87
Art 25 . . . . .155n17
Art 26 . . . . 217, 218, 541
Art 27 . . . . 1143n20
International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force, 3 January 1976) 993 UNTS 3 . . . . 119, 147, 212, 281, 337, 545, 807, 808, 952, 955–9, 970, 974–5, 984, 985
Art 2(1). 178n33, 178n34, 215n49, 858, 955, 964n78, 975n29, 986
Art 2(2) 214, 955, 956, 957, 974n28
Art 2(3) 179, 215, 520, 956, 957, 1050n31
Art 4 958
Art 6 . . . . 294, 955, 956, 958, 959, 960, 963
Art 7 . . . . 955, 956
Art 10 979
Art 10(1) 989n2
Art 11 . . . . 520, 955
Art 11(1) 178n32
Art 12(1) 876n58
Art 13 979
Art 13(3)–(4) 979
Art 23(1)(1). 989n2
Optional Protocol to the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 . . . . .943n89

1967

Declaration on Territorial Asylum, UNGA res 2312 (XXII) (14 December 1967) 41, 874
Art 3 . . . . .245n44
Art 3(2). 679n3
Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 . . . . 2, 4, 11, 12, 42, 50, 56n87, 61n3, 61n6, 81n25, 89n88, 103, 119, 120, 127, 171, 172, 173, 174, 175n19, 180, 183, 192, 222, 226, 240, 246, 247, 253, 256, 257, 259, 270, 281n8, 283, 285, 297, 303–4, 307, 317, 321, 335, 336, 339, 367, 370, 373, 391, 411, 414, 426, 429, 430, 434, 437, 443, 446, 511, 523, 536, 540, 542, 549, 560, 588, 628, 681n14, 682, 698n21, 725, 799, 869, 872, 903, 976, 1075, 1079
Art I 494n104
Art I(1) 244n34
Art IV. 585

1969

American Convention on Human Rights (adopted 22 November 1969, entered into force 27 August 1979) 1144 UNTS 123 . . . . 85, 323, 326, 595, 879, 894, 895, 896n62, 897, 900n8, 902
Art 1 324
Art 2 324
Art 3 953
Art 6(1). 562n75
Art 8 . . . . 324, 598, 602
Art 11(2) 990n16
Art 17(1) 990n14
Art 17(2). 990n15
Art 19 991
Art 22(2). 561n68
Art 22(7). 254, 324, 328, 329, 598, 878n67, 878n69, 912
Art 22(8) 208n26, 324, 328, 329, 506n25, 598, 903
Art 25 . . . . 324, 599
San Salvador Protocol
Art 6(1). 961n59
Cairo Agreement (Lebanon and PLO). . . .652, 1144
Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted

10 September 1969, entered into force 20 June 1974) 1001 UNTS 45 . . . . . 14, 41, 227, 239, 245n44, 279, 281, 283–7, 290, 128, 293, 295, 335, 428, 466, 515–6, 595, 627, 638, 662n9, 680, 700–1, 828–9, 837, 900, 903, 1055, 1123
recital 3 283–4
recital 4 284
recital 9 285
Art I(1) 284n28, 630
Art I(2) 138, 198, 284, 285, 288, 293, 294, 295, 630, 630n35, 634, 662, 701, 829n94, 830n107, 836n26, 837n40, 886n15
Art I(4) 286, 286n43, 286n44, 722–3
Art I(5) 722–3
Art II 286, 947n122
Art II(1) 286n45, 1082n16
Art II(2) 284, 1082n16
Art II(3) 269n78, 286n48, 506n25, 632n49
Art II(4) . . . 286–7, 466n9, 521n21, 1082n15
Art II(5) 251n98, 286, 1082n15
Art II(6) 287, 1061
Art III 284, 722, 723–4, 1049n28
Art III(1) 284
Art III(2) 284
Art IV 286
Art IV(e) 1042n96
Art V 286
Art VI 947n122
Art VII 287
Art VIII(2) 283, 285, 630n32, 670n92
Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 . . . . 211n33, 617n51, 830, 875, 1176
Art 18 919–20
Art 19 920
Art 26 . . . 238n110, 590n11, 792n89, 919–20
Art 30(3) 178n31
Art 30(4) 178n31
Art 31 . . . 382n48, 706, 710n97, 717n30, 908
Art 31(1) 224n27,705, 706n76, 822n50
Art 31(1)–(2) 755n68
Art 31(3) 225n31, 700n36, 705, 705n68, 705n70, 710n97
Art 31(32) 705n67
Art 32 . . . . 617, 822n50, 908, 957n33
Art 33(1) 908
Art 33(4) 921
Art 36 . . . . 546n59
Art 54 . . . . 653n63
Arts 56–9 . . . . 653n63
Art 65 . . . . 653n63

1973

India–Pakistan: Agreement on Repatriation of Prisoners of War (adopted 28 August 1973) 12 ILM 1080 . . . . 417n71, 419

1974

International Convention for the Safety of Life at Sea (adopted 1 November 1974, entered into force 25 May 1980) 1184 UNTS 278 . . . . 483n4, 491n81
ch V, reg 7(1) 490n76, 491n84
ch V, regs 10(a) 508n40
ch V, reg 33 . . . . 491n82, 492n89, 492n91, 508n40

1977

Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 . . . . 221n3, 716
Art 1(1) 229
Art 20 . . . . 232n64
Art 43 233
Arts 48–54 . . . . 232n60
Art 50 233
Art 52(2) 232n69
Art 54 . . . . 232n63
Arts 57–8 . . . . 232n62, 232n68
Art 70 . . . . 232n65

Art 73 . . . . 235n91
Art 76 . . . . 232n66
Art 77(2). 818n20
Arts 77–8 . . . . 232n67
Art 78(1). 850n13
Art 85(2). 235n92
Art 91 . . . . 1153n93
Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 . . . . 222, 230, 716n24
Art 1 . . . . 1146n41
Art 1(1) 229
Art 1(2) 226
Art 4(3)(b) 1149
Art 4(3)(c) 818n20
Arts 13–14. . . . . 232n60
Art 17 . . . . 850n13
Art 17(1) 1147, 1148, 1149
Art 17(2). 1149
Art 73 . . . . 1146n42

1979

Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13. . . . . .82n26, 337, 427, 807
Art 6 . . . . 562n75
Art 11(1)(a). 952n3
Art 16(2). 997n61
International Convention on Maritime Search and Rescue (adopted 27 April 1979, entered into force 22 June 1985) 1405 UNTS 119 . . . . 483n4, 490n71, 490n73, 491n80, 491n82, 492n89, 492n91, 508n42
Protocol relating to Free Movement of Persons, Residence and Establishment (adopted 29 May 1979) 1906 UNTS 58 . . . . . 266n55, 291, 1100n2
Art 2 . . . . 262n31
Art 24(1). 292n87
Art 24(2) 292n88

1981

African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 21 ILM 58 . . . . 279–80, 286, 287–8, 289, 724, 960–1, 974, 1057n86
Art 2 . . . . 288n55
Art 5 . . . . .288n59, 562n75, 664n34
Art 7 601
Art 7(1). 599
Art 12 880
Art 12(1) 294
Art 12(2). 880
Art 12(3) 254, 286n47, 288, 288n64, 880, 882
Art 12(4). 288
Art 12(5). 288
Art 15 .957n30, 960
Art 18 288
Art 18(1) 990
Arts 18–19 288
Art 26 595

1982

Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 . . . 491
Art 2(2) 485n20
Art 2(3). 485n21, 488n51
Art 3 . . . . 485n20
Art 17 . . . . 485n22
Art 18(2). 485n23, 486n35
Art 19 486
Art 19(2)(g) 486n24
Art 21(1) 486n25, 486n29
Art 25 486
Art 33 487
Art 33(1) 487n40, 487n47
Art 33(2). 487n38
Art 87 . . . . 488n52
Art. 87(1) 514
Art 87(1). 488n51
Art 91 . . . . 488n58
Art 92 . . . . 488n58
Art 92(1). 488n52, 488n53
Art 98 . . . . 483n4

Art 98(1) . . . 490, 508n40
Art 98(2) . . . 491n84, 508n41
Art 99 . . . 488n54, 489
Art 100 . . . 488n54
Art 105 . . . 488
Art 109 . . . 488n54
Art 110 . . . 488, 488n55, 489
Art 110(1) . . . 488n54
Art 111 . . . 487n45, 488n54
Art 111(1) . . . 487n46

1983

Charter on the Rights of the Arab Child (adopted 6 December 1983) . . . 342

1984

Cartagena Declaration on Refugees (adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico, and Panama, 22 November 1984) . . . 14, 128, 227, 239, 297, 309, 310, 322, 323, 324, 331, 333, 478, 515–6, 627, 633, 635, 701, 828–9, 830, 837, 838, 887, 890, 891, 900, 903, 994, 1055
Conclusion III . . . 138n24, 245n44, 270n88, 701n42, 886n14
Conclusion III(1) . . . 594n41
Conclusion III(3) . . . 634n36, 662n7, 670n92, 829n94, 836n26, 837n40
Conclusion III(8) . 251n99, 670n92, 920n25

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 . . . 147, 180n42, 297, 337, 393, 398, 405, 494–5, 532, 658n90, 753
Art 2 . . . 943n87
Art 3 . . . 85, 208, 245n47, 386, 422n118, 426, 444n11, 444n13, 506n25, 610n16, 664, 664n32, 674, 784, 900
Art 16 . . . 943n87
Art 22 . . . 386

1985

Supplementary Protocol on the Code of Conduct for the Implementation of the Protocol on Free Movement of Persons, the Right of Residence and Establishment (adopted 6 July 1985) 1906 UNTS 69 . . . 1100n2

1986

Supplementary Protocol on the Second Phase (Right of Residence) of the Protocol on Free Movement of Persons, the Right of Residence and Establishment (adopted 29 May 1986) 1906 UNTS 81 . . . 1100n2

1989

Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 . . . 11, 15, 147–8, 337, 426–7, 546, 746–7, 750–1, 760, 807, 838–9, 854n43, 979, 984, 985, 990
preamble . . . 989n2
Art 1 . . . 747–8
Art 2 . . . 427, 756, 757, 974n26
Art 2(1) . . . 747n12, 753n56
Art 3 . . . 165, 427, 748, 749, 753, 754, 755, 756, 756n75, 757, 759, 989n7
Art 3(1) . . . 942n85
Art 5 . . . 996
Art 6 . . . 753, 757, 901
Art 6(2) . . . 757–8, 839n51
Art 7 . . . 159n39, 164n65, 165, 427n15
Art 8(1) . . . 989n8
Art 9 . . . 991
Art 9(1) . . . 759, 989n8
Art 9(3) . . . 1003
Art 10(1) . . . 759, 989n9
Art 12 . . . 752–3, 757
Art 12(2) . . . 752n52
Art 16 . . . 1011
Art 16(1) . . . 989n2, 989n9
Art 19 . . . 427n15, 751n36, 756n75
Art 22 . . . 288, 427, 435, 747, 748, 749, 756, 757, 757n83, 784n35

Art 22(1) . . . 747
Art 24 . . . 758
Art 24(3) . . . 997n61
Art 27 . . . 758
Art 28 . . . 427n15, 758, 974n24, 979
Art 29 . . . 987
Art 32 . . . 952n3
Art 37 . . . 753, 755, 756, 901
Art 37(a) . . . 664n34, 665n39, 943n87
Art 38 . . . 753, 780n11, 818n20
Art 40 . . . 752n50
Second Optional Protocol to the International Covenant on Civil and Political Rights on the Abolition of the Death Penalty (adopted 15 December 1989, entered into force 11 July 1991) 999 UNTS 414 . . . 665n39
Supplementary Protocol Amending and Complementing the Provisions of Article 7 of the Protocol on Free Movement, Right of Residence and Establishment (adopted 30 June 1989) 2375 UNTS 346 . . . 1100n2

1990

African Charter on the Rights and Welfare of the Child (adopted 11 July 1990, entered into force 29November 1999) OAU Doc CAB/LEG/24.9/49 . . . 281, 288, 291, 756n78
Art 6 . . . 1057n86
Art 18(1) . . . 990n14
Art 19 . . . 991
Art 23 . . . 288, 605n108
Art 23(2) . . . 994n36
Art 23(4) . . . 749
Art 25 . . . 994n36
Convention Determining the State Responsible for Examining Applications for Asylum Lodged in one of the Member States of theEuropean Communities [1990] OJ C 254 . . . 353
Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3 . . . 337, 390
Art 2(1) . . . 135n7
Art 11 . . . 952n3
Art 14 . . . 989n4
Art 25 . . . 952n3
Art 26 . . . 952n3
Art 40 . . . 952n3
Art 44(1) . . . 989n2
Art 52 . . . 952n3
Art 54 . . . 952n3
Schengen Implementing Convention [1993] OJ L 239/19 . . . 353n3
Supplementary Protocol on the Implementation of the Third Phase (Right to Establishment) of the Protocol on Free Movement of Persons, the Right of Residence and Establishment (adopted 29 May 1990) 1906 UNTS 100 . . . 1100n2

1991

Treaty Establishing a Common Market between the Argentine Republic, the Federative Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay (adopted 26 March 1991, entered into force 1 January 1995) 2140 UNTS 257
Art 1 . . . 262n30, 266n54

1992

Declaration on the Protection of Refugees and Displaced Persons in the Arab World (adopted 19 November 1992) . . . 338, 339, 1134–5
Art 2 . . . 245n44
Art 4 . . . 339n32
Art 6 . . . 339n33
Treaty on European Union [1992] OJ C 191/1 . . . 353
United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 . . . 845

1993

Convention on Legal Aid in Civil, Family and Criminal Cases (adopted 22 January 1993, entered into force 19 May 1994) 375n15, 383

1994

Arab Convention on Regulating Status of Refugees in the Arab Countries (adopted 1994) 338, 340
Art 1 339
Inter-American Convention on International Traffic in Minors (adopted 18 March 1994, entered into force 15 August 1997) 33 ILM 721 . . . . . 557n28
Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (adopted 9 June 1994, entered into force 5 March 1995) 33 ILM 1534
Art 1 . . . . 554n4
Art 9 . . . . 565n100
San José Declaration on Refugees and Displaced Persons (adopted 7 December 1994). 323

1995

General Framework Agreement for Peace in Bosnia and Herzegovina (adopted 14 December 1995) 35 ILM 75
Annex VII 1125

1996

European Social Charter (revised) (adopted 3 May 1996, entered into force 1 July 1999) ETS 163 . . . . .364n113
Art 1 963
Arts 1–4 963
Art 2 962
Art 3 962
Art 4 962

1997

Constitution of the International Association of Refugee and Migration Judges (adopted 18 September 1997, entered into force 16 November 2018) 579n67
European Convention on Nationality (adopted 6 November 1997, entered into force 1 March 2000) ETS 166 159
Art 6(4)(g). 813n102, 1056
Art 16 1056
Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts(adopted 2 October 1997, entered into force 1 May 1999) 39 ILM 270. 354
Art 2(15) 689n65

1998

Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (adopted 10 June 1998, entered into force 25 January 2004) OAU Doc OAU/LEG/EXP/AFCHPR/PROT. 290n76
Art 3(1) 290n77
Art 4 . . . . 290n77
Art 5(3). 290n78
Art 7 . . . . 290n77
Art 12(3) 878n68
Art 34(6) 290n78, 290n79, 291
Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2000) 2187 UNTS 90 438–9
preamble 1177–8
Art 5 . . . . 1178n21
Art 7 . . . . .1176, 1178n22, 1182
Art 7(1). 237n116, 715, 850n14, 1136n79, 1154n112, 1175n6, 1178–9, 1181, 1182, 1182n52, 1182n53
Art 7(2)(d) 850n14, 1136n79
Art 8 . . . . 223n11, 715, 850n14, 1136n79
Art 8 *bis* 715
Art 8(2) 223n11, 234n79, 234n82, 818n21, 850n14, 1136n79, 1154n111, 1155n115, 1175n7

Art 19(3) 439n71
Art 25 720
Art 25(3) 715n19, 720, 720n45
Guiding Principles on Internal Displacement, UN doc E/CN.4/1998/53/Add.2 (11 February 1998) 234n81, 834, 835, 849–54, 863, 1120, 1126, 1127, 1143, 1148, 1151
Introduction 853n40
Principle 6(2) 1152n80
Principle 6(2)(b) 1152n81
Principle 7(1) 1148n58
Principle 10 . . . . 1152n82
Principle 12 . . . . 851n23
Principles 24–7 . . . . 1152n83
Principle 25(2) 851n26, 859
Principles 28–30 860
Principle 28(1) 855n50, 860n84
Principle 29(2) 856n59, 1126

1999

Convention (No 182) concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (adopted 17 June 1999, entered into force 19 November 2000) 2133 UNTS 161 (ILO Convention No 182)
Art 3(a) 818n25

2000

Charter of Fundamental Rights of the European Union (adopted 7 December 2000, entered into force 1 December 2009) [2012] OJ C 326/391 . . . . 253, 355, 523n38
Art 4 525
Art 7 . . . . 531, 990n16
Art 8 549
Art 18 . . . . 549n74, 878, 880–1
Art 19(2) 208–9, 664n34, 665n39
Art 51(1) 367n136
Constitutive Act of the African Union (adopted 11 July 2000, entered into force 26 May 2001) 2158 UNTS 3
Art 15 . . . . 291n84
Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (adopted 25 May 2000, entered into force 12 February 2002) 2173 UNTS 222 . . 337
Art 2 . . . . 818n24
Art 4 . . . . 818n23
Protocol Against the Smuggling of Migrants by Land, Sea, and Air, supplementing the UN Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 28 January 2004) 2241 UNTS 480 . . . . 13, 196n49, 536, 537, 539, 540, 542–3, 552
Art 1(1) 550n83
Art 1(2) 548–9
Art 2 . . . . 489n65, 538n17, 545
Art 2(3) 489n68
Art 3 . . . . 536k 536n3
Art 3 536
Art 4 545
Art 5 . . . . 544, 550, 551n87, 930n103
Art 6 544
Art 6(1) 541–2
Art 6(3) 542
Art 6(4) 544
Art 8 489
Art 8(7) 489n66
Art 9(1) 545
Art 11 542
Art 11(1) 547
Art 11(2) 542
Art 11(3) 542
Art 11(3)–(4) 556n18
Art 11(4) 542
Art 16 545
Art 16(1) 545, 546
Art 16(2) 545
Art 16(3) 545–6
Art 16(5) 545, 546, 546n58
Art 18 . . . . 544n48, 546
Art 19 . . . . 489n67, 549
Art 19(2) 541
Art 87(1) 489n68
Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing

the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 25 December 2003) 2237 UNTS 319 . . . . .196n48, 537, 551, 554n6
Art 2 . . . . 489n63, 539
Art 3(a). 536n5, 555n7
Art 3(b) 555n7
Art 5 . . . . 557n24
Art 6(1). 557n25
Art 6(5) 557n26
Art 7 556
Art 8 556
Art 8(1). 556n21
Art 8(2) 556n22
Art 8(3). 556n21
Art 8(4) 556n21
Art 11(2)–(4) 556
Art 14 . . . . 429n27
Art 14(1) 489n64, 540, 559–60
Art 19(1) 539–40
Rio de Janeiro Declaration on the Institution of Refuge (adopted 10 November 2000) 323
United Nations Convention against Transnational Organized Crime (adopted 12 December 2000, entered into force 29 September 2003) 2225 UNTS 209. . . . . . 536n4, 538, 554n6

2001

Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts between Member States in Receiving Such Persons and Bearing the Consequences Thereof [2001] OJ L212/12 . . . . . 251n102, 355n32, 356, 689n68, 837n40
Art 2(a). 358n61, 690n71
Art 4 . . . . 691n75
Art 5 . . . . .690n70
Art 6 691
Arts 7–19 . . . . 358n63
Art 8(3). 358n65
Arts 8–16 . . . . 358n62
Art 17(1) 690n72
Art 17(2). 690n73
Arts 22–4 . . . . 358n64
International Convention for the Suppression of Terrorist Bombing (adopted 15 December 1997, entered into force 23 May 2001) 2149 UNTS 256 . . . . 722n58
International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts
Art 16 . . . . 511, 512
Art 48 . . . . 257n149
Shanghai Convention on Combating Terrorism, Separatism and Extremism (adopted 15 June 2001, entered into force 23 March 2003) 375n16, 383

2002

Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone, annex Statute of the Special Court for Sierra Leone (adopted 16 January 2002)
Art 4(c) 818n21
Council Directive 2002/90/EC of 28 November 2002 Defining the Facilitation of Unauthorised Entry, Transit and Residence [2002] OJ L238/17 . . . . 550, 550n80
preamble 548n69
Council Framework Decision 2002/946/JHA of 28 November 2002 on the Strengthening of the Penal Framework to Prevent the Facilitation of Unauthorised Entry, Transit and Residence [2002] OJ L238/1
preamble 550n80
Art 1 548
Art 6 549
Protocol No 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the Abolition of the Death Penalty in All Circumstances (adopted 3 May

2002, entered into force 1 July 2003) ETS 187. . . . . 665n39
SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution (adopted 5 January 2002, entered into force 15 November 2005). 558–9
Art 1(5) 559n46

2003

Council Directive 2003/86/EC on the Right to Family Reunification [2003] OJ L251/12–251/18. 994–5
recital 4 . . . . 994n43
recital 8. . . . . 995n44
Art 4 . . . . 996n55
Art 9(2) 996n55
Art 10(2). 996n56
Art 12(1) 1000n73
Art 12(2). 1000n74
Ch V 1000n73
Council Directive 2003/109/EC of 25 November 2003 Concerning the Status of Third-Country Nationals Who Are Long-Term Residents [2003] OJ L 16/44 . . . . 359n76
Council Regulation (EU) No 343/2003 of 18 February 2003 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Asylum Application Lodged in One of the Member States by a Third-Country National [2003] OJ L 50/1 530
Protocol to the African Charter on the Rights of Women in Africa (adopted 11 July 2003, entered into force 25 November 2005) OAU Doc CAB/LEG/66.6 . . . . 281, 289
Art 1(j) 554n4
Art 4 288
Art 4(g) 565n101
Art 4(k) 565n101
Art 10 . . . . 288, 565n101
Art 11 . . . . 288, 565n101
Art 30 . . . . .289n68
Art 60. . . . . .289n69

2004

Agreement between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries (29 December 2004). 192, 302, 312, 531
s 7 530
s 15. 530
Arab Charter on Human Rights (adopted 22 May 2004, entered into force 15 March 2008) 12 IHRR 893. . . . 338n18, 342, 658n90
Art 8 . . . . 664n34
Council Directive 2004/81/EC of 29 April 2004 on the Residence Permit Issued to Third-Country Nationals who are Victims of Trafficking in Human Beings or Who Have Been the Subject of an Action to Facilitate Illegal Immigration, who Cooperate with the Competent Authorities [2004] OJ L261/19 . . .557n31
Art 8 . . . . 558n39
Art 13 . . . . 558n41
Art 14 . . . . 558n41
Council Directive (EC) 2004/38 on the Right of Citizens of the Union and their Family Members to Move and Reside Freely Within the Territory of the Member States Amending Regulation (EEC) No 1612/68 and Repealing Directives 64/221/EEC, 68/221/EEC, 72/360/EEC, 73/148 EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L158/77
Art 27 . . . . .715n17
Directive 2004/83/EC of the European Parliament and the Council 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. 704n59

recital 26 . . . . 672n101, 673n115
Art 2 . . . . 870n18
Art 2(e). 663n14, 674n119
Art 8 . . . . .673n118
Art 10(1)(d) 763n8
Mexico Declaration and Plan of Action to Strengthen the International Protection of Refugees in Latin America (adopted 16 November 2004). 270n89, 323
South Asia Declaration on Refugees (adopted January 2004). 415

2005

Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status [2005] OJ L 326/13 . . . . . .355n33, 582n83
Art 5 . . . . .354n15
Art 38(1). 523n41
Council of Europe Convention on Action against Trafficking in Human Beings (adopted 16 May 2005, entered into force 1 February 2008) CETS 197 . . . . .557n29, 557n32, 558, 566n103
Arts 7–8 . . . . 558n34
Art 13 568
Art 14 . . . . 557n41
Art 16 . . . . 557n41
Art 26 . . . . 562, 931n104
Art 36 . . . . 557n33
United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law 1120–1, 1135–6
Principles on Housing and Property Restitution for Refugees and Displaced Persons (2005) UN doc E/CN.4/Sub.2/2005/17 . . . . . . .1120, 1127, 1128–30
Principle 2(1)–(2) 1129n46
Principle 15(1)–15(2) 1133n63
Principle 17(1) 1132
Principle 17(2) 1132n61
Principle 17(3) 1132n60

2006

Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 . . . .11, 15, 337, 427, 779, 786
Art 1 780
Art 2 792
Art 3 . . . . 791n86
Art 5(2). 785n40
Art 5(3). 785n39, 792n87
Art 11 . . . . 780, 784, 785
Art 12 791
Art 13 . . . . 785n39
Art 14 . . . . 785n39
Art 14(2). 792n87
Art 15 . . . . .784, 789n68
Art 15(1) 943n87
Art 18(2)(c) 792n87
Art 18(5). 792n87
Art 22(1). 989n4
Art 24 . . . . 785n39
Art 27 . . . . 785n39, 952n3
Art 27(1)(i). 792n87
Art 31 . . . . .1011n16
Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession (adopted 19 May 2006, entered into force 1 May 2009) CETS 200. 159
Darfur Peace Agreement (between the Government of Sudan, the Sudan Liberation Movement, and the Justice and Equality Movement)
Art 194 . . . . .1154n105
International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3. 337
Art 16 . . . . 208n25, 245, 665n40, 900
Protocol on the Protection and Assistance to Internally Displaced Persons' (International Conference on the Great Lakes Region, 30 November 2006)

Art 1 . . . . 835n20
Art 3(2). 835n20
Art 3(5). 835n20
Art 6(4)(c) 835n20

2007

Charter of the Association of Southeast Asian Nations (adopted 20 November 2007, entered into force 15 December 2008) 429
Council Decision of 29 November 2007 concerning the Conclusion of the Agreement between the European Community and Ukraine on Readmission of Persons (2007/839/EC) [2007] OJ L 332/46 . . . . 368n145
Optional Protocol to the Convention on the Rights of Persons with Disabilities (adopted 30 March 2007, entered into force 3 May 2008) 2518 UNTS 283 . . . . 779n8
Regulation No 862/2007 of 11 July 2007 on Community Statistics on Migration and International Protection and Repealing Council Regulation (EEC) No 311/76 on the Compilation of Statistics on Foreign Workers [2007] OJ L199/23. . . . . 134n3
Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community [2007] OJ C 306/1
Art 78 . . . . .355n21
Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity 95
Principle 23 . . . . 89, 90

2008

Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals [2008] OJ L348/98 . . . . 726n78
Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (adopted 10 December 2008, entered into force 5 May 2013) UN doc A/RES/63/117 . . . . 958n39, 984–5

2009

African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (adopted 23 October 2009, entered into force 6 December 2012) 49 ILM 86 . . . . . .849, 852–4, 1120, 1152n91
Art 1 . . . . .835n18
Art 1(k). 835n21, 852, 853n40
Art 3(2). 853
Art 5(4). .835n21, 852
Art 6 853
Art 7 852
Art 8 852
Art 10 852
Art 11(4) 1128n41
Art 11(5) 1128n41
Art 12 1128
Art 12(1) 1128n42
Art 12(2). 1128n42
Art 12(3). 1128n42

2010

Brasília Declaration on the Protection of Refugees and Stateless Persons in the Americas (adopted 11 November 2010). 323
Council Regulation (EU) No 439/20 of 19 May 2010 Establishing a European Asylum Support Office [2010] OJ L 132/11 . . . . 361n85
recital 14. . . . . 361n89
Art 2(6) 361n89
Art 10 . . . . 361n86
Art 10(a)–(c) 361n87
Art 12(2). 361n90
Art 13 . . . . 361n86
Art 15 . . . . 361n88

2011

Almaty Declaration Adopted by Participating States at the Regional Conference on Refugee Protection and International Migration held in Almaty, Kazakhstan (adopted 16 March 2011) 340–1
Council Directive 2011/36/EU of 5 April 21 on Preventing and Combating Trafficking in Human Beings and Protecting its Victims [2011] OJ L1/1. . . . . 557n30
Arts 2–3 . . . . 558n36
Art 8 . . . . .558n37, 562n72, 931n104
Art 11 . . . . 558n37
Art 12 . . . . 558n37
Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (adopted 11 October 21, entered into force 1 August 24) 31 UNTS 1 (Istanbul Convention) 564n92, 565–6
Art 3(a). 554n4
Art 3(d) 554n4
Art 4(2) 566n102
Arts 59 . . . . .567n113
Directive 21/95/EU of the European Parliament and of the Council of 13 December 21 on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted [2011] OJ L337/9 . . . . .65n38, 583, 626, 626n12, 663n27, 669, 676, 685n45, 699, 702n47, 763n8, 870–1, 870n18, 1039, 1142–3
preamble 1041n79
recital 4 . . . . 355n24
recital 33. . . . . 358n56
recital 35. . . . . .672nn1, 673n115
recital 47 1056
Art 2(d) 804n44
Art 2(e). 663n14, 726
Art 2(f). 663n14, 674n119
Art 4(5). 611n18, 613n29, 614, 617
Art 4(5)(c) 609n11
Art 4(5)(e) 614
Art 7 . . . . 357n54, 703n56, 704
Art 7(1)(b) 695n5, 1041, 1142n17
Art 7(2). 1041n80, 1143n18
Art 7(3). 1041, 1041n87
Art 8 . . . . 357n55, 673n118, 695, 700n34, 706n71, 707n80, 707n81, 708n88
Art 9 . . . . 732n16, 788
Art 9(1). 357n48
Art 9(1)(a) 707n84
Art 9(2) 357n49
Art 10 . . . . 357n50
Art 10(1)(d) 563n84
Art 11(2) 1042n91
Art 11(3) 1043n98
Art 12 725
Art 12(1)(a) 650n51
Art 14 725
Art 14(3). 725n75
Art 14(4). 725, 726
Art 14(5). 725, 726
Art 14(6). 675n129, 725, 726
Art 15 . . . . 227–8, 358n57, 663n14
Art 15(b). 667n58
Art 15(c) 228–9, 239, 669n84, 672n100
Art 17 . . . . 675n127
Art 19 . . . . 675n129
Art 20(3) 92
Art 33, 1061n117
Art 34 . . . . 1056, 1057, 1058
Art 49 . . . . .702n49
International Law Commission, Draft Articles on the Responsibility of International Organizations . . 1161, 1172
Art 4 . . . . .1164n32
Art 6 . . . . .1164n35
Arts 14–16 . . . . 1164n34
Art 17 . . . . 1164n36
Art 48 . . . . .1163n30
Art 49 . . . . .1163n30
Art 50 . . . . 1163n31
Art 57 . . . . 1163n31
Art 64 . . . . 1164n39

Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (adopted 19 December 2011, entered into force 14 April 2014) UN doc A/RES/66/138 . . . 755n72, 985n103

2012

Ashgabat Declaration of the International Ministerial Conference of the Organization of Islamic Cooperation on Refugees in the Muslim World (adopted 11–12 May 2012) 341n56, 569–70
Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47
Arts 77–80 . . . . 521n24
Art 78(1) 355n28, 357n51, 617n50, 881
Arts 78(1)–(2) 355n22
Art 78(2) 355n29, 356
Art 78(2)(a)–(g) 355n30
Art 78(2)(e) 356n43
Art 80 . . . . 359n74, 466, 521n21
Art 83(1) 559n48
Art 289(1) 355n22
Art 294 . . . . 355n22
Fortaleza Mercosur Declaration of Principles on International Refugee Protection (adopted 23 November 2012) 323
Protocol (No 24) on Asylum for Nationals of Member States of the European Union [2012] OJ C 326/1 . . . . .357n51

2013

ASEAN Human Rights Declaration and the Phnom Penh Statement on the Adoption of the ASEAN Human Rights Declaration
Art 16 . . . . 429n25
Council Directive 2013/32/EU of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection [2013] OJ L 180/60 . . . . . 356n44, 359n73
Art 3 . . . . 595n45
Art 10(2) 358n56, 595n45
Art 31(8) 596n47, 597n52
Art 32(2) 596n47
Art 33 . . . . 925n70
Art 36 . . . . 597n52
Art 37 . . . . 597n52
Art 38 . . . . 358n67, 925n70
Art 38(1) 367n137
Art 43 . . . . 596n47
Council Regulation (EU) No 604/2013 of 26 June 23 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in One of the Member States by a Third-Country National or a Stateless Person (Recast) [2013] OJ L 180/31 . . . . . 356n35, 521–2, 521n26, 596n49, 1106–9
Art 1 . . . . 1107n36
Art 3(1) 359n68
Art 3(2) 359n71
Art 3(3) 359n73
Arts 7–11 . . . . .1107n37
Art 12 . . . . 359n70, 1107n38
Art 13 . . . . 1107n36
Art 78(2)(g) 356n36
Ch III 359n69
Ch IV 359n72
Directive 2013/33/EU of 26 June 2013 Laying Down Standards for the Reception of Applicants for International Protection [2013] OJ L180/96 . . . . . . 355n34, 966n95
Art 8(2) 942n83
Art 11(2) 942n83
Art 21 92

2014

Agreement between the European Union and the Republic of Turkey on the Readmission of Persons Residing without Authorisation [2014] OJ L 134/3 . . . . 367n138
Association Agreement between the European Union and its Member States, of the One Part, and Ukraine, of the Other Part [2014] OJ L 161/3
Art 16 . . . . 368n148

Brazil Declaration: A Framework for Cooperation and Regional Solidarity to Strengthen the International Protection of Refugees, Displaced and Stateless Persons in Latin America and the Caribbean' (Brasilia, 3 December 2014, UNGA res 34/60 (29 November 1979) 243n29, 323, 478, 837n40, 1097n134
Council Regulation (EU) 516/2014 of 16 April 2014 Establishing the Asylum, Migration and Integration Fund, Amending Council Decision 2008/381/EC and Repealing Decisions No 573/2007/EC and No 575/2007/EC of the European Parliament and of the Council and Council Decision 2007/435/EC [2014] OJ L 150/168
Art 7 . . . . 356n37
Art 17 . . . . 356n37
International Law Commission, Draft Articles on the Expulsion of Aliens
Art 1(1) 905n36
Art 1(2) 905n37
Art 2(1) 906n38
Art 6 . . . . 906n39
Art 10 . . . . 914n102
Art 10(1) 913n95
Art 10(2) 914
Art 26 906
Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 Establishing Rules for the Surveillance of the External Sea Borders in the Context of Operational Cooperation Coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2002] OJ L 189/93 . . . . . . 508n43

2015

ASEAN Convention against Trafficking in Persons, Especially Women and Children (adopted 21 November 2015) 429, 558
Art 2 . . . . 558n43
Art 14 . . . . 558n43
Art 14(4) 558n43
Art 14(7) 562n72, 931n104
Art 24 . . . . 558n44
Council Decision 2015/778/CFSP of 18 May 2015 on a European Union Military Operation in the Southern Central Mediterranean (EUNAVFOR MED) [2015] OJ L 122/31 . . . . 499n148
Council Decision (EU) 2015/16 of 22 September 2015 Establishing Provisional Measures in the Area of International Protection for the Benefit of Italy and Greece [2015] OJ L 248/80 . . . . . 360n81, 470n33
Council Decision (EU) 25/1523 of 14 September 2015 Establishing Provisional Measures in the Area of International Protection for the Benefit of Italy and of Greece [2015] OJ L 239/146. . . . . 360n81
Sendai Framework for Disaster Risk Reduction 2015–2030' UN doc A/CONF.224/CRP.1 (18 March 2015). 782n23, 845

2016

Agreement between the European Union and the Republic of Turkey on the Readmission of Persons Residing without Authorization [2014] OJ L134 . . . . .505n21, 523, 524, 967
Art 4(1)(c) 1106n33
Agreement concerning the Relationship between the United Nations and the International Organization for Migration, UN doc A/70/976 (8 July 2016)
Art 2 . . . . 1168n60
Joint Declaration on Trade and Women's Economic Empowerment on the Occasion of the WTO Ministerial Conference in Buenos Aires in December 2017 (adopted December 2017) 978

Charter on Inclusion of Persons with Disabilities in Humanitarian Action (adopted 2016) 782
Declaration of the Sixth Ministerial Conference of the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime (adopted 23 March 2016) 341n54, 430n29, 450n58
International Convention on the Elimination of All Forms of Racial Discrimination (adopted 7 March 1966, entered into force 4 January 1969) 660 UNTS 195 . . . . 44, 52, 337, 807
Art 1(1) 53
Art 1(2) 53
Art 5(b) 901
Art 5(e)(i) 952n3
International Law Commission, Draft Articles on the Protection of Persons in the Event of Disasters 841n67
Art 13 . . . . 859n79
New York Declaration for Refugees and Migrants, UNGA res 71/1 (19 September 2016) 75, 139, 145n68, 145n70, 154, 245n45, 251n103, 252n104, 336, 464, 472, 474–5, 481, 521, 521n22, 679n7, 693, 782–3, 783n27, 861, 861n90, 904, 908, 928, 928n85, 948, 950n147, 972, 978, 1070, 1112
Annex I
Comprehensive Refugee Response Framework 144, 336, 474–5, 595, 659n95
Regulation (EU) 2016/679 of 27 April 2016 on the Protection of Natural Persons with regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/64/ED [2016] OJ L119/1
Art 5(1) 1011–2
Art 17 1015
Art 20 1015

2018

Arrangement on Return of the Displaced Persons from Rakhine State between the Republic of the Union of Myanmar and People's Republic of Bangladesh (adopted 15 January 2018) 1065n9
Declaration of Quito on Human Mobility of Venezuelan Citizens in the Region (adopted 4 September 2018) 271n100, 332n76
Declaration of the Seventh Ministerial Conference of the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime (adopted Bali, 7 August 2018) 341n55
Global Compact for Safe, Orderly and Regular Migration, UNGA res 73/195 (19 December 2018) 75, 85, 96, 136, 137, 149n95, 336n11, 341, 427, 667, 667n57, 783, 845, 930n103, 931n106, 948, 949, 950n147
Global Compact on Refugees, UN doc A/73/12 (Part II) (2018) . . . . . . 6, 12, 16, , 75, 76 77, 85, 96, 114n1, 114n3, 114n6, 115n8, 115n9, 136, 185n70, 197n52, 245n45, 250, 252n104, 286, 292, 295, 336, 341, 427, 464, 465, 472–3, 474n51, 521, 521n23, 551n87, 552, 574, 585, 595, 693, 783, 861, 861n93, 862n101, 867–8, 869n13, 870, 908, 908n48, 948, 953, 966–7, 978, 985, 1046–8, 1049, 1070, 1103, 1103n14, 1112n63, 1115
Sydney Declaration of Principles on the Protection of Persons Displaced in the context of Sea Level Rise (Resolution 6/2018 adopted at the 78th Conference of the International Law Association, Sydney, 19–24 August 2018) 834n13, 835n19, 837n39, 837n74, 846n105, 846n112

2019

Agreement between the Government of the United States and the Government of the Republic of Honduras for Cooperation in the Examination of Protection Claims (adopted 25 September 2019) 532n121

International Law Commission, Draft Articles on Crimes against Humanity
Art 4 . . . . . 1139n1
Art 5 . . . . . 722n27, 1139n2
Art 8 . . . . . 1139n2
Art 9 . . . . . 1140n3
Art 10 . . . . . 1140n3
Art 11 . . . . . 1139n2
Memorandum of Cooperation between the Department of Homeland Security of the United States of America and the Ministry of Government of the Republic of Guatemala on Security Activities that Make It Possible to Address Irregular Migration (adopted 31 May 2019) 532n121
Protocol to the African Charter on Human and Peoples Rights on the Specific Aspects of the Right to a Nationality and the Eradication of Statelessness in Africa (December 2019) . . . 159, 290, 291
Regulation (EU) 2019/1896 of 13 November 2019 on the European Border and Coast Guard [Frontex] and Repealing Regulations (EU) No 1052/23 and (EU) 26/1624 [2019] OJ L295/1 . . . . . 498n136

United Nations High Commissioner for Refugees (UNHCR)

Executive Committee (ExCom)

Conclusion No 2 (XXVII) 1081n7
Conclusion No 8 (XXVIII) 592n22, 594
Conclusion No 11 (XXIX) 593n28
Conclusion No 14 (XXX) 593n28
Conclusion No 18 (XXXI) 1033
Conclusion No 22 (XXXII) 683n26, 683n27, 686n50
Conclusion No 23 (XXXII) 1081n12, 1088n67
Conclusion No 24 (XXXII) . . . 996n51, 998n66
Conclusion No 28 (XXXIII) 593n28
Conclusion No 40 (XXXVI) 1039n68, 1079n98
Conclusion No 44 (XXXVII) 944n98
Conclusion No 47 (XXXVIII) 977n50, 1088n67
Conclusion No 52 (XXXIX) 679n4
Conclusion No 54 (XXXIX) 1088n68
Conclusion No 55 (XL) 1088n69
Conclusion No 58 (XL) 1082n13, 1105
Conclusion No 60 (XL) 1088n68
Conclusion No 64 (XLI) . . . 593n32, 1088n68
Conclusion No 65 (XLII) 593n29
Conclusion No 67 (XLII) 1088n69, 1088n71
Conclusion No 68 (XLIII) . . 1065n3, 1088n70
Conclusion No 69 (XLIII) 1034, 1035, 1062n124
Conclusion No 71 (XLIV) 593n28
Conclusion No 73 (XLIV) 593n32
Conclusion No 74 (XLV) 593n28, 821n43, 1065n3, 1068n25
Conclusion No 75 (XLV) 821n43
Conclusion No 81 (XLVIII) 593n30
Conclusion No 82 (XLVIII) 875n53
Conclusion No 84 (XLVIII) 747n14
Conclusion No 85 (XLIX) . . 593n33, 1088n71
Conclusion No 88 (L) 996n51
Conclusion No 93 (LIII) 593n28
Conclusion No 99 (LV) 1065n3
Conclusion No 100 (LV) 679n6, 683n30
Conclusion No 101 (LV) 1070n39
Conclusion No 103 (LVI) 662n3, 871n24
Conclusion No 104 (LVI) 1046n3, 1054n60, 1059n105, 1060n110
Conclusion No 105 (LVII) 593n32
Conclusion No 107 (LVIII) 593n32, 747n14, 977n49
Conclusion No 109 (LX) 1065n3
Conclusion No 110 (LXI) 781n13, 793
Conclusion No 112 (LXVII) 1070n39

National Legislation

Albania

Law on Asylum in the Republic of Albania, No 121/2014
Art 78 . . . . . 662n9

Angola

Le No 10/15
Art 54(3) 663n29

Argentina

Ley No 26.165 Ley General de Reconocimiento y Protección al Refugiado 2006
Art 2 . . . . 176n25
Art 40 . . . . 921n31

Australia

Australian Constitution 1901 . . . . . . 272n106, 291, 300–1
s 51 . . . . 272n109
Maritime Powers Act 2013 (Cth)
s 75A 273n115
Migration Act 1958 (Cth) 1058n97
Division 3, Subdivision AI 525n56
s 5 . . . . 665n46, 673n117
s 5(1) 669n83, 840n
s 5H(2) 675n127
s 5J(4)–(6) 732n16
s 5J(5) 788n63
s 36 . . . . 445n23, 670n92
s 36(2A) 665n46
s 36(2A)–(2C) 662n10
s 36(2)(aa) 674n119
s 36(2B)(a) 673n118
s 36(2B)(c) 673n115
s 36(3) 525n57, 527n80
s 36(3)–(5A) 526n69
s 46A 445n24
s 75A(1)(c) 496n121
s 91N(1) 525n56
s 91N(2) 525n56
s 166J 577n53
s 189 . . . . 445n24
s 197C 247n61
s 198A 273n119
s 198A(3)(a) (now repealed) 529n89
s 198AB(1) 274n121
s 198AB(2) 274n122, 496n118
s 198AB(3) 274n124
s 198AB(4) 274n124
s 198AB(7) 274n124
s 198AD 445n24
Migration Regulations 1994 (Cth) 1058n97
Tribunals Amalgamation Act 2015 (Cth)
Sch 2 . . . . 577n53

Bolivia

Ley de Protección a Personas Refugiadas 2012
Art 7 . . . . 921n31

Bosnia and Herzegovina

Law on Asylum, No 11/2016
Art 22 . . . . 662n11

Brazil

Ley No 9.474 1997
Art 10 . . . . 921n31, 925n69

Brunei

Brunei Nationality Act 1962
ss 4–5 . . . . 436n57

Burundi

Loi No 1/32
Art 5 . . . . 663n29

Cambodia

Sub-Decree No 224, on Procedure for Recognition as a Refugee or Providing Asylum Rights to Foreigners in the Kingdom of Cambodia 430–1

Canada

Bill C-97, An Act to Implement Certain Provisions of the Budget Tabled in Parliament on March 19, 2019 and Other Measures 1st Sess, 44th Leg 2019 (assented to 21 June 2019) 313
Immigration Act 1906 308
Immigration Act 1910 308
Immigration Act 1976 299
Immigration and Refugee Protection Act 2001 . . . . 297n2, 1058n96
ss 33–43 . . . . 718n35
ss 95–7 . . . . 670n92
s 97 . . . . 662n12
s 97(1)(b)(ii) 673n115
s 97(1)(b)(iii) 673n117
s 97(1)(b)(iv) 673n116
s 98 . . . . 675n127

Central African Republic

Loi No 07.019
Art 22 . . . . 663n29

Chile

Ley No 20.430 2010
Art 8 . . . . 921n31

China

Constitution of the People's Republic of China 1954
Art 99 . . . . 391n12
Constitution of the People's Republic of China 1975
Art 29 . . . . 391n12
Constitution of the People's Republic of China 1978
Art 55 . . . . 391n12
Constitution of the People's Republic of China 1982
Art 32(2) 391n12
Constitution of the People's Republic of China (as amended 14 March 2004)
Art 32(2) 392n20
Counter-Terrorism Law 2016
Art 2(2) 392n21
Art 3 . . . . 392n21
Law on the Administration of Entry and Exit of Foreigners 1985
Art 15 . . . . 391n13
Art 31 . . . . 392n22
Art 46 . . . . 392, 394

Colombia

Victims' Law (Ley de Victimas, L 1448/11, junio 10, 2011, 40.096 DIARIO OFICIAL (DO)) 1129

Costa Rica

Ley General de Migración y Extranjería No 8764, 10 September 2009
Art 6(6) 662n13, 664n33
Art 94(12) 662n13
Reglamento de Personas Refugiados 2011
Art 137 . . . . 921n31

Ecuador

Constitution (2008)
Art 41 . . . . 890n31

Egypt

Constitution (1971, amended 1980)
Art 151 343
Constitution of 2014
Art 151 343

Ethiopia

Refugees Proclamation No 1110/2019
Art 26 . . . . 294n100
Art 28 . . . . 294n100

France

Code de l'entrée et du séjour des étrangers et du droit d'asile (22 February 2005)
Art L.723–11 . . . . 925n70
Declaration of the Rights of Man and Citizen (1789) 123, 936

Germany

Asylum Act (AsylVfG) (2 September 2008)
s 18(2) 925n70
s 26a 925n70

Greece

Law No 3907/2011 (26 January 2011) Official Gazette of the Greek Government, Series A, Issue 7 . . . . 360n79
Law No 4346/2019 (1 November 2019) Official Gazette of the Greek Government, Series A, Issue 169, 4827 *et seq*
Art 76(1) 361n92
Art 76(2) 361n92
Art 90 . . . . 361n92

Hong Kong

Bill of Rights 393, 405
Immigration Ordinance, Cap 115
Part IIIA 391
Part VIIC 663n15

Hungary

Constitution (2011)
Art 65 . . . . 888n25

Indonesia

Regulation of the President of the Republic of Indonesia No 125 of 2016 concerning Handling of Foreign Refugees 2016. . . 432

Iran

Constitution of the Islamic Republic of Iran (1989)
Art 155 . . . . 888n25

Israel

Regulations regarding the Treatment of Asylum Seekers in Israel 343n70

Japan

Constitution of Japan 1946
Art 98(2) 888n25
Immigration Control and Refugee Recognition Act (Cabinet Order No 319 of 4 October 1951) 397
Arts 39–44 . . . . 399n74
Art 53(3)(ii) 398n65
Art 53(3)(iii) 398n65
Art 53(3)(iii) 665n40
Art 61-2 . . . . 397n58
Art 61–2(1)(xiii) 397n58
Art 61-2-2(2) 397n63
Art 61-2-6(4) 397n63
Art 61-2-9. . . . . 397n60
Art 61-2-10(2) 397n61
Art 61-2-10(3) 397n62
Arts 69 . . . . 397n58
Art 69-2 . . . . 397n58
Regulation for Enforcement of the Immigration Control and Refugee Recognition Act
Art 61-2(1)(xiii). 397n58

Kazakhstan

Act of the Republic of Kazakhstan No 345-II of 8 August 2002 on the Rights of the Child in Kazakhstan
Art 25 . . . . 383n53
Civil Procedure Code of Kazakhstan No 377-V of 31 October 2015. . . . 377n28
Law on Refugees No 216-IV of 4 December 2009 . . . . . .375n19, 385, 386
Legal Profession Act of Kazakhstan No 196-1 of 5 December 1997 . . . . 377n28
Regulation on Granting, Renewal, Cessation and Termination of Refugee Status enacted by the Resolution of the Government of Kazakhstan No 183 of 9 March 2010. . . . . . . .376n23
Regulation on Registration and Consideration of Refugee Status Applications enacted by the Decree of the Minister of Interior of Kazakhstan No 496 of 29 November 2010 . . . . . 376n23, 378n29

Kenya

Constitution of Kenya 2010
Art 2(5). 264n43, 268n68, 269
Art 21(3) 269
Art 28 .268n68, 269
Art 39 269
Art 47(1). 269
Kenyan Refugees Act No 13 (2006). . .1056n82
s 3(1)(a). 626n7
Security Laws (Amendment) Act No 19 of 2014 . . . . 981n79

Korea

Constitution of the Republic of Korea 1987
Art 3 . . . . .400n82
Art 6(1). 401n85
Enforcement Decree of the Immigration Act as amended by Presidential Decree No 26311 (15 June 2015)
Art 23(1) 402n100
Art 23(2). .402n100
The Protection of Defecting North Korean Residents and Support of Their Settlement Act (1997)
Art 4 . . . . .400n84
Republic of Korea: Law No 11298 of 2012 (Refugee Act) 400n81
Art 2(1). 401n86
Art 2(2) 401n86

Art 2(3) 401n87
Art 2(4) 402n101
Art 3 . . . . . 401n97
Art 5 . . . . . 401n88
Art 6 402
Art 8(1) 401n89
Art 8(5) 403
Art 18(1) 401n90
Art 21(1) 401n91
Art 21(3) 401n91
Art 25(1) 401n92
Art 25(2) 401n93
Art 26(1) 401n94
Art 29(2) 401n96
Art 37 . . . . . 402n99
Art 40 . . . . . 402n102
Art 41 . . . . . 402n103
Art 42 . . . . . 402n104

Kyrgyzstan

Civil Procedure Code of Kyrgyzstan No 146 of 29 December 1999 . . . . . 377n28
Constitution of the Kyrgyz Republic 2010
Art 19(2) 376n22
Law on Refugees No 54 of 25 March 2002 . . . . . 375n19
Regulation on Work with Refugees approved by the Kyrgyz Government Resolution No 188 of 4 April 2003 . . . . 376n24, 378n31

Laos

Decree No 35/PO of 15 June 2004, Law on Lao Nationality
Art 13 . . . . . 437n61

Lebanon

Law Regulating the Entry and Stay of Foreigners in Lebanon and their Exit from the Country (entered into force 10 July 1962) Bulletin de Législation Libanaise (Official Gazette) No 28–1962 . . . . . 655n69

Macau

Legal Regime on the Recognition and Loss of Refugee Status 2004 . . . . . 392–3, 394
Art 3 . . . . . 393n25
Art 5 . . . . . 393n26
Art 14(5) 393n29
Art 15(1) 393n30
Art 15(4) 393n30
Art 22 . . . . . 393n27

Macedonia

Law on Asylum and Temporary Protection, L No 07–3664/1 (2003)
Art 2 . . . . . 663n17
Art 5 . . . . . 663n17

Malaysia

Child Act 2001 435
Immigration Act 1959/63 . . . . . 435, 436
Industrial Relations Act 1967 438

Mexico

Constitution (1917) 895, 897
Art 1 . . . . . 888n24, 893, 894n48
Art 5 . . . . . 894n48
Art 6 . . . . . 893n44
Art 8 . . . . . 894n48
Art 11 . . . . . 894n48
Art 14 . . . . . 894n48, 896n60
Art 16 . . . . . 893n44, 894n48
Art 17 . . . . . 893n44, 894n48, 896n60
Art 25 . . . . . 894n48
Art 33 308
General Law of Population (1974) 308
Law on Refugees and Complementary Protections (2011) 297n2, 309n80, 892n36
Art 18 . . . . . 892n37
Arts 28–32 . . . . . 663n18
Art 36 . . . . . 895n53
Ley de Amparo (Protection Act) (1967) 892n36

Montenegro

Law on International and Temporary Protection of Foreigners (29 December 2016)
Art 4 . . . . . 663n19
Art 25 . . . . . 663n19

Myanmar

Burma Citizenship Law 1982, 420

Nairobi

Declaration and Plan of Action 2017 . . 476n58

The Netherlands

Vreemdelingencirculaire 2000 (Aliens Circular) 738n47

New Zealand

Immigration Act 2009
s 130 . . . . 663n16, 669n82
s 130(1) 674n119
s 131 . . . . 663n16, 669n82
s 131(1) 674n119
s 131(5)(a) 673n117
s 131(5)(b) 673n116
s 137(2) 675n127
s 139 . . . . 675n127
s 219(1)(c) 578n60

Nicaragua

Ley No 655 de la Protección a Refugiados 2008
Art 10 . . . . 921n31
Ley No 761—Ley General de Migración y Extranjería (7 July 2011)
Art 220 . . . . 663n20, 664n33, 669n85

Norway

Act of 15 May 2008 on the Entry of Foreign Nationals into the Kingdom of Norway and Their Stay in the Realm (Immigration Act)
s 28 . . . . 663n21

Pakistan

Cooperation Agreement 1993 419
Foreigners Act 1946 420

Papua New Guinea

Constitution Amendment (No 37) (Citizenship) Law 2014
s 1 . . . . 275n137
Constitution of Papua New Guinea (1975)
s 36 275
s 38 275
s 38(2) 275
s 39(3) 264n43, 274n131
s 42 . . . . 274, 275
s 42(1) 274n129
s 42(1)(g) 274n130
s 42(ga) 275n137
Migration Act 1978
s 20 . . . . 275n133

Peru

Reglamento de la Ley del Refugiado, Ley No 27,891 (2002)
Art 6 534

Poland

Constitution of the Republic of Poland (2 April 1997)
Art 56 . . . . 888n23
Art 75 . . . . 884n3

Portugal

Constitution of the Republic of Portuguese Republic (1976)
Art 22 . . . . 888n23

Serbia

Law on Asylum (2007)
Art 2 . . . . 663n22
Art 4 . . . . 663n22

Sierra Leone

Refugees Act
s 16 . . . . 663n29

South Africa

Bill of Rights
s 10 . . . . 965n82
Constitution of the Republic of South Africa (1996)
Arts 232–2 . . . . 264n43
Refugee Act 1998 965
s 3 . . . . 662n9

s 3(a) 626n7
s 27 . . . . 1058n99
Refugees Amendment Act 11 of 2017 . . . . 965n86, 1056n81

South Korea

Refugee Act, Law No 11298 of 2012
Art 2(3) 663n23

Switzerland

Federal Act on Foreign Nationals and Integration of 16 December 2005
Art 83(3)–(4) 663n24

Syria

Law 260 of 1956 . . . . 656n76

Taiwan

Employment Service Act 2018
Art 51 . . . . 393n33

Tajikistan

Civil Procedure Code of Tajikistan of 5 January 2008 . . . . 377n28
Constitution of the Republic of Tajikistan 1994
Art 16 . . . . 376n21
Legal Profession Act of Tajikistan No 1311 of 14 May 2015 . . . . 377n28
Tajikistan Law on Refugees No 50 of 10 May 2002 . . . . 375n19, 376n25, 378n29

Tanzania

Tanzanian Refugees Act (1998) 1056n83

Turkey

Law No 6458 of 2013 on Foreigners and International Protection (as amended 29 October 2016) 344, 366n124, 692n82
Art 46 . . . . 663n25
Art 48 . . . . 663n25
Art 55 . . . . 663n25
Art 63 . . . . 663n25
Art 91 . . . . 366n127
Regulation 1994/6169 on Asylum 344
Temporary Protection Regulation, RG, 22 October 2014 No 2915 . . 344, 366n127, 692n82

Turkmenistan

Refugee Law 2012 371–2
Refugee Law 2017 371–2

Uganda

Control of Alien Refugees Act 1960 981

Ukraine

Law of Ukraine on Refugees and Persons in Need of Complementary or Temporary Protection in Ukraine 2011, No 3671-VI 368n146
Art 1(4) 663n26
Art 1(13) 663n26

United Kingdom

Aliens Act 1905 (5 Edw 7 c 13)
s 1(3)(d) 575n39
Children and Young Persons Act 1933 . . . . 791n81
Habeas Corpus Act 1679 (31 Ch II c 2) 936
Human Rights Act 1998, 965n90
Immigration Rules (as updated 2 May 2017) 663n27
Magna Carta 1297 (Cha 9 25 Edw 1 cc 1 9 29) 936
Mental Capacity Act 2005 . . . . 791n81
Race Relations Act 1976 513
Youth Justice and Criminal Evidence Act 1999 . . . . 791n81

United States

Code of Federal Regulations (CFR) Title 8
§ 208.13(b)(2) 674n123
§ 208.16 . . . . 663n28
§ 208.16(c)(2) 674n123
§ 209 . . . . 1058n98

Constitution (1791) 936
Eighth Amendment 927n82
Illegal Immigration Reform and Immigrant Responsibility Act 1996 . . . . 305, 306–7, 329n98
Immigration Act 1924 308
Immigration and Nationality Act 1952 . . . . 529–30, 685
s 1158 . . . . 297n2, 529n98
s 1231(b)(3) 297n2
Immigration Reform and Control Act 1986 301
Refugee Act 1980 . . . . 304–5, 1091

Uruguay

Ley No 18.076 del Refugiado 2006
Art 15 92131

Vanuatu

Immigration Act 2010
s 50 . . . . 446n29
s 73(2) 446n29

Vietnam

Decree No 78/2009/ND-CP of 22 September 2009
Art 17 437

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INTRODUCING INTERNATIONAL REFUGEE LAW AS A SCHOLARLY FIELD

CATHRYN COSTELLO, MICHELLE FOSTER, AND JANE McADAM

1. Introduction

International refugee law is a recognized area of international law, yet relatively new as a sub-discipline, having been characterized as 'a new branch of law' by one of its most important contributors, the late Paul Weis, in only 1973.[1] However, since the adoption of the Refugee Convention 70 years ago, it has emerged as a dynamic and ever-challenging area of international law, particularly as its relationship to other branches of law continues to be explored and understood. Given the prevalence of refugee law in domestic legal and political settings, its relevance to regional frameworks and international governance, and the practical, ethical, and legal challenges it entails, it is timely to produce a critical work that examines the field at a crucial juncture. Accordingly, this *Handbook* draws together leading and emerging scholars to analyse the state of research across the refugee law regime as a whole, understood broadly to encompass various forms of cross-border displacement and the legal responses thereto.

Our aim was to create a book that did not just recount the *status quo*, but also critiqued it and set the agenda for the next phase of research. We encouraged authors to approach their subjects critically and from different starting points. Some chapters necessarily lend themselves to a more doctrinal approach, providing a clear elucidation of the state of the law, its effectiveness, and its future trajectory. Others are more iconoclastic, questioning foundational practices and legal assumptions. The result is a 65-chapter reference work involving 78 authors, of whom 48 are women. The gender

[1] Paul Weis, 'Refugee Law: A New Branch of Law' (1973) International Bar Journal 30.

(im)balance of the authors and editors reflects a notable feminization of this field of study, one which has decisively influenced its development.

The *Handbook* differs significantly from existing reference works on international refugee law, both in terms of its breadth and depth. In our editorial choices about authors, topics, and overall structure, we aspired for it to be global in scope—legally and geographically. In terms of law, we sought to ensure consideration of a wide range of international legal instruments relevant to refugee protection. While the Refugee Convention and Protocol are central instruments and reference points, they are not the only ones. Instead, refugee protection involves many other sources of law, including international human rights law, international humanitarian law, international migration law, the law of the sea, and international and transnational criminal law.

Geographically, we aimed to reflect on the practice of States all over the world, not just those in the Global North and/or parties to the Refugee Convention. We strove to include material on refugee law from most regions, and to ensure that regional protection instruments, particularly those of Latin America and Africa, were given their due throughout the *Handbook*. Yet, we recognize that to seek to be truly global is necessarily hubris, especially given global inequality in resources and power in the production of legal scholarship. The *Handbook* is in English and most of the contributors are from anglophone academic institutions in the Global North. We acknowledge, as Dauvergne so lucidly identifies in her chapter, that refugee scholars' common practice of 'assembling an overview of leading trends in the law' tends not to 'reflect Global South decision-making in any way, as Global South decisions have not attained that odd legal status of "leading" '.

Many doctrinal analyses of international refugee law focus on a handful of jurisdictions, including those analyses that inform UNHCR's interpretative guidance.[2] The *Handbook* attempts somewhat of a correction in this regard, but we recognize that international refugee law still has much to learn from the sophisticated methodological approaches emerging in comparative international law.[3]

In this introductory chapter to the *Handbook*, we begin by reflecting on the emergence of international refugee law as a scholarly sub-discipline in the twentieth century, and its role within the wider area of refugee studies (Section 2).[4] We note, in particular, the important interface between scholarship and praxis in the sub-discipline's development, as well as the field's methodological strengths and weaknesses. In Section 3, we

[2] See eg Cecilia M Bailliet, 'National Case Law as a Generator of International Refugee Law: Rectifying an Imbalance within UNHCR Guidelines on International Protection' (2015) 29 Emory International Law Review 2059.

[3] Anthea Roberts, Paul B Stephan, Pierre-Hugues Verdier, and Mila Versteeg (eds), *Comparative International Law* (OUP 2018); Anthea Roberts, *Is International Law International?* (OUP 2017).

[4] The name of this area of study is itself fraught: 'refugees' are one group of 'forced migrants', albeit with special protection in international law. See eg Claudena Skran and Carla N Daughtry, 'The Study of Refugees before "Refugee Studies" ' (2007) 26(3) RSQ 15; James C Hathaway, 'Forced Migration Studies: Could We Agree Just to "Date"?' (2007) 20 JRS 349; Roger Zetter, 'More Labels, Fewer Refugees' (2007) 20 JRS 172; BS Chimni, 'The Birth of a "Discipline": From Refugee to Forced Migration Studies' (2009) 22 JRS 11.

provide an overview of the *Handbook*, highlighting key themes and debates. In Section 4, we conclude with some observations about the future of international refugee law, identifying potential challenges and opportunities.

2. History and Praxis of International Refugee Law Scholarship

International law on refugees and displacement has ancient roots. The first international treaty with provisions on 'asylum' is usually identified as the Treaty of Kadesh, concluded in the thirteenth century BCE between Ramses II of Egypt and the Hittite King Hattusilis III, as referenced in the chapter by Gil-Bazo and Guild on 'The Right to Asylum'. The intervening millennia generated diverse forms of political organization and legal institutions, but dealing with those fleeing persecution and violence is perennial. The modern practice of asylum is a feature of statehood itself. So, too, is the basic congruence of territory, authority, and population that statehood entails. However, modern statehood is also the product of empire and colonialism, as well as the disintegration of both land and maritime empires in the nineteenth and twentieth centuries. The figure of the refugee, as distinguished from the citizen and the migrant, alters across these shifting cartographies.

a. The Emergence of the Scholarly Field

International refugee law, as conceived in this *Handbook*, is a twentieth-century creation. The first treaties on the protection of refugees emerged in the 1920s under the auspices of the League of Nations, responding to the displacement of particular groups of refugees who were identified by their nationality (or former nationality, as they had often been denationalized). Although the concept of 'protection' and the scope of those entitled to it has expanded in the intervening years, many of the same political challenges remain, not least in the realization and enforcement of the obligations that States have voluntarily accepted under international law.

Paul Weis was a Legal Advisor for the International Refugee Organization, and later a Legal Advisor, then Head of the Legal Department, at UNHCR. As well as writing several monographs, including *Nationality and Statelessness in International Law*,[5] he is noted for his commentary on the *travaux préparatoires* of the Refugee Convention.[6]

[5] Paul Weis, *Nationality and Statelessness in International Law* (London Institute of World Affairs 1956); Paul Weis, *Nationality and Statelessness in International Law* (2nd edn, Sijthoff and Noordhoff 1979).

[6] *The Refugee Convention, 1951: The Travaux Préparatoires Analysed with a Commentary by Dr Paul Weis* (UNHCR 1990).

Like many involved in the early years of refugee protection, he had personal experience of the persecution and displacement of the Nazi era, having survived Dachau. Later, in 1966 and 1972, Atle Grahl-Madsen, a law professor at the University of Oslo, published his two-volume treatise on international refugee law.[7] This provided the first detailed legal analysis of the field and launched a Nordic tradition of engagement with international refugee law.

The sub-field truly emerged with Guy S Goodwin-Gill's work, *International Law and the Movement of Persons between States*,[8] followed in 1983 by the first edition of *The Refugee in International Law*.[9] In 1991, James C Hathaway published *The Law of Refugee Status*,[10] which focused specifically on the refugee definition in the Refugee Convention and was heralded as pioneering a human rights-based approach to its interpretation.[11] These works follow the anglophone doctrinal tradition with a strong authorial voice. By contrast, Andreas Zimmermann's edited 2011 commentary on the Refugee Convention provides a detailed, methodical exposition of each of the 46 articles of the Refugee Convention and 11 articles of the Protocol.[12] As well as these monographs and commentaries, another milestone in the emergence of a distinct sub-discipline was the creation of the International Journal of Refugee Law (IJRL) in 1989. Founded by Goodwin-Gill, just one year after the establishment of the Journal of Refugee Studies (JRS), the IJRL aimed to 'stimulate research and thinking on refugee law'.[13]

No account of the milestones in the emergence of the field, however brief, could omit the scholarship of BS Chimni. Writing in 1998, he identified the containment of refugees in the Global South as the defining feature of the global refugee regime, and critiqued the role of UNHCR as seeking to 'operationalize the vision of containment of the powerful

[7] Atle *The Status of Refugees in International Law,* vols 1 and 2 (AW Sijthoff 1966, 1972).

[8] Guy S Goodwin-Gill, *International Law and the Movement of Persons between States* (Clarendon Press 1978).

[9] Guy S Goodwin-Gill, *The Refugee in International Law* (Clarendon Press 1983); see also Guy S Goodwin-Gill, *The Refugee in International Law* (2nd edn, Clarendon Press 1996); Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, OUP 2007). The fourth edition is in press, co-authored with Jane McAdam, with the assistance of Emma Dunlop.

[10] James C Hathaway, *The Law of Refugee Status* (Butterworths 1991). The second edition was published by Cambridge University Press in 2014, co-authored with Michelle Foster. Macklin noted that the explosion in case law and other developments between the editions was 'extraordinary': Audrey Macklin, 'Book Review: James C Hathaway & Michelle Foster, *The Law of Refugee Status* (2d ed Cambridge University Press, 2014)' (2017) 39 Human Rights Quarterly 220, 221.

[11] See eg Andrew Shacknove, 'Book Review: *The Law of Refugee Status*. By James C Hathaway' (1991) 4 JRS 291, who described it as 'the most important publication in the field of international refugee law since Guy Goodwin-Gill's volume' (291). He noted that Hathaway gave 'welcome and pioneering guidance' (292) and challenged 'the generally accepted, and UNHCR endorsed, assertion that "well-founded fear" entails two requirements' (292).

[12] Andreas Zimmermann (ed), *The 1951 Convention relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (OUP 2011).

[13] The Editor-in-Chief and the Members of the Editorial Board, 'Editorial: Refugee Law and the Protection of Refugees' (1989) 1 IJRL 1, 2.

donor countries'.[14] He further argued that international refugee law 'has long occupied centre stage in refugee studies' and that its scholarship 'has been dominated by a positivist tradition which limits the possibility of engagement with politics'.[15] His seminal contributions are cited throughout the *Handbook*, including in chapters that explore contemporary containment practices and their now entrenched features.

Books, journals, and doctorates are the main form of scholarly knowledge production in law, disseminated through wider research networks. While in the main, refugee studies centres have tended to be interdisciplinary (such as the Refugee Studies Centre at the University of Oxford, the Centre for Refugee Studies at the University of York in Canada, and the Centre for Migration and Refugee Studies at the American University in Cairo), some other centres and groupings have a particular legal focus. For instance, since 1998, Hathaway has convened eight colloquia on cutting-edge topics relating to refugee and asylum law, resulting in eight sets of 'Michigan Guidelines' agreed by experts. Many of these are cited throughout the *Handbook*, testament to their influence. The Refugee Law Initiative (RLI) at the University of London was established by David Cantor in 2011, while in 2013, Jane McAdam founded the Andrew & Renata Kaldor Centre for International Refugee Law at the University of NSW in Australia. These, too, have supported the development of academic scholarship, policy-relevant research, and the creation of scholarly networks, in particular to support early career scholars globally.

The story of international refugee law thus far is one with European origins, with its deepest scholarly roots in prestigious Nordic and anglophone universities. That two of the *Handbook*'s editors are former doctoral supervisees of, and now co-authors with, two of the seminal scholars (McAdam/Goodwin-Gill; Foster/Hathaway), and the third (Costello) is a professor at Goodwin-Gill's most long-standing academic home, the University of Oxford, reflects a perhaps familiar pattern of academic social reproduction. However, this anglophone tradition is certainly not the only one in refugee law scholarship, nor the only one reflected in the *Handbook*, although admittedly it does dominate.

b. International Refugee Law as a Field of Praxis

The authors featured in this *Handbook* are not 'only' scholars; many have worked, or continue to work, directly 'in the field', with their scholarship and practice mutually informing each other. For instance, Achiume is the UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, dedicating her first thematic report to the subject of racial discrimination in the context of citizenship, nationality, and immigration status.[16] Crépeau

[14] BS Chimni, 'The Geopolitics of Refugee Studies: A View from the South' (1998) 11 JRS 350, 367.

[15] ibid 352.

[16] Human Rights Council, *Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance*, UN doc A/HRC/38/52 (25 April 2018).

was the UN Special Rapporteur on the Human Rights of Migrants from 2011 to 2017, during which time he issued several thematic reports, including on detention, the EU's 'external borders', and the relationship between climate change and migration. Muntarbhorn was appointed as the first UN Independent Expert on Violence and Discrimination based on Sexual Orientation and Gender Identity and has held an array of other UN-related roles. Kälin is the Envoy of the Chair of the Platform on Disaster Displacement, and a former Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, whose erudite scholarship on internal displacement is enhanced by his acute understanding of realities on the ground. Wouters' analysis in the *Handbook* of 'conflict refugees' is infused with his deep knowledge from UNHCR operations, as is Garlick's expert assessment of the capacity of the Global Compact on Refugees to provide a stronger institutional framework for responsibility-sharing. Durieux's scholarship, too, draws on a long and distinguished UNHCR career. Burson's chapter on the evolution of refugee status determination is enriched by his professional experience as a decision-maker for New Zealand's Immigration and Protection Tribunal.

Other authors seek to influence the law from the outside, in particular by supporting strategic litigation and advocacy. For example, Moreno-Lax discusses litigation before the European Court of Human Rights in which she served as lead counsel. Mann's chapter includes an account of the communication to the International Criminal Court challenging Australia's offshore processing regime, in which he had a role via the pioneering legal NGO, the Global Legal Action Network. Across the globe, refugee law clinics have had a demonstrable impact on refugee protection and the development of international refugee law. Several of the authors founded and/or run prestigious and impactful legal clinics (Achiume (UCLA); Akram (Boston); Anker (Harvard); Khan (Cape Town); Meili (Minnesota)), and many other authors have supported clinical initiatives. The Refugee Law Project in Kampala, Uganda is a standard bearer, and clinical activities are increasingly developing in Europe.[17]

The scholarship and practice of the contributors reflects a common characteristic of refugee law research, namely, the pursuit of a 'dual imperative' to advance scholarly and protection objectives simultaneously. As Byrne and Gammeltoft-Hansen wrote recently, the sub-discipline is 'heavily influenced by international organizations and networks of practitioners that actively take part in and promote particular kinds of scholarly production',[18] with networks comprising 'overlapping communities of scholars, decision makers, practitioners, and representatives of non-governmental organizations'.[19] The benefits of such networks are evident: sharing knowledge, experi-

[17] See eg Nora Markard, 'The Refugee Rights Movement and the Birth of Clinical Legal Education in Germany' in Alberto Alemanno and Lamin Khadar (eds), *Reinventing Legal Education in Europe: How Clinical Education is Reforming the Teaching and Practice of Law in Europe* (CUP 2018).

[18] Rosemary Byrne and Thomas Gammeltoft-Hansen, 'International Refugee Law between Scholarship and Practice' (2020) 32 IJRL 181, 185.

[19] ibid 187.

ence, and expertise, and prompting progressive legal developments. However, they also risk creating a feedback loop, and sometimes even an echo chamber. The opportunity to influence may at times risk stifling deeper reflection and foundational critique.

c. Methodology: Doctrine and Beyond

Much of the scholarship in international refugee law is unabashedly doctrinal. However, there is also a strong tradition of interdisciplinarity within refugee studies. Doctrinal legal scholarship often reflects the interests of powerful States and actors, and masks geopolitical interests and oppressive power structures. In light of the limitations of doctrinal scholarship, the first part of the *Handbook*—the overview of the field—is informed by the perspectives of history, politics, ethics, feminism, race, postcolonial theory, and queer theory. These important contributions seek to problematize the role of law, interrogate the complexity of the forces at play, and decentre purely doctrinal approaches.

The contributions to the *Handbook* are variously doctrinal and contextual, many drawing on socio-legal and empirical approaches, reflecting a healthily eclectic approach to methods. Nevertheless, one particular ethical and methodological concern with refugee law scholarship warrants mention here, namely the importance of reflecting the perspectives of those with lived experience of displacement and refugeehood. This has long been acknowledged, finding a place, for example, in the maiden editorials of both the JRS and IJRL over 30 years ago.[20] The IJRL's first editorial stressed that the journal was 'open to submissions from all engaged in refugee law and related work', including refugees.[21] However, while engaging with refugee voices is an ethical imperative, it remains a methodological challenge for legal scholarship in particular, which tends to privilege official sources and interpretations according to a strict hierarchical ordering. For some, the 'nothing about us, without us' call means investing in participatory research methods with refugees, radically decentring knowledge production. For others, it means turning to archival and non-traditional sources to problematize official accounts. Overall, though, legal scholarship has not confronted the challenge of refugee voices head on.

In her Foreword to the *Handbook*, Rêz Gardî considers the possibilities for better incorporating refugee perspectives into academic research in a more serious and systematic way. While many of the Refugee Convention's drafters were themselves refugees, and drew directly on their personal experiences of displacement, nowadays the gulf between the worlds of power, legal practice and influence, and the 'refugee experience' seems to have widened.

[20] The Editor-in-Chief and the Members of the Editorial Board (n 13) 4; Roger Zetter, 'Refugees and Refugee Studies—A Label and an Agenda: Editorial Introduction to the Journal of Refugee Studies' (1988) 1 JRS 1, 6.

[21] The Editor-in-Chief and the Members of the Editorial Board (n 13) 4.

3. Structure and Content

The *Handbook* is divided into eight parts: 'International Refugee Law—Reflections on the Scholarly Field' (Part I), 'Sources' (Part II), 'Regional Regimes' (Part III), 'Access to Protection and International Responsibility-sharing' (Part IV), 'The Scope of Refugee Protection' (Part V), 'Refugee Rights and Realities' (Part VI), 'The End of Refugeehood—Cessation and Durable Solutions' (Part VII), and 'Accountability for Displacement and Refugee Rights Violations' (Part VIII).

Part I: International Refugee Law—Reflections on the Scholarly Field

As mentioned above, the authors in Part I were invited to reflect on the scholarly field of international refugee law in general, using different disciplinary and ethical lenses. The *Handbook* opens with Goodwin-Gill's history of international refugee law, focusing on the years from the creation of the League of Nations in 1920 to the end of the Second World War. This first quarter-century established refugees as a 'known legal category' with recognized rights. Yet, protection was and remains 'often offset by claims of national interest and national security'. Overall, Goodwin-Gill observes, international refugee law has 'demonstrated its dynamic character', expanding its protective capacity, particularly due to the 'normative background provided by human rights'. However, he concludes that 'the law alone does not provide solutions, and much remains to be done'.

While Goodwin-Gill problematizes law's promise in the face of political restriction, Achiume's chapter on 'Race, Refugees and International Law' invites us to consider law as part of the problem. She coaxes us out of complacency with her observation that 'international legal scholarship on refugees has a race problem', a 'racial aphasia', and 'a collective inability to talk about or theorize race'. Tracing the history of international refugee law scholarship, she observes that the implications of Chimni's contributions have not been fully internalized, putting forward a convincing case that study of race and refugees in international law requires 'a structural and intersectional conception of race and discrimination'. Achiume suggests that both Third World Approaches to International Law and Critical Race Theory offer scholars tools 'to engage with law as itself implicated in the social construction of race, and as an artefact that can compound racial subordination, including through facially neutral institutions and mechanisms'.

The next chapters examine international refugee law in light of other exclusionary social structures. Anderson and Foster's chapter, 'A Feminist Appraisal of International Refugee Law', acknowledges the profound normative shift from the Refugee Convention's gender-blind origins, thanks to feminist legal efforts. However, they argue that a truly gender-sensitive interpretation of the refugee definition remains elusive, and lament the comparative dearth of feminist legal scholarship examining the refugee experience beyond the definition. The chapter calls for research and advocacy employing interdisciplinary methods and informed by feminist theories, masculinity studies, and queer theory. Ferreira and Danisi's contribution, 'Queering International Refugee Law', engages a queer lens to explore aspects of sexual orientation and gender identity (SOGI) and asylum. They consider how refugee law has been 'progressively queered', but note that the process is far from complete.

Beyond these two chapters, gender and gender-identity issues are interwoven throughout the *Handbook*, including in chapters on the scope of refugee protection (for example, Dauvergne on 'Women in Refugee Jurisprudence' and Millbank on 'Sexual Orientation and Gender Identity in Refugee Claims'). Gender is given attention in other contexts, too, with Briddick and Stoyanova taking an explicitly feminist approach to 'Human Trafficking and Refugees', for example.

Hamlin's chapter, 'The Politics of International Refugee Law and Protection', explores how politics permeates all facets of international refugee law and protection, from the construction of the refugee, to the law's implementation, through to the reasons for diverse State commitment and compliance with refugee protection norms. Building on Chimni's insights into the geopolitics of refugee protection, she acknowledges the practices of containment of refugees but suggests that further research is needed to problematize the Global South/North binary. Further, she argues that future research 'should consider the political incentives of various different types of States, not just the prototypical liberal democratic receiving State' and 'shifting power dynamics between—but also within—the Global North and South deserve closer attention'. Hamlin urges that a refined geopolitical or postcolonial lens is needed to understand why States make formal commitments to international refugee law, but do not necessarily comply with them—a pervasive feature of the global regime. Several chapters in Part III take up that challenge, as does Milner and Ramasubramanyam's analysis of UNHCR in Part II.

Benhabib and Nathwani's chapter, 'The Ethics of International Refugee Protection', explores the contested ethical foundations of refugee admission and protection, identifying two diverging scholarly strands. The first, the 'statist ethics of refugee protection', includes both liberal nationalists and liberal internationalists, while the second is the 'cosmopolitan ethics of refugee protection'. Their account of the scholarship identifies 'divergences along several key axes, such as territorial sovereignty versus international obligation, legal formalism versus political action, and victimhood versus agency'. Yet, one overarching tension 'encapsulates the rest: *the legal versus the political*'. Drawing on Benhabib's concept of 'jurisgenerative politics', the chapter argues that 'a responsible ethics of refugee protection must look both to the law and to political praxis to elaborate our obligations towards those forcibly displaced across borders without effective State protection'. In a thought-provoking conclusion, they suggest that broadening refugee protection based on 'certain cosmopolitan views, including those rooted in postcolonial theory', risks eliding questions of displacement with 'immigration policy writ large'. This broadening, they argue, might ultimately erode States' obligations towards refugees in particular.

The elasticity and limits of the scope of protection is a central theme throughout the *Handbook*, as reflected in the final two contributions to Part I. Atak and Crépeau interrogate and problematize the categorical distinctions drawn between 'refugees' and 'migrants', while van Waas examines refugeehood and statelessness. Atak and Crépeau argue that 'conceptualizing refugees as migrants does not undermine the specific normative and institutional framework for refugee protection', but rather 'further promotes refugees' access to asylum and safety', ideas further explored in Long's chapter on onward migration (in Part VII). Van Waas articulates the importance of understanding the relationship between refugee law and the law on statelessness, 'in particular, the ability to critically reflect on the challenges that arise out of the separation, yet interaction', between the two. Lambert's later chapter on stateless refugees picks up on this last point, examining the extent to which the Refugee Convention protects stateless persons *as refugees* and arguing that 'the particular challenges pertinent to stateless refugees have been overlooked'.

Part II: Sources

Part II on 'Sources' opens with Hathaway's contribution, 'The Architecture of the UN Refugee Convention and Protocol'. For Hathaway, the Refugee Convention and Protocol are the 'heart' of refugee law. Their 'architecture' includes two key features that reflect 'legitimate host State concerns', namely, that refugees' rights accrue incrementally, and that such rights are not defined in absolute terms, but are 'instead contingent on what a particular host State provides to a specified group of non-refugees under its jurisdiction' (such as nationals or foreigners generally). This 'compromise' ought to support compliance with the Convention and, ultimately, ensure protection for refugees. However, Hathaway argues that the absence of mechanisms to ensure independent supervision of the Convention and fair responsibility-sharing amongst States (examined in Garlick's chapter) undermine these objectives.

In their chapter on UNHCR, Milner and Ramasubramanyam contrast the organization's role as a 'leading actor in the development and implementation of international refugee law' with its complicity in 'some of the most significant violations of the spirit and the letter' thereof. Drawing on Barnett and Finnemore's work on the power and pathologies of international organizations,[22] they explore the reasons for this dissonance in light of the political constraints on UNHCR, including its dependency on a handful of States for its funding and on host States for practical cooperation.

[22] See Michael N Barnett and Martha Finnemore, 'The Politics, Power, and Pathologies of International Organizations' (1999) 53 International Organization 699.

Chetail's chapter, 'Moving Towards an Integrated Approach of Refugee Law and Human Rights Law', argues that the systemic nature of international law means that a holistic approach to States' obligations 'opens up new perspectives to rethink and revisit the reach of refugee protection'. He maintains that 'human rights law supplements and upgrades refugee law to such an extent that the latter has become an integral component of the former', a position endorsed by a number of other chapters. It is exemplified by Pobjoy's analysis of the CRC in protecting refugee children, for instance, and Crock's work on the potential of the Convention on the Rights of Persons with Disabilities to enhance refugee protection.

In her chapter on 'Customary Refugee Law', Lambert posits that for 'all its difficulties and contestations', customary international law 'has the potential to play a vital role in refugee protection because major receiving countries are by and large not parties to the Refugee Convention and/or Protocol'. At a minimum, it protects against *refoulement*; its role with respect to temporary refuge and the right to receive asylum 'is more uncertain as both operate outside the scope of treaty law and the practice of States is more nuanced', although 'persuasive arguments have been made to the extent that temporary refuge may be regarded as international custom and the right to receive asylum as emerging custom'. Durieux's chapter on 'Temporary Protection and Temporary Refuge' also explores customary norms.

Ziegler's chapter on 'International Humanitarian Law and Refugee Protection' argues that interactions between international refugee law and international humanitarian law are 'both inevitable and challenging, due to terminological, institutional, and structural divergences, and to their being specialized regimes designed to be invoked in (divergent) exceptional circumstances'. Lester, meanwhile, notes that while not a panacea, national constitutions are in some cases effective in offering a new source of protection to refugees—a theme also explored in Meili's chapter on 'National Constitutions and the Right to Asylum'. Costello and Ó Cinnéide's chapter on 'The Right to Work' notes that, despite diverse degrees of constitutionalization of the right to work across different jurisdictions, and diverse approaches to the domestication of international law, remarkably similar jurisprudence has emerged.

Part III: Regional Regimes

Part III's 10 chapters on 'Regional Regimes' reflect the *Handbook*'s global aspirations. Some chapters assess parts of the world with distinctive regional refugee protection regimes: Sharpe's chapter on 'Africa', Fischel de Andrade's on 'Latin America', and Tsourdi's on 'Europe'. Other chapters examine how countries in particular geographical areas engage with international refugee law, even if no formal regional approach can be discerned. For instance, Arakaki and Song compare refugee protection across the diverse States and jurisdictions that comprise East Asia (encompassing China, Hong Kong, Japan, Korea, Macau, and Taiwan). Notably, the regional commonality is extremely low refugee recognition rates (an example of commitment without compliance, foreshadowed in Hamlin's chapter).

Several chapters identify intra-regional dynamics that have a profound impact on refugee protection, in particular where regional hegemons attempt to deflect or contain refugees elsewhere. This dynamic appears in Anker's chapter on 'North America' (examining Canada, the US, and Mexico—precisely to expose and explore this dynamic); and Tsourdi's chapter on 'Europe' (which includes Turkey). Foster and Hood's chapter on 'Oceania' (Polynesia, Micronesia, Melanesia, Australia, and New Zealand) emphasizes the role of the regional hegemon, Australia, but also resistance from weaker States, such as Papua New Guinea, to Australia's containment practices. For instance, the Supreme Court of Papua New Guinea ruled in 2016 that the country's detention facilities (established at Australia's behest, with its direct funding and involvement) violated the constitutional right to personal liberty.[23]

The 'regional' chapters reveal commonalities as well as contrasts. In diverse contexts, States that are not parties to the Refugee Convention have used religion and ethnicity to distinguish between particular groups of refugees, in some cases providing protection and in other cases withholding it. In their chapter on the Middle East, Janmyr and Stevens note that there 'is no single approach to cross-border displacement or refugee protection', but cast doubt on the 'pervasive regional claim to "hospitality" as the underlying rationale' for the region's 'generous treatment of "guests"'. The regional chapters also reveal various reasons, often historical or geopolitical, why some States have chosen to ratify the Refugee Convention and/or Protocol, and others have not. Azhigulova discusses the notion of 'strategic ratification' in the context of Central Asia, while Ramasubramanyam argues that States in South Asia have felt sidelined ever since the creation of the post-Second World War international refugee regime. Nevertheless, the institutional authority of UNHCR should not be underestimated: as Muntarbhorn observes in Southeast Asia, 'UNHCR's presence is essential' as it 'helps to advocate for refugee protection, especially to underline the importance of *non-refoulement* and the humane treatment of asylum seekers'. It also plays a crucial operational role in many States.

Part IV: Access to Protection and International Responsibility-sharing

Part IV comprises nine chapters. It opens with Garlick's chapter on 'The Sharing of Responsibilities for the International Protection of Refugees', which critiques the principle and practice of responsibility-sharing amongst States, examining several international initiatives based on the Global Compact on Refugees that seek to engage not only States, but also private actors and 'refugees themselves'.

23 *Namah v Pato* [2016] PGSC 13.

Weak norms on responsibility-sharing are the backdrop for the various containment practices examined in the next chapters. Moreno-Lax's chapter on 'Protection at Sea and the Denial of Asylum' argues that rescue at sea, often thought of as an archetypal manifestation of basic duties of humanity, has been distorted into a means to preclude access to asylum. Gammeltoft-Hansen and Tan, writing on 'Extraterritorial Migration Control and Deterrence', posit that over the last three decades, 'different forms of extraterritorial border controls have developed across the world, rendering access increasingly difficult' and making access to international mobility 'highly limited or non-existent' for most refugees. In their comparative analysis of 'The Evolution of Safe Third Country Law and Practice' in three regions, Freier, Karageorgiou, and Ogg illustrate how the safe third country mechanism has little regard for either refugee rights or inter-State solidarity in protecting refugees. Indeed, each of the chapters in Part IV explores a regional containment dynamic whereby powerful States shift responsibility for refugee protection to weaker, generally poorer, States.

Schloenhardt's chapter on 'Smuggling of Migrants and Refugees' notes that '[i]nternational law relating to smuggling of migrants complements international refugee law, but can also run into conflict with it'. He explains that States often use anti-smuggling rhetoric to justify containment measures, but that the Smuggling of Migrants Protocol does not provide a legal basis for these measures.[24] Briddick and Stoyanova critique anti-trafficking measures in a similar vein, examining ways in which victims of trafficking are entitled to the protection of refugee and human rights law (including through specific instruments relating to violence against women).

The three chapters on various aspects of refugee recognition processes offer diverse takes on these practices. Burson's chapter, 'Refugee Status Determination', explores the historical development of the adjudication of refugee claims, and questions the dichotomy between group and individual determination. He identifies key positive reforms, including a greater role for group-based determination, and some of the threats posed by new technologies. Botero and Vedsted-Hansen explore the function of human rights law in regulating asylum procedures, comparing and contrasting European and inter-American standards. Noll's chapter on 'Credibility, Reliability, and Evidential Assessment' explores robust empirical evidence that suggests that the outcomes of asylum processes are highly variable, even verging on the arbitrary. Moreover, he persuasively argues that both UNHCR guidance and EU law seeking to regulate the assessment of credibility (in practice, often the determinative element in asylum adjudication) is irrational. While Burson and Botero and Vedsted-Hansen view refugee status determination as a process in need of reform, Noll argues that the process accords so much discretion to decision-makers that the law's capacity for constraint is extremely limited.

[24] Protocol against the Smuggling of Migrants by Land, Sea and Air (adopted 15 November 2000, entered into force 28 January 2004) 2247 UNTS 507.

Part V: The Scope of Refugee Protection

Part V on 'The Scope of Refugee Protection' comprises 14 chapters. It opens with Wood's chapter on 'The International and Regional Refugee Definitions Compared', which illustrates the evolution and limitations of the Refugee Convention definition and contrasts it with the OAU Convention and Cartagena Declaration definitions (and their diverse institutionalization). Akram's chapter on 'UNRWA and Palestine Refugees' examines both the interpretative controversies surrounding article 1D of the Refugee Convention, and the history and politics of the UN Relief Work Agency's role. McAdam's analysis of complementary protection recognizes the added protective capacity of human rights law, but notes that there is still 'a need for greater, principled articulation of the relationship between refugee law and human rights law when it comes to the principle of *non-refoulement* and—importantly—the legal status granted to those who cannot be removed'. Durieux's chapter on 'Temporary Protection and Temporary Refuge' draws on wide-ranging examples from State practice, bringing much needed conceptual clarity to this topic. He argues for a customary international law understanding of the practices of admitting refugees on a temporary basis in mass influx situations.

Ní Ghráinne's chapter on 'The Internal Protection Alternative' examines this controversial gloss on the refugee definition, noting that it originated in German practice then spread widely. Despite widespread divergences in its interpretation and application across States, the chapter proposes 'a minimum binding standard of relevant IPA criteria from both State practice and the text of the Refugee Convention itself'. Gilbert and Bentajou, writing on 'Exclusion', argue that it is 'an unusual concept for the contemporary world of protection, where international human rights law applies to all human beings no matter what they might have done'. They describe exclusion as 'a relic of the immediate post-war era that international refugee law preserves', and argue that it can only be properly understood and interpreted when analysed within the context of international criminal law and the international law of armed conflict.

Dauvergne's chapter on 'Women in Refugee Jurisprudence' focuses on the Convention definition, and her analysis is sobering. While advocacy and scholarship on women and refugee jurisprudence 'began with a huge burst of energy and creativity in the final decade of the twentieth century', it has 'stalled spectacularly'. She argues that the 'newer challenge of protecting LGBTIQ+ claimants—women and men and non-binary persons—has generated much more that is new in the past decade than any work about women'. Nevertheless, in her chapter on 'Sexual Orientation and Gender Identity in Refugee Claims', Millbank observes that 'there is a persistent, indeed widening, gap between the formal acceptance of SOGI claims in refugee *law*…and the implementation of such law through the low-level administrative practice that comprises the vast bulk of refugee status determination'. It is clear that neither of these issues has been resolved, and that creativity is required, especially in the case of gender, to renew and inspire further critical work.

Pobjoy's intervention on 'Child Refugees' foregrounds the CRC as offering 'independent and more appropriate forms of protection status for children', and explores its relevance for protection and humanitarian assistance, durable solutions, and family reunification. Crock's chapter considers the impact of the Convention on the Rights of Persons with Disabilities on refugee protection, and the role of the Committee on the Rights of Persons with Disabilities in seeking to hold States to account in this regard. Lambert's chapter on 'Stateless Refugees' examines the intersections between statelessness and refugee recognition under the Refugee Convention. She argues that stateless people often should be recognized as refugees, since they are commonly persecuted for reasons of race or nationality, with arbitrary denial or withdrawal of nationality being at the heart of such persecution.

Wouters examines the capacity of the Refugee Convention to protect so-called 'conflict refugees', in light of the recognition that in contemporary conflicts, 'civilian populations are targeted or disproportionately affected because the conflict is rooted in, motivated, or driven by—and/or conducted along the lines of—race, ethnicity, religion, politics, gender, or social group divides'. He also examines the scope of regional definitions in Africa and Latin America to protect people fleeing 'truly indiscriminate' harms. McAdam's chapter on 'Displacement in the Context of Climate Change and Disasters' reflects on the 'ongoing need to tease out the intersections between refugee law, human rights law, disaster law, environmental law, and climate change law at the international, regional, and domestic levels, as well as to scrutinize the outer limits of the principle of *non-refoulement* when it comes to protecting those at risk'. Finally, Kälin's chapter on 'Internal Displacement' examines the conceptual distinctions between internally displaced persons (IDPs) and refugees, highlighting the concerning fact that 'IDP protection lags behind' refugee protection, even though IDP numbers dwarf those of refugees.

Part VI: Refugee Rights and Realities

The nine chapters in this Part explore the rights of refugees, by necessity taking a selective approach. Two chapters consider the right to asylum. Gil-Bazo and Guild outline the contours and limitations of the right in international law, while Meili analyses the right to asylum in national constitutions, which he describes as 'a rather neglected backwater of international refugee law'. Mathew examines 'the interaction between shrinking and expansive approaches to *non-refoulement*', noting that while the principle's scope has expanded in reach, 'States have often sought to avoid its application in practice'. Together, these three chapters illustrate the complexities and contestations around these central concepts of refugee protection.

In the chapter on 'Non-penalization and Non-criminalization', Costello and Ioffe examine article 31 of the Refugee Convention, alongside other provisions that may protect against penalization and criminalization for migration-related reasons. In the chapters on 'The Right to Liberty' (Lester), 'The Right to Work' (Costello and Ó Cinnéide), 'The Right to Education' (Dryden-Peterson and Mariën), and

'The Right to Family Reunification' (Nicholson), strong protections are contrasted with widespread, although not universal, non-compliance. The chapters identify various modes to make rights effective, including domestic litigation, transnational political pressure, and local activism. Finally, Sandvik's chapter on 'The Digital Transformation of Refugee Governance' confronts a different reality, namely, the increasing reliance on technology to 'govern' refugees, in ways that further diminish refugees' agency and ability to hold powerful actors to account.

Part VII: The End of Refugeehood—Cessation and Durable Solutions

The *Handbook* aims to examine legal issues arising from all aspects of the global refugee regime, including 'solutions' for refugees. In this regard, we shine a legal spotlight on practices that are often viewed as more political in nature. Part VII comprises five chapters. Cole's chapter on 'Cessation' reviews the profound shifts in State and UNHCR practice when it comes to the cessation of refugee status, which at times make refugee status increasingly precarious.

A trio of contributions problematizes the orthodox 'durable solutions'. Khan and Ziegler's chapter on 'Refugee Naturalization and Integration' examines the diminished emphasis on the acquisition of host country citizenship for refugees over time, noting, in particular, the Global Compact on Refugees' 'timid reference' to the prospects of host countries providing naturalization as merely 'useful'.[25] They argue powerfully that measures short of naturalization, such as those focusing solely on economic inclusion, often set up a 'vicious cycle' in which 'many refugees find themselves in protracted displacement with neither a "durable" solution in sight, nor the legal, economic, and social capacity to properly integrate in their asylum countries'. Zieck's chapter, 'Reimagining Voluntary Repatriation', examines the historical antecedents to UNHCR's voluntary repatriation practices, and argues for a profound rethinking. The practice, she suggests, should be transformed from the 'voluntary return of unrepatriable persons, which of necessity puts a heavy premium on the voluntariness of return', to only engaging in repatriation after cessation of refugee status. Kneebone and Macklin's chapter on 'Resettlement' argues that this particular 'solution' is in intractable tension with 'asylum'. While asylum is legally regulated, resettlement is framed as entailing 'a moral appeal to humanitarian discretion', remaining 'untethered to obligation'. Exploring both the historical development of resettlement and its regulation (in soft law and institutional practice), they conclude that it 'portrays sovereignty in its most flattering light' and is often invoked to downplay legal obligations and asylum. Laws could be created to enact 'relationships of dignity and respect between refugees and agents of power', but they are currently lacking. Finally, Long examines 'Onward Migration' as a possible 'fourth' durable solution, both

[25] Global Compact on Refugees, para 97.

problematizing refugees' lack of opportunities for international mobility, and opening up new conceptual and practical approaches thereto.

Overall, these chapters not only critique each solution in turn, but also cast doubt on much of the discourse and institutional practice that characterizes 'solutions'. For most refugees, there is no solution, in that they will neither quickly return to their home country, nor find a new permanent home. Indeed, many refugees are born into refugeehood and some live in exile for several generations without secure rights or status.

Part VIII: Accountability for Displacement and Refugee Rights Violations

Part VIII, the final part of the book, aims to adopt a reparative justice angle, asking how accountability for the wrongs perpetuated against refugees are to be legally righted. Its four chapters examine the accountability of States, international organizations, and armed groups. It opens with Bradley's chapter on 'Restitution and Other Remedies for Refugees and Internally Displaced Persons', which traces 'significant progress . . . in advancing international norms on remedies for refugees and IDPs', which have focused predominantly on the restitution of housing, land, and property. She explores how gender, race, class, and other intersecting power relations influence redress, and how to move beyond a narrow focus on property restitution. Saul's chapter on 'The Responsibility of Armed Groups Concerning Displacement' examines the extent of non-State armed groups' responsibility for displaced people under international refugee law, international human rights law, international humanitarian law, and international criminal law, concluding that '[f]rom a protection standpoint . . . there remains room for normative improvement, even if it is politically unlikely'.

One of the most serious accountability gaps relates to international organizations, in particular those charged to protect refugees. In this Part, Klabbers' chapter on 'The Accountability of International Organizations in Refugee and Migration Law' problematizes UNHCR, the International Organization for Migration (IOM), and other international organizations' lack of legal and political accountability for such violations. Klabbers argues that the accountability deficit for international organizations is due to a false conceptualization of their nature, ignoring the fact that they exercise public powers, often over vulnerable populations.

International criminal law not only criminalizes acts that lead to displacement and create refugees, but, as Mann argues, many of the human rights violations perpetrated in order to deter and contain refugees should be regarded as crimes against humanity. His chapter on 'Border Crimes as Crimes against Humanity' offers three politico-ethical readings of the basis for this category, and claims that border crimes can be considered crimes against humanity since they not only violate categorical ethical imperatives, but also a cosmopolitan vision of how borders ought to be constituted in an interconnected globe.

4. The Future Research Agenda: Challenges and Possibilities

As editors, we set ambitious aims for the *Handbook*. Many have been achieved, some have not, but at the very least, we have opened up new lines of scholarly inquiry. Doctrinally, the integration of different bodies of international law into refugee law—most notably, international human rights law and international humanitarian law—is already well underway, contributing to the wider project of systemic integration of international law. Yet, there remain many possibilities for better incorporating both established and emerging norms in support of the progressive interpretation of refugee law, which is arguably one endeavour of the legal scholar. The *Handbook* also critiques existing norms from a variety of ethical and ideological positions, with several chapters identifying foundational flaws, opening up space for radical rethinking.

A strong critical theme relates to the lack of effectiveness of many commitments in refugee law. Even States that accept obligations to protect refugees often do not implement them. Modes of non-compliance range from overt and egregious rights violations, through to the more common practice of refusing to recognize refugees as such, leaving them in a rightless limbo. This is despite a high number of ratifications of the relevant refugee and human rights law treaties, widespread 'domestication' of protection norms, and enforceability and/or oversight by regional human rights courts and international treaty-monitoring bodies. In diverse legal contexts, many national judges have also found ways to protect refugees, at least from *refoulement*, at times also securing a legal status and other rights for them. However, even in the highly judicialized region of Europe, as Tsourdi notes, courts are often under political pressure and constraint, leading to greater deference to States' migration control imperatives. Empirical legal scholarship on 'backlash' against courts and the rise of authoritarianism are, regrettably, increasingly pertinent to refugee protection, and in need of further scholarly attention.

While violations by States may be remedied by courts, there is no obvious forum to hold international organizations, including UNHCR and IOM, to account. It is noteworthy that groundbreaking work on the legal responsibility of UN institutions for human rights violations was prompted by witnessing UNHCR's work in the field (in particular, the human rights violations entailed in encampment).[26] These issues are explored further in Klabbers' chapter, and also that by Milner and Ramasubramanyam, with both confirming the accountability gap. For the millions of refugees who depend on food rations from the World Food Programme, or await status determination by UNHCR, or, in the case of Palestine refugees, depend entirely on UNRWA for their

[26] Ralph Wilde, '*Quis Custodiet Ipsos Custodes*? Why and How UNHCR Governance of "Development" Refugee Camps Should Be Subject to International Human Rights Law' (1998) 1 Yale Human Rights and Development Law Journal 107; Guglielmo Verdirame, *The UN and Human Rights: Who Guards the Guardians?* (CUP 2011).

livelihood and social services, being subject to unaccountable power over one's life and death is the defining refugee experience.

As the *Handbook* was nearing completion, the world was hit by the COVID-19 pandemic. This resulted in previously unfathomable restrictions on movement globally, including the right to seek asylum and to enjoy protection. By June 2020, 219 States, territories, and areas had implemented over 64,500 restrictive measures, predominantly concerning border closures and entry restrictions.[27] At least 99 States made no exception for people seeking asylum.[28] Also at this time, there was a wave of global protest against racial injustice, triggered by the shocking police killing of African-American George Floyd on 25 May 2020 in the US. While protests occurred in, and responded to, diverse contexts, many highlighted the links between racial injustice, colonial legacies, and the violation of refugees' rights. The 'Black Lives Matter' movement ought to compel us all to reflect on the systemic biases of the disciplines and institutions within which we work. As several chapters in the *Handbook* attest, refugee law is part of a system that enables border violence and other rights violations, and that legitimates exclusion—at times, racist exclusion. We must constantly question what we do and how we do it, and whether our 'objectivity' is in fact deeply partial. Our original hope that this *Handbook* would stimulate further innovative research on international refugee law now seems guaranteed by these external forces, which should continue to push us to ensure that the law meets its protective promise, while highlighting its imbrication with exclusionary politics.

[27] IOM, Global Mobility Restriction Overview (4 June 2020) <https://reliefweb.int/report/world/dtm-covid-19-global-mobility-restriction-overview-04-june-2020> accessed 10 June 2020.

[28] Kristy Siegfried, 'The Refugee Brief: 5 June 2020' (UNHCR 2020) <https://www.unhcr.org/refugee-brief/latest-issues/> accessed 10 June 2020; see also UNHCR, 'Key Legal Considerations on Access to Territory for Persons in Need of International Protection in the Context of the COVID-19 Response' (16 March 2020) <https://www.refworld.org/docid/5e7132834.html> accessed 10 June 2020.

PART I

INTERNATIONAL REFUGEE LAW—REFLECTIONS ON THE SCHOLARLY FIELD

CHAPTER 1

INTERNATIONAL REFUGEE LAW IN THE EARLY YEARS

GUY S GOODWIN-GILL

1. Introduction

Where to begin? The history of international refugee law has been written many times already, and this brief introduction takes the creation of the League of Nations in 1920 as the point of departure, for the 'modern' system of protection is inextricably linked to another story—the twentieth century's first attempts at cooperation on matters of international concern.[1] The early activities attracted comment on law and practice at the time,[2] and more recent narratives have served both academic and forensic purposes—to demonstrate the personal impact of individuals, such as Fridtjof Nansen, the first High Commissioner for Refugees;[3] Gustave Ador, President of the International Committee of the Red Cross;[4] Herbert Hoover and the American Relief Association;[5] or James Grover McDonald, the High Commissioner for Refugees (Jewish and other) coming

[1] See Francis P Walters, *A History of the League of Nations* (OUP 1952).

[2] See eg Special Issue: Refugees (1939) 203 Annals of the American Academy of Political and Social Science; specifically, Louise W Holborn, 'The League of Nations and the Refugee Problem' (1939) 203 Annals of the American Academy of Political and Social Science 124; John Fischer Williams, 'Denationalization' (1927) 8 British Yearbook of International Law 45; Norman Bentwich, 'The League of Nations and Refugees' (1935) 16 British Yearbook of International Law 114; Robert Y Jennings, 'Some International Law Aspects of the Refugee Problem' (1939) 20 British Yearbook of International Law 98.

[3] See Ernest E Reynolds, *Nansen* (Penguin 1949); Special Issue: Fridtjof Nansen and the International Protection of Refugees (2003) 22(1) RSQ 1.

[4] See *Société Gustave Ador* <www.ador.ch> accessed 25 March 2020.

[5] Matthew L Adams, 'Herbert Hoover and the Organization of the American Relief Effort in Poland (1919–1923)' (2009) 4(2) European Journal of American Studies 1; 'The American Relief Administration in Soviet Russia' (*Hoover Institution*) <www.hoover.org/events/american-relief-administration-soviet-russia> accessed 25 March 2020.

from Germany.[6] History has also been called in aid to trace the evolution of the refugee definition,[7] or to track the consolidation of the principle of protection, or to show how States' responses to refugees came to be organized, if never perfectly, in what today passes for the international refugee regime.[8]

This path has been trodden so often and so well, that few new insights are likely to emerge. International refugee law evolved within the politics of confrontation, mediated from time to time by the idealism of those participating in these first experiments in international cooperation, by the voices of individuals, including refugees, amongst the private voluntary agencies that provided relief and participated in international institutions, and by those who acted as advocates and interlocutors with governments.

At times, the history seems to confirm the absence of any clear, consistent intent or commitment on the part of States, either to deal with causes and find solutions, or to regulate practice between themselves on the basis of rules, let alone vis-à-vis the individual refugee considered as agent and rights holder. The refugee is commonly portrayed as a transitory phenomenon and if he or she or they are to be treated otherwise than as just another foreigner, then it will be done reluctantly, with as little violation as possible of the State's sovereign competence. Overall, however, the picture is more complex.

Raising refugees to a known legal category and entrenching certain rights in their regard was certainly progress, but these days it is often offset by claims of national interest and national security.

a. The League of Nations

The Covenant of the League of Nations was adopted as Part I of the Treaty of Versailles on 29 April 1919, and the organization itself was inaugurated on 10 January 1920, after the Peace Treaty came into force.[9] At first glance, the Covenant appeared to allow little scope for involvement in humanitarian issues, but there were also sufficient references to social justice and 'to the regulation of matters of international interest' to open the

[6] See James G McDonald, *Refugees and Rescue: The Diaries and Papers of James G McDonald, 1935–1945*, edited by Richard Breitman, Barbara McDonald Stewart, and Severin Hochberg (Indiana University Press 2009); Richard Breitman, Barbara McDonald Stewart, and Severin Hochberg (eds), *Advocate for the Doomed: The Diaries and Papers of James G McDonald, 1932–1935* (Indiana University Press 2007).

[7] See James C Hathaway, 'The Evolution of Refugee Status in International Law: 1920–1950' (1984) 33 ICLQ 348.

[8] See Claudena M Skran, *Refugees in Inter-War Europe: The Emergence of a Regime* (OUP 1985); Claudena M Skran, 'The International Refugee Regime: The Historical and Contemporary Context of International Responses to Asylum Problems' (1992) 4 Journal of Policy History 8.

[9] 'The Covenant of the League of Nations' (1920) 1 LNOJ 3 (The Covenant). The original members who ratified the Peace Treaty were Belgium, Bolivia, Brazil, British Empire (Canada, Australia, South Africa, New Zealand, India), France, Guatemala, Italy, Japan, Poland, Peru, Siam, Czecho-Slovakia, and Uruguay; the Argentine Republic, Chile, Paraguay, Persia, and Spain had also acceded by the end of 1919: 'Original Members Who Have Ratified the Treaty of Peace' (1920) 1 LNOJ 12.

way for action;[10] and three issues resonated in the early years—the plight of prisoners of war, many of whom remained in exile years after the conclusion of hostilities; health matters, particularly when linked to famine and the threat of epidemics; and the anomalous situation of refugees without the protection of their country of origin or nationality. Here, politics were to play an important role, for many States were initially unwilling to recognize or otherwise deal with the Soviets, the Bolshevik revolution was seen as an affront to civilized government, and in several cases diplomats and consular officials from the old *régime* continued to exercise their functions.[11]

Some of the problems of population displacement brought about by the war, the October 1917 revolution and the collapse of the Ottoman and Austro-Hungarian empires, were even then becoming apparent. Long-established religious minorities in the borderlands of Persia, Turkey, and the British and French mandates were now unsettled, with the plight of Assyrian and Armenian refugees in Mesopotamia the subject of lengthy correspondence between those responsible in the field and the ministries and cabinet office in London.[12]

With the defeat of anti-Bolshevik forces in Russia in late 1920, the British and the French were to be found assisting with the evacuation of military and civilian refugees, their former allies, from the Crimea,[13] each country acting unilaterally, with some cooperation at the working level.[14] The British 'contingent' of about 4,500 refugees was initially dispersed in Egypt, Cyprus, Malta, and the Serb-Croat-Slovene Kingdom, and they were eventually accepted for permanent settlement by Bulgaria and other countries, thanks to a British contribution of £150,000 (about £7 million at today's value).[15]

b. Matters of International Concern

The situation in Russia was a major source of concern, and in February 1920, the Supreme Council of the Allies, acting on an initiative of the International Labour Office,

[10] The Covenant (n 9) art 23. See also art 25 cf art 11, para 2.

[11] Hsu Fu-yung, *La protection des réfugiés par la Société des Nations* (Bosc Frères and M & L Riou 1935) 94–8; Roger Nathan-Chapotot, *Les Nations Unies et les réfugiés* (Pedone 1949) 5–11; Guy S Goodwin-Gill, 'The Politics of Refugee Protection' (2008) 27(1) RSQ 8.

[12] See Memorandum by the Secretary of State for India, on 'The Assyrian and Armenian Refugees in Mesopotamia' (5 July 1920) CAB 24/108/72 (National Archives, London); Memorandum by the Secretary of State for India (4 November 1920) including Appendix and Enclosure B352, 'Note on the Christian Communities in and around Mesopotamia' (27 October 1920) CAB 24/114/74 (National Archives, London); Memorandum by the Secretary of State for War (9 November 1920) CAB 24/114/83 (National Archives, London).

[13] 'Second Meeting (Private)' (1922) 3 LNOJ 375, 376; 'Telegram' (15 November 1920) No 588z in CAB 24/115/5 (National Archives, London).

[14] Letter from CH Harrington, Lieut General, General Officer Commanding-in-Chief, Army of the Black Sea, to the Secretary, the War Office (19 December 1920) CAB 24/117/25 (National Archives, London).

[15] 'Annex 344, Russian Refugees: Report submitted to the Council by Dr Nansen' (1922) 3 LNOJ 612, 614–15; 'Annex 472, Russian Refugees: Report by Dr Nansen' (1923) 4 LNOJ 387, 392–3 ('Refugees Taken over from the British Government').

invited the Council of the League to organize an inquiry into the conditions prevailing there.[16] Not surprisingly, the Soviet government rejected the idea.[17]

Other issues of international concern soon surfaced, with Russia again the link, and article 25 of the Covenant proved to be a useful basis for involvement in 'humanitarian activities', notwithstanding the absence of express words.[18] The League Council relied on this in April 1920, when it decided to invite Fridtjof Nansen to assume responsibility for the repatriation of prisoners of war (POWs).[19] Despite the civil conflict and the League's other difficulties with Russia, Nansen made considerable progress with repatriation in both directions, working together with the International Committee of the Red Cross (ICRC), national Red Cross societies, and voluntary organizations,[20] with the governments of Poland and Germany, the Soviet authorities, Estonia, and Finland.[21]

Famine, too, had clear international implications. Mortality from this and from disease in Russia was estimated to be about four million above average for the civil population between 1918–20, and from October 1921 to June 1922, almost five million deaths resulted.[22] Article 23(f) of the Covenant provided a clear basis for the establishment of the International Health Bureau and for related measures,[23] and in September 1921, the League Assembly recognized the 'urgent necessity' of combatting the famine. As many governments were unable or unwilling to take any action, it turned to the Council to consider intervention.

In March 1922, Nansen, who had been appointed High Commissioner for Refugees the previous September, reported that the famine had become 'far greater in extent and

[16] 'Procès-Verbal of the Third Session of the Council of the League of Nations' (1920) 1 LNOJ 60.

[17] ibid 62; 'Annexes' (1920) 1 LNOJ 64, annexes 1–3; 'Procès-Verbal of the Sixth Session of the Council of the League of Nations' (1920) 1 LNOJ 213, annexes 63, 63A.

[18] The Covenant (n 9) art 25; cf Holborn (n 2).

[19] 'Procès-Verbal of the Fourth Session of the Council of the League of Nations' (1920) 1 LNOJ 80, 83–4 (report of Count Bonin Lingare, Italy).

[20] 'Procès-Verbal of the Sixth Session' (n 17) 215, annex 64 ('Repatriation of Prisoners of War: Report presented by Dr Nansen'), 64A, 65. See also 'Repatriation of Prisoners of War: Report by Dr Nansen' (1921) 2 LNOJ 746, 746–7; 'Third Meeting (Public)' (1922) 3 LNOJ 1167, 1172.

[21] 'Procès-Verbal of the Tenth Session of the Council of the League of Nations' (1920) 1 LNOJ 4, 7; 'Procès-Verbal of the Twelfth Session of the Council of the League of Nations' (1921) 2 LNOJ 105; 'Report on the Repatriation of Prisoners of War by the High Commissioner, Dr Nansen' LON doc C.585.1922 (1 January 1922).

[22] Quoted in Stephen G Wheatcroft, 'Famine and Epidemic Crises in Russia, 1918–1922: The Case of Saratov' (1983) *Annales de démographie historique. Méres et nourissons* 329.

[23] The Covenant (n 9) art 23: 'Subject to and in accordance with international conventions…, the Members of the League…(f) will endeavour to take steps in matters of international concern for the prevention and control of disease.' cf 'Procès-Verbal of the Second Session of the Council of the League of Nations' (1920) 1 LNOJ 29, 43–4 'Health measures are essentially international measures…'.

far more disastrous in its consequences than anyone had predicted'.[24] With winter coming to an end and the ever-present risk of epidemics, millions were now more likely to 'migrate from their homes in search of countries where food may be obtained', which would be a major problem for Europe, particularly States bordering Russia.[25] Closing frontiers—the so-called *cordon sanitaire*—was not working, and the issues had to be tackled at source. In Nansen's view, refugees and famine were but two aspects of a single problem, namely, the reconstruction of Russia, including economic welfare, international trade, and other matters of common interest.[26] Finally, an International Committee for Russian Relief was set up, serviced by the Secretariat of the High Commissioner for Russian Refugees in Geneva, but in practice the League was far less successful than the American Relief Association under the direction of Herbert Hoover. On one level, however, the League did succeed, and through the efforts of its then recently established Health Office and the Director, Ludwik Rajchman,[27] it engaged successfully with the Soviet government, implemented practical alternatives to frontier closures, and tackled the causes of the epidemics at source.[28]

c. Refugees

The ICRC and the Red Cross movement had already been working with the League on the repatriation of prisoners of war, the typhus epidemic in Poland, and relief work generally in Eastern Europe. Gustave Ador, the ICRC's President, took advantage of these successes and the Council's February 1921 meeting in Paris to submit 'a fresh proposal', focusing on Russian refugees.[29] He urged the appointment of a commissioner as 'an obligation of international justice', and because the League was 'the only supernational

[24] 'Relief Work in Russia' (1922) 3 LNOJ 447, 447–9; 'Annex 385, Famine in Russia: The Proposal for a Commission of Enquiry' (1922) 3 LNOJ 827, 929–32; 'Eighth Meeting of the Council (Public)' (1922) 3 LNOJ 809, 809–10; 'Report on Economic Conditions in Russia with Special Reference to the Famine of 1921–1922 and the State of Agriculture', LON doc C.705.M.451.1922.II (29 September 1922) 99–102.

[25] 'Relief Work in Russia' (n 24) 449.

[26] 'Annex 355, Famine in Russia: Statement by Dr Nansen' (1922) 3 LNOJ 556, 680–5.

[27] Marta A Balińska, 'Ludwik Rajchman, International Health Leader' (1991) 12 World Health Forum 456 <https://www.unicef.org/sowc96/50years.htm> accessed 25 March 2020.

[28] See further, Francis Haller, '*Secours en temps de paix—la famine en Russie*', *Le Temps* (Lausanne, 12 August 2003); Carl Emil Vogt, 'Fridtjof Nansen and European Food Aid to Russia and the Ukraine 1921–1923' (2009) 2 The Twentieth Century/Dvacáte století 40; Carl Emil Vogt, 'Fridtjof Nansen *et l'aide alimentaire européenne à la Russie et à l'Ukraine bolcheviques en* 1921–1923' (2009) 3(95) *Matériaux pour l'histoire de notre temps* 5.

[29] 'The Question of the Russian Refugees' (1921) 2 LNOJ 225, 227–9, and attached memorandum (Gustave Ador to the President of the Council of the League of Nations confirming an earlier telegram, 20 February 1921). See Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, OUP 2007) 421 fn 2.

political authority capable of solving a problem which is beyond the power of exclusively humanitarian organisations'.[30] The accompanying memorandum noted that the refugees were 'without legal protection and without any well-defined legal status'.[31] The ICRC proposed that a High Commissioner be appointed, to define the legal position of Russian refugees so that they should not be 'unprotected by any *legal organisation recognised by international law*';[32] to organize their employment and repatriation;[33] and to coordinate the efforts of private organizations.

The Secretary-General, Sir Eric Drummond, circulated these ideas to governments in order to assess the level of support for international action.[34] The replies may not have satisfied his wish for concrete proposals, but they do start to highlight the then very present concerns of governments, and presage some of those to come. Many were persuaded of the need for joint action, although of varying kinds.[35] The government of Czecho-Slovakia, for example, emphasized that the legal status of the refugees, including 'international protection in connection with . . . passports, certificates of identity, and all other documents bearing on legal status', could not be settled by isolated action, lest further complications arise.[36] The Foreign Minister, Dr Edvard Beneš, thought it obvious that every government that recognized the Soviets would have to find 'some uniform method of protecting Russian non-Bolshevik refugees'.[37]

A single organization in the form of a High Commissioner could deal directly with the Soviets, as Nansen had done for POWs. Beneš proposed that agreement be sought amongst States, particularly on the employment question and on related issues, such as passports, identity cards, and movement. The Swiss government was no less concerned with the documents question, for this in turn was linked to legal status; its own practice had had to deal with ever-changing political difficulties, and it regretted that repatriation appeared to have been rejected without discussion. Nevertheless, 'an international system regarding the validity of Russian identification papers would . . . be extremely useful, as it would afford greater liberty of movement'.[38]

The situation of refugees was by no means uniform, and policy and practice often reflected the nature and extent of the problem faced by different States. In Poland, a 'front-line' State, Russian refugees were governed by the March 1921 Treaty of Riga.

[30] 'The Question of the Russian Refugees' (n 29). [31] ibid 228–9. [32] ibid 228.

[33] The reference to repatriation was soon qualified in light of conditions in Russia and the necessity for guarantees of security; see '*Letter of 15 June 1921 from Gustave Ador, President of the International Red Cross Committee, to the President of the Council of the League,*' LON doc C.132.M.73.1921 (30 June 1922).

[34] 'The Question of the Russian Refugees' (n 29) 225–6; 'The Question of the Russian Refugees' (1921) 2 LNOJ 485; See also 'Russian Refugees: Further Communications completing Council Document No C.126.M.72.1921.VII', LON doc C.126(a).M72(a).1921.VII (1 August 1921).

[35] 'The Question of the Russian Refugees' (n 34) annex 1 (France), annex 3 (Belgium), annex 5 (Spain), annex 6 (Czecho-Slovak Republic), annex 7 (Great Britain), annex 11 (Finland); 'Russian Refugees: Further Communications' (n 34) annex 1 (Finland), annex 3 (Sweden).

[36] 'The Question of the Russian Refugees' (n 34) annex 6 (Czecho-Slovak Republic). [37] ibid.

[38] ibid annex 8, app 1 (Switzerland). Roumania also favoured a special passport for Russian refugees—'an *ad hoc* passport issued in the name of the League of Nations by the Governments of those countries in which they are refugees': 'Russian Refugees: Further Communications' (n 34) annex 2.

Russian citizens were under the diplomatic and consular protection of Moscow, but refugees might choose to reject this protection, in which case they enjoyed 'the right of sanctuary, and cannot, for political reasons, be subject to extradition'. Moreover, under the February 1921 Convention of Riga, all repatriation had to be voluntary.[39] Finland, another 'front-line' State, was particularly keen on League of Nations assistance, because repatriation could not be foreseen at present, and relief from the American Red Cross was running out.[40]

Non-State stakeholders also strongly supported the League's involvement.[41] In his June 1921 report, the French representative, Gabriel Hanotaux, noted that there was general support for an organization under a High Commissioner,[42] with the key question being whom to appoint. Administrative and financial issues also needed attention, and he wondered whether the resources of the former Russian government deposited abroad might be used in whole or in part.[43] The Council did not take this up, but otherwise adopted his recommendations, including both the appointment of a High Commissioner and the prompt convening of a conference of States concerned.[44]

In anticipation of the 'Conference of Enquiry' to be held in Geneva from 22–24 August 1921, governments and three non-States parties supplied information on the numbers and condition of Russian refugees in their territories.[45] In between the narrative and what had been done and was now being done for refugees,[46] several common concerns emerged: the particular problems faced by 'front-line' States; the provision of relief and education for children;[47] the impact of famine on refugee movements; burden-sharing contrasted with unilateral endeavours; the legal status of refugees and their documentation, especially passports for foreign travel; and employment for

[39] 'The Question of the Russian Refugees' (n 34) annex 9 (Poland).

[40] ibid annex 11 (Finland). See also 'Russian Refugees: Further Communications' (n 34) annex 1.

[41] 'The Question of the Russian Refugees' (n 34) annex 12 (Russia Council), annex 13 (Relief Committee of the Zemstvos and Towns of Russia on behalf of Russian Citizens Abroad); 'Russian Refugees: Further Communications' (n 34) annex 5 (*Union Internationale de Secours aux Enfants*), annex 6 (Russian Financial, Industrial and Commercial Association), annex 7 (National Ukrainian Committee at Paris).

[42] 'The Question of the Russian Refugees' (1921) 2 LNOJ 755.

[43] ibid 757; 'The Question of Russian Refugees' (1921) 2 LNOJ 1006, 1014; see also Guy S Goodwin-Gill and Selim Can Sazak, 'Footing the Bill: Refugee-Creating States' Responsibility to Pay', *Foreign Affairs* (29 July 2015) <https://www.foreignaffairs.com/articles/africa/2015-07-29/footing-bill> accessed 25 March 2020.

[44] 'Humanitarian Questions' (1921) 5 LNOJ Special Supp 36, 36–7.

[45] 'The Question of Russian Refugees' (n 43) information received from Bulgaria, China, Finland, France, Great Britain, Greece, Poland, Romania, Czecho-Slovakia, Serb-Croat-Slovene State, Russian, Armenian, and Georgian delegations.

[46] cf the respective activities and costs incurred by France and Great Britain with regard to the exodus from Crimea: ibid.

[47] See Elizabeth White, 'Relief, Reconstruction and the Rights of the Child: The Case of Russian Displaced Children in Constantinople' in Nick Baron (ed), *Displaced Children in Russia and Eastern Europe, 1915–1953* (Brill 2017); Elizabeth White, 'A Category "Easy to Liquidate": The League of Nations, Russian Refugee Children in the 1920s and the History of Humanitarianism' in Magaly Rodríguez García, Davide Rodogno, and Liat Kozma (eds), *The League of Nations' Work on Social Issues: Visions, Endeavours and Experiments* (UN 2016).

refugees in a time of economic depression. Any papers issued to Russian refugees needed to be recognized internationally, and the Conference recommended that immigration regulations might be modified in favour of refugees seeking employment, even if only temporarily. In addition, the Conference laid the foundations for what would come to be called *non-refoulement*, stressing that no Russian refugee should be compelled to return; nevertheless, information should be gathered with regard to those who might in fact want to go back.[48] The protection and employment needs of Russian intellectuals also attracted special mention, as did the education of refugee children and the close connection between refugees and relief work for the starving populations of Russia. It would not be just, 'to leave the burden of relieving Russian refugees to the few nations which have hitherto borne it alone'; in this regard, all States 'ought to be invited to contribute in proportion to their resources for this urgent and essential task for the common interest of mankind'.[49]

2. The League of Nations High Commissioner for Russian Refugees

Nansen assumed the post of High Commissioner in early September 1921, and immediately faced the crisis of refugees, 'absolutely without resources', starving to death in the streets of Constantinople.[50] Reporting to the Secretary-General and the Council, Nansen emphasized not only the need for relief, but also that the only 'real solution' was productive employment in countries where the refugees would not become a charge on public funds.

This crisis and the following twelve months of the High Commissioner's office helped to set the outline, the themes, and the recurrent concerns of States for what would ultimately evolve into today's not entirely functional international refugee regime. From an organizational perspective, States readily recognized the need for intergovernmental action, but they were equally concerned that the High Commissioner should not be responsible for direct relief;[51] the refugees may have been a political, social, and humanitarian problem, but the financial aspect was never far away. Nansen, in any event, saw his primary goal as promoting refugee self-reliance, if not where they were, then through 'resettlement' in other countries where work was available or the cost of living was cheaper.[52]

[48] 'Conference on the Question of the Russian Refugees' (1921) 2 LNOJ 899. [49] ibid 902.

[50] 'Russian Refugees: Note by the Secretary-General', LON doc C.452.M.343.1921 (23 November 1921).

[51] cf 'Statute of the Office of the United Nations High Commissioner for Refugees', UNGA res 428(V) (14 December 1950) para 20.

[52] The word 'resettlement', commonly understood today to mean one State's acceptance for settlement of refugees from countries of 'first asylum', was not then in use.

With help from the International Labour Office, a census of refugees was conducted, but the few replies to Nansen's appeal for places were mostly negative. Nevertheless, he managed to appoint representatives in a number of countries, persuaded governments to nominate officials to deal directly with his office, and set up a joint committee of voluntary agencies to help coordinate relief.[53] A recognizably similar interactional structure is part of today's regime.[54]

a. Certificates of Identity and Passports

Following the lead offered by the August and September 1921 conferences, Nansen stressed the importance of passports and papers for travel, when the strategy was to move refugees to where work was available. He proposed two ways forward: either the necessary papers should be issued by the countries in which the refugees had found temporary abode; or they might be issued by the High Commissioner on behalf of the League. His discussions with governments inclined Nansen to the former and he urged them to indicate whether they could agree to his proposals.[55]

On 25 March 1922, in the context specifically of evacuation from Constantinople,[56] the Council submitted Nansen's proposals to governments, asking them to deliver identity certificates free of charge to refugees on their territory who needed them; to 'visa' the documents issued by other governments as if they were ordinary passports; not to charge for visas issued to refugees, where so requested by the High Commissioner's representative; to arrange for transit visas to be issued promptly and without charge; and finally to contribute to the provision of transportation facilities, including food for refugees in transit.[57]

These proposals provided the agenda for the conference convened by Nansen in Geneva in July 1922, which led to certificates of identity for Russian refugees.[58] Participating States unanimously agreed on the form of the certificate, and recommended its adoption also by other States, both members and non-members of the League. Nansen's major hope was that such a certificate would facilitate refugees' freedom of movement and travel to where employment might be available.[59] One deficiency, however, would have to be remedied, for, at the time, States insisted that

[53] For a summary of some of the work of the Advisory Committee of Private Organisations, see 'Annex 384, Russian Refugees: Report by Dr Nansen' (1922) 3 LNOJ 923, 925.

[54] The first UN High Commissioner for Refugees, Gerrit Jan van Heuven Goedhart, remarked in 1952 that country representatives were required, if protection was to be effective: UNGA, Sixth Session, 373rd Meeting (2 January 1952) UN doc A/C.3/SR.373 152–3.

[55] 'Annexes' (1922) 3 LNOJ 385, annex 321(a).

[56] The Council had before it Sir Samuel Hoare's report on the situation: ibid annex 321(b).

[57] Second Meeting (n 13); 'Third Meetings (Private)' (1922) 3 LNOJ 378; 'Annex 344' (n 15) 615–16.

[58] Arrangement with regard to the Issue of Identity Certificates to Russian Refugees (adopted 5 July 1922, entered into force 16 November 1922) 13 LNTS 237 (Issue of Identity Certificates).

[59] 'Annex 384' (n 53) 926–8.

the grant of a certificate, 'does not in any way imply the right for the refugee to return to the State in which he has obtained it without the special authorization of that State'.[60]

For some 'front-line' States, the certificate was valuable if it facilitated 'self-resettlement'. Poland, which did not participate in the Conference, shortly afterwards circulated a memorandum reflecting its concerns on these issues.[61] The government had initially imposed no controls on the influx of Russian refugees, considering their presence as 'temporary, and as preliminary to their definite settlement in other countries'.[62] Amongst the 'several hundreds of thousands' of refugees, besides former combatants in the anti-Soviet movement, it identified two groups: 'Political refugees persecuted by the Bolshevik authorities', and 'Refugees seeking an improvement in the conditions of life'.[63] It confirmed that 'political refugees' were able to remain indefinitely, 'in accordance with the principle of the right of asylum, provided they did not prejudice the interests of the State and constitute a danger to public security'. Those in the second category were allowed to remain temporarily, subject to the law regulating foreigners.

The Polish government furthermore issued special permits for travel to other countries, but noted with regret that such countries were either unwilling to visa such passports, or insisted that Poland undertake to readmit the holder.[64] It encouraged the League to take initiatives in spreading the load, given that Russian refugees were concentrated in just a few countries that faced heavy financial burdens and political and social drawbacks unknown to more distant States.

States continued to assume the temporariness of the refugee problem, partly because they feared extended financial commitments,[65] but the 'humanitarian activities' of the League and their moral and political aspects exerted their own pressure;[66] still, where large numbers of refugees were involved, repatriation often looked like the only way out. The American Relief Association and the American Red Cross, major philanthropic partners in assisting Russian refugees, considered that there could be 'no final satisfactory solution' other than return; they requested that 'protection in and repatriation to Russia' be taken up with the Soviet government.[67]

[60] Issue of Identity Certificates (n 58) condition 3. See also 'Passport and Transport Facilities for Russian Refugees: Note by the Secretary-General' in 'Russian Refugees' (1922) 3 LNOJ 1134, 1138–9.

[61] 'Russian Refugees in Poland: Memorandum by Mr Tytus Filipowicz, 7 July 1922', LON doc C.483.M.305.1922 (28 July 1922).

[62] ibid 2. [63] ibid.

[64] 'Russian Refugees in Poland' (n 61) 5–7.

[65] cf the views of M Hofmeyr (South Africa), 'Nineteenth Plenary Meeting' (1924) 23 LNOJ Special Supp 144, 147.

[66] cf the views of Mrs Helena Swanick, Rapporteur for Refugee Questions in ibid 144–5.

[67] 'Russian Refugees' (1922) 3 LNOJ 1134, 1135–6. See also Holborn (n 2) 329–33, 338–42; Fischer Williams (n 2).

b. Developing Standards: 1923 and Beyond

By 1923, the High Commissioner's reports to the Council had begun to assume a familiar pattern. They provided an accounting of the numbers of Russian refugees 'evacuated' or otherwise departing from Constantinople, the extent of relief provided, and the contributions of particular States. The High Commissioner also flagged actual or ongoing problems, such as legal status, identity certificates, the particular needs of orphans and invalids, or the question of repatriation.[68] At the same time, Nansen found himself drawn into analogous issues, such as the exchange of Greek and Turkish populations, and thus into schemes for relief and large-scale resettlement, or on behalf of Armenian refugees and other groups similarly situated.

i. *The Principle of No Compulsory Return*

A number of distinct protection problems were also the subject of intervention by the High Commissioner; for example, the situation of Russian refugees in China, many of whom had been engaged in military activities against the Soviet government; or the evacuation to Serbia of a particular group of Russian refugees whose presence in Constantinople was deemed dangerous; or the threatened expulsion, 'for military reasons', of refugees from Roumania; or of refugees alleged to have left their country, not on political grounds, but for economic and other reasons. The High Commissioner intervened successfully, pointing out that many refugees had lost their nationality and would not be allowed to enter Russia, and initiated steps to ensure their relocation in other countries.[69] The word '*non-refoulement*' was not then in use, but the principle of no involuntary return remained central to the policy-thinking of the League, its Member States, and humanitarian partners.[70]

The view nevertheless persisted that the refugee problem comprised just two phases—the first, 'transitory'; and the second, the permanent solution of repatriation, 'if and when' conditions became favourable. By 1923, some 6,000 Russian refugees were reported to have returned home, the internal situation was thought to be improving, but pending general repatriation, the High Commissioner's duty must be to organize the refugees' protection, 'in the widest sense of the term'.[71] A year later, however, the prospect of repatriation as a general solution had fallen away,[72] and in an attempt to reduce the costs to the League, Nansen proposed, and the Council accepted in principle, that the International Labour Office assume responsibility for employment and

[68] 'Annex 472, Russian Refugees: Report by Dr Nansen' (1923) 4 LNOJ 387; 'Annex 542, Russian Refugees: Report by Dr Nansen' (1923) 4 LNOJ 1040.

[69] 'Annex 542' (n 68) 1040–4; George Ginsburgs, 'The Soviet Union and the Problem of Refugees and Displaced Persons 1917–1956' (1957) 51 AJIL 325, 337–8.

[70] cf the views of the Advisory Committee of Private Organisations in 'Annex 542' (n 68) 1044.

[71] 'Annex 2, Work of the High Commissioner for Refugees: (a) Russian Refugees and (b) Bulgarian Inhabitants Expelled from Western Thrace' (1923) 13 LNOJ Special Supp 369.

[72] Holborn (n 2) 129–30; Ginsburgs (n 69).

emigration.[73] At the same time, the Council also approved extending the identity certificates scheme to Armenian refugees, authorization for which Nansen succeeded in steering through without the need for another conference.[74] One important change, although with the emphasis always on the absence of any obligation, was that space be left on the document for an authorization to re-enter the country of issue.[75] Without committing themselves further, States approved the principle of a 'return clause', 'in order to facilitate freedom of movement', and adopted a number of recommendations (*voeux*) regarding fees and a revolving fund for refugees, to be financed from the sale of stamps and from State contributions.[76]

ii. *'Defining' Refugees*

The Armenian extension was confirmed in the 1926 Arrangement, which was also the first occasion on which the 'refugee' was defined. Limited as it was to just two 'national' categories, the defining characteristics were that those in question no longer enjoyed the protection of their 'former' government, and had not acquired another nationality.[77] Two years later, States sought to define legal status more clearly,[78] and the 1928 Arrangement extended the passport scheme to certain 'Turkish, Assyrian, Assyro-Chaldean and assimilated refugees'.[79] It also recommended that the High Commissioner and his representatives, much like a national consul, should assume responsibility for certain services relating to legal status, such as certifying the identity of refugees, their family position and civil status, their signature, copies and translations of documents, as well as testifying to the good character and conduct of individual refugees and recommending them for visas, residence permits, and so forth.[80]

The language of recommendations, rather than that of law or right or obligation, was also maintained with regard to freedom of movement in the State of residence, the return clause in certificates of identity, and even in the case of expulsion, which should 'be avoided or suspended . . . where the person concerned is not in a position to enter a neighbouring country in a regular manner'; but even that did not apply in the case of a refugee who enters in violation of national law.[81] In fact, 1928 was the high point of

[73] 'Second Meeting (Public)' (1924) 5 LNOJ 902, 904–6; 'Refugee Questions: Memorandum by Dr Fridtjof Nansen, High Commissioner for Refugees' LON doc C.553.1924.XIII (1924).

[74] 'Identify Certificates for Armenian Refugees: Report by the High Commissioner', LON doc C.386.M.141.1924 (12 August 1924).

[75] 'Second Meeting (Public)' (n 73) 907–8; 'Armenian Refugees: Report by Dr Fridtjof Nansen, High Commissioner for Refugees', LON doc C.237.1924 (31 May 1924). Experience showed that this would facilitate the free movement of refugees.

[76] Arrangement relating to the Issue of Identity Certificates to Russian and Armenian Refugees (adopted 12 May 1926) 89 LNTS 47 (1926 Arrangement); 'Conference on Russian and Armenian Refugee Questions: Report by the High Commissioner', LON doc C.327.1926 (5 June 1926).

[77] 1926 Arrangement (n 76).

[78] Arrangement relating to the Legal Status of Russian and Armenian Refugees (adopted 30 June 1928) 89 LNTS 53 (Legal Status of Russian and Armenian Refugees).

[79] Arrangement concerning the Extension to other Categories of Refugees of Certain Measures Taken in Favour of Russian and Armenian Refugees (adopted 30 June 1928) 89 LNTS 63.

[80] Legal Status of Russian and Armenian Refugees (n 78).

[81] cf Bentwich (n 2) 117.

attempts to improve the lot of refugees by way of recommendations. The following year, the League Assembly recognized that its responsibility for refugees would continue, and also that any immediate and radical solution was impossible. It looked forward to refugee work being wound up within 10 years, and suggested that the High Commissioner's services be entrusted to the Secretary-General for a trial period.[82] In the absence of any administrative objection to political and legal protection being transferred to the Secretariat, the Inter-Governmental Advisory Commission (IGAC) proposed that an international refugee office be created to deal with all aspects of relief.[83] After a year's trial, the Assembly endorsed this 'bifurcated' approach, with 'legal protection, civil rights and legal status' remaining the responsibility of the Secretary-General.[84] A sub-committee looked at the technical aspects of the new arrangement, and Max Huber, President of the ICRC and a former President of the Permanent Court of International Justice, agreed to draft the statutes.[85] The office was conceived as a separate institution, under the direction of the League in the sense of article 24 of the Covenant,[86] but enjoying independence and freedom of decision. Its lifespan was nevertheless limited to nine years, 'as its objects are successively accomplished'.[87] On 1 April 1931, the Nansen International Refugee Office began its work of coordinating and facilitating relief; in practice, it also dealt with protection.[88]

iii. *'Protecting' Refugees*

Although it is sometimes said that 'political and legal protection' was never defined, the 1928 Arrangement had indicated a variety of protection activities which the High Commissioner might undertake, and the IGAC adopted a pragmatic approach to the refugee as someone either deprived of their nationality, or no longer enjoying the protection of the government of their country of origin or, indeed, of any government. In part, the relevant international institutions would indeed act as a substitute and provide that 'diplomatic protection' which had otherwise been lost, but one should beware of reading too much into that function alone.[89] As the private voluntary agency

[82] 'Seventeenth Plenary Meeting' (1929) 75 LNOJ Special Supp 139, 144–6.

[83] 'Annex 1232, Russian, Armenian, Assyrian, Assyro-Chaldean and Turkish Refugees' (1930) 11 LNOJ 1462.

[84] 'Sixth Committee of the Eleventh Ordinary Session of the Assembly' (1930) 90 LNOJ Special Supp 7, 8–15, 8–9 (statement of M François-Poncet, Rapporteur), 10 (statement of Mrs Hamilton, British Empire).

[85] 'Sixth Meeting' (1930) 90 LNOJ Special Supp 64; 'Annex 3, Russian Armenia, Assyrian, Assyro-Chaldean and Turkish Refugees' (1930) 90 LNOJ 83. Max Huber also participated in the work of the *Institut de Droit International*; see further Part 3(a)(i) below.

[86] See the Covenant (n 9) art 24.

[87] 'Annex 1263, Constitution of the Nansen International Office for Refugees' (1931) 12 LNOJ 308; adopted 'First Meeting (Private, then Public)' (1931) 12 LNOJ 142, 156.

[88] See 'Annex 1, International Assistance to Refugees' (1938) 189 LNOJ Special Supp 76; Holborn (n 2) 132.

[89] cf Claudena Skran, 'The Historical Development of International Refugee Law' in Andreas Zimmermann (ed), *The 1951 Convention relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (OUP 2011) 19, 35; Skran 1985 (n 8); Skran 1992 (n 8).

members of the IGAC repeatedly pointed out, 'protection' also required that refugees not be expelled, save on the most serious grounds, and that no refugee should be escorted to the frontier of a neighbouring country unless they were entitled to be admitted there.[90]

As attention turned to the eventual winding up of the Nansen Office, so the idea of a convention to ensure protection began to be discussed.[91] The IGAC thought that the existing rules, deriving primarily from the 1928 Arrangement, left something to be desired with regard both to legal status and the conditions of life. Indeed, a striking feature to emerge from government responses to requests about implementation was the 'comparative inefficiency of the recommendations'.[92] In its view,

> a formal convention would be the most effective means of assuring refugees of stability for their legal status; security and stability for settlement and work; facilities for the practice of professions and trade and for travel, admission to schools and universities, assistance and relief, and easy and unrestricted access to the courts.[93]

The Nansen Office appointed a committee of experts to look at the convention question, the IGAC noting that the system of 'mere recommendations' had proven inadequate and that the problem of 'instability' could only be effectively addressed by formal agreement between States.[94] The Council of the League approved and the IGAC and the Nansen Office were tasked with drafting a convention and convening a conference.[95]

3. The 1933 Convention Relating to the International Status of Refugees

The Convention relating to the International Status of Refugees was adopted on 18 October 1933, after a short conference in Geneva.[96] From one perspective, it did little more than translate the *status quo*—the 1922, 1924, 1926, and 1928 arrangements—into treaty language, and it held back from extending protection beyond the existing recognized

[90] 'Annex 1232' (n 83).
[91] See eg 'Annex 20, Russian, Armenian, Assyrian, Assyro-Chaldean and Turkish Refugees' (1931) 93 LNOJ Special Supp 227; the initial idea can be tracked back to 1927; see Robert J Beck, 'Britain and the 1933 Refugee Convention: National or State Sovereignty?' (1999) 11 IJRL 597, 604; Skran (n 89) 14–16.
[92] 'Annex 1313, Russian Armenian Assyrian Assyro-Chaldean and Turkish Refugees' (1931) 12 LNOJ 2118.
[93] ibid. See Convention relating to the International Status of Refugees (adopted 28 October 1933, entered into force 13 June 1935) 159 LNTS 199 (1933 Convention), preamble.
[94] 'Report of the Inter-Governmental Advisory Committee on the Work of Its Fifth Session' LON doc C.266.M.136.1933 (18 May 1933).
[95] 'First Meeting (Private, then Public)' (1933) 14 LNOJ 798, 806–7.
[96] 1933 Convention (n 93). For a detailed account of the Convention and of British practice, see Beck (n 91); also, Skran (n 89); Peter Fitzmaurice, 'Between the Wars—The Refugee Convention of 1933: A Contemporary Analysis' in David Keane and Yvonne McDermott (eds), *The Challenge of Human Rights: Past, Present, Future* (Edward Elgar 2012) 236.

categories of refugees.[97] The suggestion for a more open approach, incorporating all those who did not enjoy, or no longer enjoyed, the protection of their country of origin and had not acquired another nationality, was rejected by those preparing the draft for fear it would raise objections from governments.[98] Even at the time, it was well understood that many refugees—Italians, Hungarians, Austrians, and Germans—continued to have no protection.[99]

The 1933 Convention entered into force on 15 June 1935, but by then the League was well into decline and the prospects for international peace and security were seriously at risk.[100] Only eight States ratified the Convention,[101] but for all its deficiencies, it represents an important marker on the road to a rights-based system of protection.[102] Thus, it confirmed the applicable law with regard to personal status, including divorce (domicile or residence);[103] free and ready access to the courts;[104] qualified access to the labour market;[105] and it called for the standard of 'most favourable treatment accorded to foreign nationals' to be applied with regard to industrial accidents, welfare and relief, social insurance, and education,[106] while any rights contingent on reciprocity should not be denied on that account.[107]

Under the somewhat innocuous rubric of 'administrative measures', article 2 required States to issue Nansen certificates valid for not less than one year, and to include a return clause.[108] Article 3, though not entirely unambiguous in context, is often cited as the first occurrence in treaty of the principle of *non-refoulement*; each Contracting State undertook, 'not to remove or keep from its territory by application of police measures, such as expulsions or non-admittance at the frontier (*refoulement*), refugees who have been authorised to reside there regularly, unless the said measures are dictated by reasons of national security or public order'.[109]

The one major weakness of the 1933 Convention, remarked on then and later, was its perpetuation of the limited coverage offered by earlier practice.[110] When it was clear

[97] 1933 Convention (n 93) art 1. See 'Refugees from the Saar: Extension of the Nansen Passport System to these Refugees', LON doc C.374.M.188.1935.XII (21 September 1935). The League extended the Nansen Certificate to Saar refugees: Holborn (n 2) 133. In 1945, France also formally added Spanish refugees: *Décret n° du 15 mars 1945 accordant aux réfugiés espagnols le bénéfice de diverses dispositions*, JO 94/2254, 21 April 1945; Stefanie Schmahl, 'Article 1A, Para 1' in Zimmermann (n 89) 247, 269.

[98] File No 6786, 'Member of the Social Section, Memo to M Ekstrand' (9 September 1933) (League of Nations Archives, Geneva); File No 20A/6786/3948, 'M Gentili, Memo to M Ekstrand' (14 September 1933) (League of Nations Archives, Geneva).

[99] Bentwich (n 2) 120, 122–3; Michael R Marrus, *The Unwanted: European Refugees from the First World War through the Cold War* (Temple University Press 2002) 122–207.

[100] See generally, Walters (n 1).

[101] Louise W Holborn, 'The Legal Status of Political Refugees, 1920–1938' (1938) 32 AJIL 680, 690.

[102] Jacques L Rubinstein, 'The Refugee Problem' (1936) 15 International Affairs 716, 728.

[103] 1933 Convention (n 93) arts 4, 5. [104] ibid art 6. [105] ibid art 7. See Bentwich (n 2).

[106] 1933 Convention (n 93) arts 8–12.

[107] ibid art 14. See also Elizabeth White, 'The Legal Status of Russian Refugees, 1921–1936' (2017) 27 *Zeitschrift für Globalgeschichte und vergleichende Gesellschaftsforschung* 18, 30–8.

[108] 1933 Convention (n 93) art 2. [109] ibid art 3.

[110] See Holborn (n 2) 133–5; Holborn (n 101) 690–703; Skran (n 89) 26–31; Beck (n 91) 616–19.

that something had to be done for refugees from Nazism, the League set up a High Commissioner for Refugees (Jewish and other) coming from Germany, but outside the League because of Germany's continuing membership (it left in October 1933).[111] The United Kingdom House of Lords debated the resulting challenges in February 1935, focusing on refugees from the Saar and Germany, the funding problems faced by the High Commissioner, the need for resettlement and, as Viscount Cecil argued, for there to be just one organization to deal with a political question bearing on the peace of the world.[112] Four months later, Norway took up these issues in the League; with many thousands of refugees falling outside existing arrangements, the only practicable solution was a central organization, 'under or within the League … to carry out, for all refugees to whom the League has decided or may decide to accord assistance and protection, such functions as are now exercised by the Nansen Office'.[113]

a. Developments after 1933

In the meantime, the High Commissioner for Refugees coming from Germany, James McDonald, resigned in December 1935, owing to what he perceived as nearly intractable problems calling for political intervention by the League, rather than a purely 'humanitarian' response.[114] A few months later in July 1936, States did adopt a 'provisional arrangement' containing a working definition of 'refugees coming from Germany',[115] and once again included provisions on identity certificates, travel, and visas.[116] Legal status was covered in terms similar to the 1933 Convention, but there was no reference to employment,[117] and distinctly qualified limitations on expulsion and *refoulement*.[118] This provisional agreement was soon superseded by the 1938 Convention, specifically extending the personal scope of protection to stateless persons who had left Germany, 'after being established therein and who are proved not to enjoy, in law or in fact, the protection of the German Government'.[119] It retained the measures adopted earlier on certificates of identity, included additional provisions on the 'right of sojourn and

[111] See 'Annex 4, Proposal for the Organisation of an International Basis of Assistance for Refugees (Jewish and Other)' (1933) 117 LNOJ Special Supp 47.

[112] HL Deb 6 February 1935, vol 95, cols 820–44.

[113] 'Annex 1, International Assistance to Refugees' (1935) 143 LNOJ Spec Supp 65. The proposal re-emerged later, though it made little headway at the time: 'Annex 1a, International Assistance to Refugees' (1935) 143 LNOJ 66; 'Committee on International Assistance to Refugee: Report by the Committee submitted to the Council of the League of Nations', LON doc C.2.M.2.1936.XII (25 January 1936).

[114] 'Resignation of Mr James G McDonald, High Commissioner for Refugees (Jewish and Other) from Germany', LON doc C.13.M.12.1936.XII (7 January 1936).

[115] Provisional Arrangement concerning the Status of Refugees from Germany (adopted 4 July 1936, entered into force 4 August 1936) 171 LNTS 75.

[116] ibid art 2, 3. [117] ibid arts 5–7. [118] ibid art 4.

[119] Convention concerning the Status of Refugees coming from Germany (adopted 10 February 1938, entered into force 26 October 1938) 192 LNTS 59 (1938 Convention), art 1. It 'excluded' those who left Germany, 'for reasons of purely personal convenience' (cf UNHCR Statute (n 51) para 6A(ii)(e), (f)); Skran (n 89) 29–35.

residence',[120] and qualified limitations again on expulsion and *refoulement*.[121] Other articles dealt with legal standing, access to the labour market, industrial accidents, social welfare, education, assistance with emigration, taxation, and reciprocity.[122]

i. *The Institut de Droit International*

Many of these legal issues were considered concurrently by the *Institut de Droit International*.[123] Earlier meetings and resolutions had dealt with a number of related problems,[124] but in 1936, the Institut addressed the legal status of stateless persons and refugees in general. It defined the refugee to include, 'tout individu qui, en raison d'événements politiques survenus sur le territoire dont il était ressortissant, a quitté volontairement ou non ce territoires ou en demeure éloigné, qui n'a acquis aucune autre nationalité nouvelle et ne jouit pas de la protection diplomatique d'aucun autre Etat'.[125] Other articles made general provision on personal law and status, called for the issue of passports to both stateless persons and refugees, and proposed limiting the expulsion of those otherwise authorized to remain to cases where another State had agreed to admit them.[126]

ii. *Political Developments*

However, any positive impact that these legal proposals or even the 1938 Convention might have had was largely frustrated or overtaken by political developments.[127] The Council had finally agreed to a single organization, the High Commissioner for Refugees under the Protection of the League of Nations, which would superintend the entry into force and application of earlier conventions, facilitate the coordination of humanitarian relief, assist with the promotion of emigration and permanent settlement, and establish contact with the Inter-Governmental Committee on Refugees (IGCR) set

[120] 1938 Convention (n 119) arts 2–4.

[121] ibid art 5; Beck (n 91) 618–19. On State practice, see 'Annex 1313' (n 92) 2120.

[122] 1938 Convention (n 119) art 6–13.

[123] Arnold Raestad (Rapporteur), '*Statut juridique des apatrides et des réfugiés*' (*Annuaire de l'Institut de Droit International 2ième Commission, Session de Bruxelles, avril 1936*).

[124] See eg '*Règles internationales sur l'admission et l'expulsion des étrangers*' (1982–84) 12 *Annuaire de l'Institut de Droit International* 218, 219, art 2.

[125] '[A]ny individual who, as a result of political events occurring in the territory of which he or she was a national, has left or remains outside that territory, voluntarily or not, has not acquired a new nationality and does not enjoy the diplomatic protection of any other State': '*Projet de résolutions et commentaires*' (1936) 39 *Annuaire de l'Institut de Droit International* 35, 45–7, 96–112.

[126] ibid 84–99, arts 5, 9, 10, 113–67.

[127] Among other developments, the *Anschluss* with Austria and the annexation of the Sudetenland necessitated further definitional refinements: Additional Protocol to the Provisional Arrangements and to the Convention Signed at Geneva on July 4th, 1936 and February 10th, 1938, Respectively, Concerning the Status of Refugees Coming from Germany (adopted 14 September 1939) 198 LNTS 141; 'International Assistance to Refugees: Letters from the French and United Kingdom Governments', LON doc C.26.1939 (12 January 1939); 'International Assistance to Refugees: Extension of the Powers of the High Commissioner to Refugees from Territories ceded by Czechoslovakia to Germany', LON doc C.50.1939. XII (16 January 1939).

up following the Evian Conference convened by President Roosevelt in July,[128] but activities for refugees slowed more or less to a stop with the outbreak of hostilities.

In 1943, Britain and the United States met in Bermuda and agreed that the IGCR mandate should include not just Germans, but 'all persons, wherever they may be, who, as a result of events in Europe, have had to leave, or may have to leave, their country of residence because of danger to their lives or liberties on account of their race, religion or political beliefs'.[129] This was to determine policy and management, however, not for the purpose of confirming legal status or rights. The large-scale displacements occasioned by conflict were seen once again as essentially temporary, with repatriation the goal on the eventual termination of hostilities.[130] To these ends also, in November 1943, 44 States set up the United Nations Relief and Rehabilitation Administration (UNRRA), with the task of supporting military operations in Europe by providing assistance to the displaced and organizing their return home.[131] UNRRA is estimated to have repatriated some six million displaced, but it was not mandated to assist or protect 'refugees' unwilling to return; with the end of the war, the demise of the League of Nations, the emergence of the UN, and the beginnings of an East–West divide, attention turned to resolving the remaining problems.

4. The End of the Early Years

Significantly, and already at its first session, the UN General Assembly unanimously adopted resolution 8(I) on 12 February 1946.[132] It recognized the international dimensions to the refugee problem, and underlined the principle that no refugee having valid objections should be compelled to return to their country of origin, even as it also confirmed that otherwise the main task of international efforts should be to encourage and assist early repatriation. The General Assembly instructed the Economic and Social Council (ECOSC) to consider every aspect of the problem, in the expectation that a new international body would be created to these ends. By December, ECOSOC had not only reported, but also drafted the Constitution for the International Refugee Organization (IRO),[133] and once again, politics entered the picture.[134]

[128] 'Annex 1, International Assistance to Refugees' (1938) 189 LNOJ Special Supp 76, 86 (Resolution No 1), 87 (Resolution No 5). See generally, Tommie Sjöberg, *The Powers and the Persecuted: The Refugee Problem and the Inter-Governmental Committee on Refugees (IGCR), 1938–1947* (Lund University Press 1991).

[129] Sjöberg (n 128) 16. See also 'International Assistance to Refugees: Report of Sir Herbert Emerson, High Commissioner for Refugees', LON doc C.19.M.19.1943.XII (August 1943).

[130] Sjöberg (n 128) 135–7.

[131] See generally, Goodwin-Gill and McAdam (n 29) 423 fn 14 (and sources therein).

[132] 'Question of Refugees', UNGA res 8(I) (12 February 1946) (42–0–0; unanimity was not to last).

[133] 'Refugees and Displaced Persons', UNGA res 62(I)(II) (15 December 1946) (adopted 30–5–18).

[134] See the 1946 exchange between Eleanor Roosevelt and Andrei Gromyko: UNGA, Sixty Sixth Plenary Meeting (15 December 1946) UN doc A/PV.66, 1420–9; see also Report of the High Commissioner for Refugees to the General Assembly, UNGA, Sixth Session Supp No 9, UN doc A/2011 (1952) para 11; 'Draft report of the Third Committee', UN doc A/2084 (26 January 1952) paras 34–57 on the commissioning and publication of Jacques Vernant, *The Refugee in the Post-War World* (Yale University Press 1953). See also Gil Loescher, *Beyond Charity* (OUP 1993) 57–9.

At this point, the history of the early years comes to an end. The next 25 years or so would see the IRO wound up and replaced by the Office of the United Nations High Commissioner for Refugees; the conclusion of new refugee treaties—the 1951 Convention and its 'amending' 1967 Protocol; the unanimous adoption of the 1967 UN Declaration on Territorial Asylum; the first regional treaty—the 1969 OAU Convention; a ruling by the International Court of Justice on asylum in Latin America, followed by two regional initiatives on territorial and diplomatic asylum; and off to one side, of course, the persistent challenges raised by Palestine refugees under the mandate of the UNRWA.[135]

Within the international refugee regime at large, the bases for discourse and cooperation have been strengthened over the past 70 years, but the politics remain resistant to such fundamental changes as are needed, either to deal effectively with causes, or to bring about prompt and equitable solutions consistently with the demands of international justice. Overall, 'international refugee law' has nevertheless demonstrated its dynamic character; within the *legal* framework, such as the refugee definition, it has shown itself capable of responding positively to the emerging protection needs of groups and individuals at risk, while the normative background provided by human rights has strengthened its capacity to provide a principled approach to larger groups and categories of the displaced. However, the law alone does not provide solutions, and much remains to be done in the face of bureaucratic ineptitude and the bankruptcy of policies premised, for example, on the illusion of deterrence and the 'value' of cruel and inhuman practices.

If a first principle is needed, international refugee law starts with recognition of the inherent dignity and worth of every human being. Although many things can be deduced from first principles, a legal system is also about accountability for what is done to others. International criminal law, in time and in part, may address the liability of those whose policies and practices are the root of displacement, while international refugee law is about the architecture of response, and the accountability of systems in which decisions and actions impact on individuals in search of refuge.

The early years achieved much in the way of internationalizing and institutionalizing the responsibilities of the community of nations in matters of common concern; they began with innate recognition of the basic principle of protection, that no one should be sent back to conditions in which he or she would be at risk of harm. The early history 'struggled' thereafter with delimiting the scope and numbers of those who might or should benefit from international action, sometimes for self-interested reasons, or because of the costs, or for political reasons, or because of a felt need to discourage exile as a solution to national

[135] For background on later instruments and developments, see among many others: Terje Einarsen, 'Drafting History of the 1951 Convention and the 1967 Protocol' in Zimmermann (n 89); Marina Sharpe, *The Regional Law of Refugee Protection in Africa* (OUP 2018); Guy S Goodwin-Gill, 'United Nations Treaty-Making: Refugees and Stateless Persons' in Simon Chesterman, David Malone, and Santiago Villalpando (eds), *The Oxford Handbook of United Nations Treaties* (OUP 2019); Guy S Goodwin-Gill, 'Declaration on Territorial Asylum, 1967' (*UN Audio-Visual Library of International Law* 2012) <https://legal.un.org/avl/pdf/ha/dta/dta_e.pdf> accessed 31 March 2020; Guy S Goodwin-Gill, 'Convention relating to the Status of Refugees, 1951 and the Protocol relating to the Status of Refugees, 1967' (*UN Audio-Visual Library of International Law* 2009) <https://legal.un.org/avl/pdf/ha/prsr/prsr_e.pdf> accessed 31 March 2020; Guy S Goodwin-Gill, 'The Office of the United Nations High Commissioner for Refugees and the Sources of International Refugee Law' (2020) 69 ICLQ 1.

problems. Only in 1967, was a refugee definition finally agreed that could be generalized across time and space, and even then it remained limited to those with a well-founded fear of being persecuted for particular reasons. State practice and customary international law had already moved ahead, however, even if the normative framework of response remained patchy.

Within that legal framework, there is much still to be done, both within the scheme offered by the 1951 Refugee Convention and 1967 Protocol, and within the interstices of that protection, which is required by human rights and customary international law. Lists are rarely comprehensive, but in the years ahead international refugee law will need to engage or re-engage with issues such as: *access to asylum generally*, within the increasingly complex scenario of migration management; *access to a decision-making procedure* consistent with international standards, which is capable of effectively identifying refugees, stateless persons, and others in need of international protection, for example, as a consequence of climate change or disaster; *humane treatment and non-discrimination* for all who move between States, irrespective of status; *detention and alternatives to detention* that comply with international standards; *documentation* of those entitled to international protection, which is essential to recognition as a person before the law, to exercise of the right to freedom of movement, and to travel for the purpose of finding solutions; *equality of treatment* for refugees and stateless persons with regard to employment, education, and social rights; and defence of the fundamental principles of protection, including *non-refoulement*.

The tension between the claims of those in search of protection and the State anxious about its 'sovereign borders' is not likely to disappear, but it will be for the next iterations of international refugee law to show how to mediate that conflict, consistently with human dignity and security from harm.

CHAPTER 2

RACE, REFUGEES, AND INTERNATIONAL LAW

E TENDAYI ACHIUME

1. Introduction

> Given the centrality of racialization to geopolitics and the inauguration of the central institutions of international affairs in the twentieth century, to think of 'race' as but one of many variables in what can also be called the century of the refugee is somewhat myopic. In short, to refer to the geopolitics of refuge as a 'Global Refugee Regime' unwittingly falls into the trap of missing the centrality of racialization as an embedded system of oppression [.][1]

The experiences of refugees are heavily mediated by race and ethnicity, and the first quarter of the twenty-first century offers no shortage of examples. Although groups marked and targeted as foreign may vary across place and time, for refugees, race remains a vital concept to make sense both of their experiences, and of the legal and policy frameworks that govern these experiences.[2]

However, international legal scholarship on refugees has a race problem. It has not paid sufficient attention to the significance of race in this field,[3] suffering from a sort of 'racial aphasia', a collective inability to talk about or theorize race. This aphasia entails

[1] Christopher Kyriakides, Dina Taha, Carlo Handy Charles, and Rodolfo D Torres, 'Introduction: The Racialized Refugee Regime' (2019) 35(1) Refuge 3, 5.

[2] As Laura Westra has argued, racial discrimination permeates the experiences of most refugees at all stages, from their displacement all the way through relocation in host nations. Laura Westra, 'The Case for Asylum Seekers: Reverting to Human Rights' in Laura Westra, Satvinder Juss, and Tullio Scovazzi (eds), *Towards a Refugee Oriented Right of Asylum* (Routledge 2015) 233–64.

[3] For exceptions to this trend, see, for example, the race-conscious international human rights literature cited in Hope Lewis, 'Reflections on Blackcrit Theory: Human Rights' (2000) 45 Villanova Law Review 1075, 1079–84.

effacement, amnesia and neglect of racism's histories and structures.[4] There are many likely explanations for international refugee law scholarship's racial aphasia, including the fractured and controversial meaning of the term 'race', and the legal significance of this designation. For this reason, the starting point of this chapter is the meaning of 'race' as it should be understood in relation to refugees and international law (Section 2). It then turns to examine the treatment of race in the Refugee Convention and the role of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) as regards refugees (Section 3), before turning to wider questions concerning the racialized nature of the global refugee regime (Section 4). Section 5 concludes with proposals for a new research agenda.

2. Race and Refugees: The Conceptual Terrain

a. Race as Structure

The term 'race' refers to the 'the historically contingent social systems of meaning that attach to elements of morphology and ancestry'.[5] This definition unequivocally rejects the scientifically and morally discredited notion of biological races, and instead recognizes race as a potent social construction, one that is intimately shaped by law, amongst other things.[6] It recognizes that the social construction of race is informed by physical features and lineage, not because features and lineage are a function of biological racial variation, but because societies invest morphology and ancestry with social meaning, including through law.[7] At the same time, race is by no means simply, or even mostly, about physical attributes such as colour. It is centrally about the legal social, political, and economic meaning of being categorized as Black, White, Brown, or any other racial designation.[8]

There is a tendency to treat race as, mostly, an identity attribute of individuals and groups and, at the same time, to ignore the ways in which race operates as a structure of power according to which privileges and rights are allocated. Quijano reminds us that race today is the product of centuries-long colonial intervention and exploitation,

[4] Debra Thompson, 'Through, Against and Beyond the Racial State: The Transnational Stratum of Race' (2013) 26 Cambridge Review of International Affairs 133, 135.

[5] Ian Haney López, *White by Law: The Legal Construction of Race* (10th edn, NYU Press 2006).

[6] ibid 7. For a philosophical socio-political account of race as a social construction that resonates with the approach adopted here, see Sally Haslanger, 'Tracing the Sociopolitical Reality of Race' in Joshua Glasgow, Sally Haslanger, Chike Jeffers, and Quayshawn Spencer (eds), *What is Race? Four Philosophical Views* (OUP 2019) 25–31.

[7] López (n 5) 10.

[8] E Tendayi Achiume, 'Putting Racial Equality onto the Global Human Rights Agenda' (2018) 15(28) Sur International Journal on Human Rights 141, 145.

during which 'race became the fundamental criterion for the distribution of the world population into ranks, places, and roles in . . . society's structure of power'.[9] In the colonial context, race structured rights and privileges on hierarchical terms determined by White supremacy. Although formal decolonization has occurred in most of the world, race persists as a *neo*-colonial structure, one that still allocates benefits and privileges to the advantage of some and the disadvantage of others—largely along the same geopolitical and racial lines that characterized the European colonial project.

This contemporary understanding of race informs the analysis in this chapter, although it is important to emphasize that the imperial and structural account of race highlighted here is not intended as a totalizing account of everything that race means or does everywhere in the world and at all times. Rather, the point is that this empire-based and structural account is one amongst those required for comprehensive legal analysis of race and refugees under international law.[10] A 2019 special issue of the journal *Refuge*, on 'Racialized Refuge', offers an example of the rich descriptive and analytical insights made possible by treating race 'not . . . as a discrete variable for consideration but as part of an embedded structure of oppression in which the racialized refugee regime is generated and reproduced'.[11] Refugee scholars and advocates must contend with a structural and power-based understanding of race because this is a fundamental way in which race impacts refugees.[12]

Race requires consideration alongside other social categories and structures, such as ethnicity, indigeneity, national origin, and even religion. These grounds may sometimes function alongside race, or act as proxies for race. The experiences of indigenous refugees are often overlooked in international legal scholarship.[13] Religion is also often neglected, yet scholars have compellingly argued that in certain contexts, animus targeting

[9] Aníbal Quijano, 'Coloniality of Power, Eurocentrism, and Latin America' (2000) 1 Neplanta: Views from the South 533, 535. Another notes, in particular, that '[t]he combination of settler-colonialism with an ideology of racial discrimination, challenges the totality of the inalienable rights and human rights of indigenous peoples and consequently it can create the most damaging refugee situation': Anis Al-Qasem, 'Racial Discrimination and Refugee Law', International Organisation for the Elimination of All Forms of Racial Discrimination (EAFORD) Paper No 34 (1984) 6.

[10] For more detailed analysis of why an empire-based analysis is vital for refugee studies, see BS Chimni, 'The Geopolitics of Refugee Studies: A View From the South' (1998) 11 JRS 350.

[11] Kyriakides, Taha, Charles, and Torres (n 1) 5.

[12] See eg Val Colic-Peisker, 'The "Visibly Different" Refugees in the Australian Labour Market: Settlement Policies and Employment Realities' in Sonia McKay (ed), *Refugees, Recent Migrants, and Employment: Challenging Barriers and Exploring Pathways*(Routledge 2009) (documenting systemic, racialized exclusion of refugees from the Australian labour market).

[13] Carlos Yescas, 'Hidden in Plain Sight: Indigenous Migrants, Their Movements, and Their Challenges' (*Migration Information Source*, 31 March 2010) <https://www.migrationpolicy.org/article/hidden-plain-sight-indigenous-migrants-their-movements-and-their-challenges> accessed 13 May 2020; Expert Mechanism on the Rights of Indigenous Peoples, Permanent Forum on Indigenous Issues, Special Rapporteur on the Rights of Indigenous Peoples, and United Nations Voluntary Fund for Indigenous Peoples, 'States Must Act Now to Protect Indigenous Peoples during Migration' (*OHCHR*, 17 August 2018) <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23,429&LangID=E> accessed 13 May 2020 (both noting particular challenges faced by indigenous migrants, as well as indigenous migrants and refugees' relative invisibility in data collection and migration scholarship).

religious groups—such as Muslims in the United States—is often in reality racialized animus, in that it operates on the basis of racial ascriptions (such as being 'Muslim-looking'), rather than on the basis of religious belief or conduct.[14]

In addition to consideration of racial proxies, meaningful analysis of race must also account for the intersectional nature of categories and structures that embody inequality and discrimination.[15] At its core, the concept of intersectionality is an attempt to capture the interactions amongst two or more structures or systems of oppression (such as patriarchy and economic disadvantage), and to address the ways in which specific laws and policies create burdens or hardships that 'flow along these intersecting axes contributing actively to create a dynamic of disempowerment'.[16] Intersectional analysis of gender and race, in particular, is essential for refugees. In a 2001 article, Pittaway and Bartolomei mapped race and gender discrimination against refugees, noting that the two forms of discrimination often occur together and may be mutually constitutive.[17] Their analysis is intersectional, grappling with the specific conditions women refugees face on the receiving end of a legal regime steeped in patriarchy.[18] They offer examples of the gendered racial discrimination experienced by women both from host States and societies (including in the resettlement process), and from within refugee communities that pressure women to maintain their traditional roles for the sake of patriarchal cultural preservation. Elsewhere, Akram has examined how stereotypes of Islam interact with gender stereotypes in judicial adjudication to undercut the refugee claims of Muslim women in the US.[19]

b. Racism, Xenophobia, and Xenophobic Discrimination

The complexity of the intersecting and multiple structures that shape the experiences of refugees is perhaps most vividly illustrated through a brief interrogation of the

[14] Muneer I Ahmad, 'A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion' (2004) 92 California Law Review 1259, 1278 ('[T]he "Muslim-looking" construct is neither religion-nor conduct-based'). See also Emmanuel Mauleón, 'Black Twice: Policing Black Muslim Identities' (2018) 65 *UCLA Law Review* 1326 (arguing the inherent racialization of religion). Minority groups persecuted on a religious basis are often also ethnic minorities, in a way that can make religion a proxy of ethnicity. See eg Stephanie E Berry, 'Bringing Muslim Minorities within the International Convention on the Elimination of All Forms of Racial Discrimination: Square Peg in a Round Hole?' (2011) 11 Human Rights Law Review 423, 431–6, 450.

[15] Kimberlé Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' (1991) 43 Stanford Law Review 1241, 1298–9.

[16] UN Secretary-General, 'Report of the Expert Group Meeting on Gender and Racial Discrimination', UN doc A/CONF.189/PC.2/20 (11 May 2001).

[17] Eileen Pittaway and Linda Bartolomei, 'Refugees, Race, and Gender: The Multiple Discrimination against Refugee Women' (2001) 19(6) Refuge 21.

[18] ibid 23.

[19] Susan Musarrat Akram, 'Orientalism Revisited in Asylum and Refugee Claims' (2000) 12 IJRL 7. For a recent study of racial and gendered discrimination in US asylum law, see Sara L McKinnon, *Gendered Asylum: Race and Violence in US Law and Politics* (University of Illinois Press 2016).

xenophobia and xenophobic discrimination to which refugees are subject. Common conceptions of xenophobia tend to emphasize individual prejudice or irrational dislike of foreigners. I have argued elsewhere that for legal analysis, xenophobia must also be understood as political—motivated and informed by collective sensibilities regarding who belongs to the nation and may permissibly enjoy its benefits, and who may not.[20] Xenophobic backlash entails backlash against perceived threats to collective sovereignty and individual citizenship. In simple terms, xenophobic discrimination is discrimination on the basis of actual or perceived 'foreignness', where foreignness is the status of being an outsider to a given political community.[21] For refugees in the international context, it is the status of being an outsider to a given State that is typically at stake when they confront xenophobic discrimination.[22]

Both for analytical and governance purposes, it is important to understand xenophobic backlash against refugees as, in many cases, intimately related to racist backlash, but also as distinctive in noteworthy respects. This is because conflating racism and xenophobia risks obscuring distinct processes of othering and exclusion that may require different analytical and remedial intervention. Xenophobic backlash very specifically challenges the status of non-nationals as beneficiaries of the goods of national membership, whereas racism or racist backlash does not always or even mostly connote this specific bone of political contention.[23] Xenophobic discrimination is often fuelled by 'xenophobic anxiety': 'the concerns (anxieties) that polity insiders mobilize in discourse and action in order to motivate, justify, or legitimate racialized or otherwise normatively suspect exclusion of foreigners',[24] where foreigners are those constructed as undeserving of the benefits of national membership. In other words, at stake in xenophobic backlash and anxiety[25] is a more direct reaction against the inclusion of refugees, and against their enjoyment of the benefits of national membership. Sensibilities about national belonging in relation to refugees are heavily influenced by conceptions of sovereignty. As a result, addressing xenophobia may require measures specifically tailored to address national discourses about who belongs and who does not. Anti-racism interventions, by contrast, may not always require the same, because belonging through citizenship is not always what is salient in racist discourse or structures, even if racism is often a factor driving this backlash.

Foreignness is an intersectional category, which is to say that it implicates identity at the intersection of many different social structures: nationality, national origin, race,

[20] E Tendayi Achiume, 'Governing Xenophobia' (2018) 51 Vanderbilt Journal of Transnational Law 333, 369.

[21] E Tendayi Achiume, 'Beyond Prejudice: Structural Xenophobic Discrimination against Refugees' (2014) 45 *Georgetown Journal of International Law* 323, 331. For more detailed analysis of foreignness as a basis for discrimination against refugees, see 331–7.

[22] Internally displaced persons, for example, may experience xenophobic responses from co-nationals, where their foreignness is a product not of a different national origin, but rather their status as perceived or actual outsiders to a particular region, community, or city. See eg Aurelia Wa Kabwe-Segatti and Loren B Landau, 'Displacement and Difference in Lubumbashi' (2007) 27 Forced Migration Review 71, 71–2.

[23] For a more detailed elaboration of this point, see Achiume (n 20) 368–71.

[24] ibid 370.

[25] ibid.

religion, class, ethnicity, gender, and others.[26] What this means in practice, for example, is that even amongst refugees of the same nationality or national origin, religion, race, or other category can differentially determine who is socially constructed as foreign and thus vulnerable to xenophobic discrimination. A Christian and a Muslim refugee both of Syrian nationality, for instance, can receive very different treatment in Europe in ways that makes clear that for law and policymakers, focusing on nationality/national origin alone is an untenable approach to xenophobic discrimination.[27] The differential treatment of White Zimbabwean refugees relative to Black Zimbabwean refugees in South Africa offers another example,[28] and more generally, Gqola has shown how 'sexualized, class marked and racialized South African stories about immigrant communities'[29] have structured violence against these communities. That said, race may not always salient in the construction of foreignness. The sometimes xenophobic and even violent treatment of white eastern Europeans in western Europe illustrates the case of xenophobic discrimination where 'race' as generally understood is not strictly implicated, as with ethnically Polish migrants in the United Kingdom, for example.[30]

Class is also salient in the construction of foreignness. Indeed, some might consider class the sole or primary determinant of xenophobia against Third World refugees who come from predominantly economically disadvantaged countries, while at the same time viewing race as epiphenomenal.[31] On such a view, it is class and not race that triggers backlash and discrimination against refugees. This 'it is class not race' position misses the historically mutually constitutive relationship between class and race,[32] and ignores how racialization still shapes class today. Race still affects wages and wealth in

[26] Achiume (n 21) 331; Natsu Taylor Saito, 'Alien and Non-Alien Alike: Citizenship, "Foreignness," and Racial Hierarchy in American Law' (1997) 76 Oregon Law Review 261, 332.

[27] See eg Zosia Wasik and Henry Foy, 'Poland Favors Christian Refugees from Syria', *Financial Times* (21 August 2015).

[28] Achiume (n 21) 333.

[29] Pumla Dineo Gqola, 'Brutal Inheritances: Echoes, Negrophobia and Masculinist Violence' in Shireen Hassim, Tawana Kupe, and Eric Worby (eds), *Go Home or Die Here: Violence, Xenophobia and the Reinvention of Difference in South Africa* (Wits University Press 2008) 213.

[30] Some have argued that the experiences of Poles in the UK are best described as xenophobia *and* racism, because white Poles are subject to 'racialization', which these scholars argue can occur on account of ethnic or migrant status and in the absence of 'putative phenotypical or biological difference'. See Alina Rzepnikowska, 'Racism and Xenophobia Experienced by Polish Migrants in the UK before and after Brexit Vote' (2019) 45 Journal of Ethnic and Migration Studies 61, 64 (citations omitted).

[31] The term 'Third World' is a geopolitical and ideological category that refers to the regions and nations of the world that were once formal European colonies. Rajagopal, amongst others, has explained the general analytical and political significance of the category: Balakrishnan Rajagopal, 'Locating the Third World in Cultural Geography' (1999) 15 Third World Legal Studies 1, 3–4. In 'Migration as Decolonization' I detail the theoretical significance of this category for legal analysis of borders and migration. E Tendayi Achiume, 'Migration as Decolonization' (2019) 71 Stanford Law Review 1509.

[32] Using the work of Franz Fanon, for example, Robert Knox explains the connection between race and class under colonialism, which recalls the discussion of race as structure in Section 2(a), above: '"in the colonial context", race served a role in structuring the distribution of political and economic benefits of imperial exploitation. It was by virtue of their race that white settlers gained access to the material benefits of colonial capitalism': Robert Knox, 'Valuing Race? Stretched Marxism and the Logic of Imperialism' (2016) 4 London Review of International Law 81, 104.

society, just as gender does, such that class and race cannot be collapsed into one another.[33] Furthermore, immigration law and enforcement—including as it relates to refugees and asylum seekers—enacts racialized exclusion through class-based restrictions.[34] The point here is that legal analysis of xenophobic backlash must be careful to probe the multiple, intersecting structures that shape the experiences of refugees, and to take race seriously as one amongst them for the vast majority of the world's refugees who are predominantly from the Global South.[35]

3. The Doctrine and Its Enforcement

a. Race and Ethnicity in the Refugee Convention

For many refugees, their race, ethnicity, and/or religion are the very reason for the persecution that forces them to seek international protection. In the twenty-first century, the conditions confronting Rohingya exemplify ethno-religious discrimination and persecution as root causes of refugee displacement. Over a million Rohingya have fled persecution, ethnic cleansings, and what some UN actors have even described as genocide in Myanmar,[36] a State that has formalized an ethno-nationalist conception of citizenship that officially excludes this group.[37] Through its refugee definition, international refugee law directly responds to racial discrimination as a cause of refugee displacement.[38] Article 1A(2) of the Refugee Convention lists the bases for refugee

[33] See eg European Network Against Racism, 'Racism & Discrimination in Employment in Europe 2013–2017' (2017) <https://ec.europa.eu/migrant-integration/librarydoc/enar-shadow-report-racism-discrimination-in-employment-in-europe-2013–2017> accessed 28 May 2020 (documenting race, class, and gender discrimination in European labour markets, including against migrant women); Val Colic-Peisker, 'The "Visibly Different" Refugees in the Australian Labour Market' in Sonia McKay (ed), *Refugees, Recent Migrants and Employment: Challenging Barriers and Exploring Pathways* (Routledge 2009) (finding that racism helps trap non-white refugees in low-income jobs).

[34] See eg Kevin R Johnson, 'The Intersection of Race and Class in US Immigration Law and Enforcement' (2009) 72(4) Law and Contemporary Problems 1, 4–35.

[35] See eg UNHCR, 'Global Trends: Forced Displacement in 2018' (2019) 14–17 <https://www.unhcr.org/statistics/unhcrstats/5d08d7ee7/unhcr-global-trends-2018.html> accessed 28 May 2020.

[36] See eg Human Rights Council, 'Report of the Independent International Fact-Finding Mission on Myanmar', UN doc A/HRC/39/64 (12 Sept 2018) paras 83–94 (finding that evidence exists sufficient for a finding of Myanmar's genocide, genocidal intent, and responsibility for other international crimes). The International Court of Justice issued provisional measures requiring that Myanmar ensure protection of Rohingya from gross human rights violations, in a case brought by the Gambia alleging violations of the Genocide Convention: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)* (Order) General List No 178 [2020] ICJ 1.

[37] Archana Parashar and Jobair Alam, 'The National Laws of Myanmar: Making of Statelessness for the Rohingya' (2019) 57 International Migration 94.

[38] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/1P/4/ENG/REV.4 (1979, reissued 2019) paras 66–70 (UNHCR Handbook); Pittaway and Bartolomei (n 17) (analysing racial discrimination as a root cause of displacement).

status, which include a well-founded fear of being persecuted for reasons of race, religion, and nationality (amongst others). Also in relation to racial persecution, article 33(1) prohibits States from expelling or returning refugees to 'the frontiers of territories where [their lives or freedom] would be threatened on account of race, religion, [and] nationality' (amongst others). Racial or religious persecution triggers *non-refoulement* obligations.

The drafting history of the Refugee Convention supports a broad interpretation of 'race' as a protected ground.[39] Hathaway and Foster note that a broad conception of race has been the approach adopted by a wide range of Contracting States to the Convention.[40] UNHCR has endorsed this approach, noting that race must be understood 'in its widest sense to include all kinds of ethnic groups',[41] and that racial discrimination 'will frequently amount to persecution in the sense of the 1951 Convention'.[42] At the same time, it has cautioned that belonging to a certain racial group alone will not normally be sufficient to substantiate a claim to refugee status.[43] Von Sternberg explains that racial discrimination has special status under the Refugee Convention: whereas racial discrimination 'will frequently amount to persecution', the same is not true of the other enumerated grounds in article 1A(2).[44]

Notwithstanding the broad conception of race reflected in the Refugee Convention, and the inclusion of religion and ethnicity as bases for refugee status, Pittaway and Bartolomei note that narrow judicial and administrative interpretations often result in discriminatory failure to recognize refugees fleeing racial and ethnic persecution.[45] Von Sternberg similarly notes that in the US, cases recognizing refugees 'based on the race category [have] been sparse', though he notes that there is reason to believe the trend was shifting at the time of his study.[46] He notes also that '[a] comparatively liberal test for establishing racial persecution had been earlier adopted in Canada'.[47] Although instructive, Von Sternberg's study only offers a region-specific analysis. Broader transnational Refugee Convention-based comparative research is required to understand the extent to which refugees successfully vindicate refugee claims on the basis of racial persecution.

Notwithstanding the prohibition of discrimination in the Refugee Convention and its Protocol, discrimination in access to, and enjoyment of, these instruments' protections nonetheless persists. In some cases, discriminatory application of the Convention is explicit and formal in its racialized exclusion of refugees from recognition and protection. For example, in the wake of arrivals in Europe of Syrian refugees in significant numbers, the US and a number of countries in Europe pursued religious and country of origin bans that were plainly discriminatory against refugees fleeing Muslim-majority

[39] See eg James C Hathaway and Michelle Foster, *The Law of Refugee Status* (CUP 2014) 394–5 (noting the historical evidence for this approach, and its consistency with treating race as social construct).

[40] ibid 395–6. [41] UNHCR Handbook (n 38) para 68. [42] ibid para 69.

[43] ibid para 70.

[44] Mark R von Sternberg, *The Grounds of Refugee Protection in the context of International Human Rights and Humanitarian Law: Canadian and United States Law Compared* (Martinus Nijhoff 2002) 21.

[45] Pittaway and Bartolomei (n 17) 22. [46] Von Sternberg (n 44) 21, 24. [47] ibid 24.

countries.[48] In reality, States that are geographically remote from conflict often exercise great discretion in determining not only the numbers, but also the kinds of refugees they admit. In particular, selective admission via refugee resettlement allows States in the Global North to employ racialized, religious, and even gendered preferences in their selections for admission.[49]

Furthermore, as Pittaway and Bartolomei argue in their analysis of the racial implications of global refugee policy that facilitates regional containment of Global South refugees, 'racism remains inherent in this approach, for refugees in the South are most likely to be assisted with basic food and medical supplies, while refugees from the North are often offered resettlement in the North, and or substantial assistance in the rebuilding of infrastructure'.[50] Westra has joined others in critiquing the predominance of long-term refugee encampment of Third World refugees, arguing that the very origins of refugee camps lie in racially discriminatory concentration camps developed under colonialism.[51] Furthermore, scholars have examined how discriminatory stereotypes influence the way that adjudicators in national asylum systems apply and develop standards for conferring refugee status.[52] Emeriau finds that in the French asylum system 'Muslims are 30 percent less likely to be granted asylum compared to otherwise similar Christian applicants'.[53] And others have examined how policy and legislation can itself embed racial and ethnic preferences that arguably violate article 3 of the Refugee Convention.[54] Macklin, for example, has mapped how Canada has used different policy and institutional arrangements (including visas and safe country of origin designations) effectively to exclude European Roma from seeking asylum in Canada.[55] In some countries,

[48] Achiume (n 20) 336–8 n 20 is correct; Banu Gökariksel, 'The Body Politics of Trump's "Muslim Ban" ' (2017) 13 Journal of Middle East Women's Studies 469; 'Big, Bad Visegrad', *The Economist* (26 January 2016). See also Tally Kritzman-Amir and Jaya Ramji-Nogales, 'Nationality Bans' (2019) 2 Illinois Law Review 563 (comparing xenophobic US and Israeli nationality bans targeting refugees).

[49] See Chapter 60 in this volume; Pittaway and Bartolomei (n 17) 21. On discrimination within integration practices, see eg Ashlynn Kendzior, 'Relocation, Regulation and Rigor: How Germany's New Integration Act Violates the Refugee Convention' (2017) 27 Minnesota Journal of International Law 527 (noting how Germany's asylum programme for Syrian refugees places conditions upon employment and permanent residency that violate the Refugee Convention, including completion of an 'integration course' that implicitly '[directs] refugees to a more Western or Christian lifestyle').

[50] Pittaway and Bartolomei (n 17) 28.

[51] Westra (n 2) 256–9. For an alternative genealogy that locates the origins of refugee camps in eighteenth-century prisoner-of-war camps, see Kirsten McConnachie, 'Camps of Containment: A Genealogy of the Refugee Camp' (2016) 7 Humanity 397.

[52] Susan Musarrat Akram, 'Orientalism Revisited in Asylum and Refugee Claims' (2000) 12 IJRL 7.

[53] Mathilde Emeriau, 'Learning to be Unbiased: Evidence from the French Asylum Office', Working Paper (2019) 3 <https://mathildeemeriau.com/files/learningtobeunbiased.pdf> accessed 28 May 2020.

[54] See eg Jamil Dakwar, 'Not So Safe and Sound' (2016) 23 Sur International Journal on Human Rights 49, 53–4 (arguing that the United States' SAFE Act contravenes article 3 of the Refugee Convention); Kritzman-Amir and Ramji-Nogales (n 48) 595–6.

[55] Audrey Macklin, 'A Safe Country to Emulate? Canada and the European Refugee' in Hélène Lambert, Jane McAdam, and Maryellen Fullerton (eds), *The Global Reach of European Refugee Law* (CUP 2013).

scholars have argued that racism is actually institutionalized in asylum law and policy governed by the Refugee Convention.[56]

In addition to racial discrimination through law and formal policy, refugees also confront article 3 discrimination in their encounters with border and refugee policy enforcement officials,[57] and through the policies and practices of humanitarian or protection agencies.[58] Reports of racial discrimination against Haitian or indigenous refugees at the US southern border,[59] or that against African refugees in South Africa, all provide examples.[60] But the empirical scope and extent of the problem of racial discrimination against refugees in the enforcement of the Convention's provisions remains difficult to determine because of the dearth of studies addressing this issue. This is a pressing area for additional multidisciplinary research.

b. Racial and Xenophobic Discrimination under ICERD

Although the Refugee Convention prohibits discriminatory application of its provisions, it does not define prohibited racial discrimination. A different international human rights treaty regime does supply such a definition, in addition to offering the most comprehensive international framework for combatting racial discrimination. This treaty, ICERD, should be understood as central to the international legal terrain concerning race and refugees, and to the protection of refugees from discrimination.[61] However, it is largely absent in litigation on behalf of refugees that nonetheless relies on

[56] See eg Kalia C Randolph, 'Executive Order 13769 and America's Long-Standing Practice of Institutionalized Racial Discrimination towards Refugees and Asylum Seekers' (2017) 47 Stetson Law Review 1.

[57] See eg European Network against Racism and Michela Semprebon, 'Racism, Racial Discrimination, and Migration in Italy 2015/2016', Research Briefing (2016) 5–6 <https://www.enar-eu.org/IMG/pdf/italy_research_briefing_final.pdf> accessed 12 May 2020; *R (European Roma Rights Centre) v Immigration Officer at Prague Airport* [2004] UKHL 55, [2005] 2 AC 1, para 72.

[58] Hathaway, for example, argues that UNHCR has been instrumental in achieving the racialized regional containment of Third World refugees to prevent access of these refugees to countries in the Global North: James C Hathaway, 'A Reconsideration of the Underlying Premise of Refugee Law' (1990) 31 Harvard International Law Journal 129, 157–61. Others have criticized the vastly different resources UNHCR spends on white European refugees relative to black African refugees: T Christian Miller and Ann M Simmons, 'Relief Camps for Africans, Kosovars Worlds Apart', *Los Angeles Times* (21 May 1999).

[59] Malissia Lennox, 'Refugees, Racism, and Reparations: A Critique of the United States' Haitian Immigration Policy' (1993) 45 Stanford Law Review 687; Natsu Taylor Saito, 'Crossing the Border: The Interdependence of Foreign Policy and Racial Justice in the United States' (1998) 1 Yale Human Rights and Development Law Journal 53.

[60] Mónica Inés Cejas, 'Racial Discrimination in Post-Apartheid South Africa: A New Irreducible "Other"?' (2007) 8 Safundi 473.

[61] See eg UN Committee on the Elimination of Racial Discrimination, 'General Recommendation XXX It is 30 on Discrimination against Non-Citizens', UN doc CERD/C/64/Misc.11/Rev.3 (1 October 2002) (including refugees and asylum seekers in the Committee's discussion of the application of the prohibition against racial discrimination to non-citizens).

other international human rights treaties.[62] The limited legal engagement and experimentation with ICERD's application to racial discrimination against refugees is a missed opportunity when considered in light of the protection this and other international human rights law treaties stand to offer. The doctrinal dynamism of international human rights law, in part due to the existence of dedicated treaty bodies such as the Committee for the Elimination of Racial Discrimination (CERD), means that non-discrimination and equality protections based in international human rights law have the potential to play a meaningful role in the lives of refugees.[63]

Article 1(1) of ICERD defines prohibited racial discrimination as 'any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life'.[64] This definition is appropriately broad, such that discrimination on the basis of descent, national origin, or ethnic origin is encompassed by this prohibition. Although article 1(2) carves out distinctions between citizens and non-citizens from the definition of prohibited racial discrimination, CERD has interpreted this provision to mean that restrictions on the basis of citizenship are permissible only when proportionately tailored to achieve a legitimate end, judged in light of ICERD's object and purpose.[65] Furthermore, this prohibition includes both direct and indirect forms of discrimination, meaning that racially disparate conduct or policies which affect human rights violate international human rights law, even in the absence of discriminatory intent or purpose. These and other provisions equip ICERD to provide the basis for an anti-subordination approach to racial discrimination, one that takes seriously the legal dismantling of structures and institutions that perpetuate racial or ethnic underclasses,[66] including for refugees. In the regional context, the Inter-American Court of Human Rights' jurisprudence offers examples of human rights-based anti-racial subordination interventions in this vein.[67]

[62] See eg *ND and NT v Spain*, App Nos 8675/15 and 8697/15 (ECtHR, 3 October 2017); *Hirsi Jamaa and Others v Italy* (2012) 55 EHRR 21; *Khlaifia and Others v Italy*, App No 16483/12 (ECtHR, 15 December 2016). For a recent exception, see Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, and Xenophobia, 'Legal Opinion on India's Obligations under International Law to Not Deport Rohingyas, Amicus Brief to the Indian Supreme Court' (12 July 2019) <https://www.ohchr.org/Documents/Issues/Racism/SR/Amicus/AmicusBrieftoIndianSupremeCourt.pdf> accessed 28 May 2020 (explaining the application of CERD's prohibition against refugees to forced returns of Rohingya refugees from India to Myanmar).

[63] See also Vincent Chetail, 'Armed Conflict and Forced Migration: A Systematic Approach to International Humanitarian Law, Refugee Law, and International Human Rights Law' in Tom Haeck and Alice Priddy (eds), *Oxford Handbook of International Law in Armed Conflict* (OUP 2014).

[64] CERD, art 1(1).

[65] UN Committee on the Elimination of Racial Discrimination (n 61) paras 1–5.

[66] For discussion of a human rights anti-subordination or substantive approach to racial equality and non-discrimination, see Achiume (n 8).

[67] *Case of Expelled Dominicans and Haitians v Dominican Republic*, Inter-American Court of Human Rights Series C No 282 (28 August 2014); *Benito Tide Méndez et al v Dominican Republic*, Inter-American Court of Human Rights Series C No 64/12 (29 March 2012).

ICERD's refugee potential is illustrated by the *Roma Rights* case.[68] The case involved a UK government policy (and related practices) adopted in the wake of increased asylum applications by Roma from the Czech Republic. The UK stationed immigration officers at Prague airport to pre-screen passengers before boarding, and under this programme almost 90 per cent of Roma were denied leave to enter the UK, as compared to only 0.2 per cent of non-Roma.[69] The court's review of the applicable policy guidance concluded that immigration officials treated Roma less favourably because they were Roma, in other words, on grounds of race or ethnicity.[70] The court overturned the government policy as being racially discriminatory, but it failed to reach this decision on the basis of article 3 of the Refugee Convention, which it found not to contain 'a freestanding non discrimination provision'.[71] Instead, the court relied on international human rights law—ICERD and the ICCPR—as well as the *jus cogens* prohibition on racial discrimination under customary international law.[72]

There is, as yet, no international legal definition of xenophobic discrimination, although international actors have deployed existing anti-discrimination frameworks to address it.[73] Xenophobic discrimination is foreignness discrimination, which may manifest as explicit anti-foreigner prejudice, but may also be structural and take the form of individual or multiple overlapping policies and practices that on grounds of foreignness disproportionately undercut enjoyment of human rights.[74] Xenophobic backlash has received attention from UNHCR and from international human rights organizations, which have, amongst other things, proposed guidelines for combatting this discrimination.[75] I have argued that the underlying approach in such initiatives has been a *prejudice approach*, namely, one that restricts its engagement with xenophobic

[68] *Roma Rights* (n 58). No, 58. Another instructive example of human rights possibilities for protection (for refugees who subsequently naturalize) is *Biao v Denmark*, App No 38590/10 (ECtHR, Grand Chamber, 24 May 2016), in which the European Court of Human Rights found a Danish family reunification policy to be prohibited indirect racial discrimination under European human rights law.

[69] *Roma Rights* (n 58) para 34. No, 58.

[70] ibid para 36.

[71] ibid para 43.

[72] ibid paras 44–7.

[73] For an overview of the nascent global anti-xenophobia framework, see Achiume (n 20). In 2015, the UN Human Rights Council tasked its Ad Hoc Committee on Complementary Standards to ICERD with initiating the drafting of an international protocol that would criminalize 'acts of a racist and xenophobic nature', pursuant to a UNGA resolution calling for such a draft. See Human Rights Council, 'Elaboration of Complementary Standards to the International Convention on the Eliminations of All Forms of Racial Discrimination', UN doc A/HRC/34/L.31/Rev.1 (21 March 2017). It is conceivable that the yield of this process might include a legal definition of prohibited xenophobic discrimination.

[74] For a fuller legal analysis of xenophobic discrimination with examples, see Achiume (n 21).

[75] UNHCR, 'Combating Racism, Racial Discrimination, Xenophobia and related Intolerance through a Strategic Approach' (December 2009) <https://www.refworld.org/docid/4b30931d2.html> accessed 28 May 2020; International Labour Office, International Organization for Migration, and UNHCR, 'International Migration, Racism, Discrimination and Xenophobia' (August 2001) <https://www.refworld.org/docid/49353b4d2.html> accessed 28 May 2020; Human Rights First, 'Combatting Xenophobic Violence: A Framework For Action' (4 December 2011) 1 <https://www.humanrightsfirst.org/resource/combating-xenophobic-violence-framework-action> accessed 17 May 2020.

discrimination to contexts characterized by explicit racial or xenophobic animus.[76] A prejudice approach is inadequate for theorizing the racialized impact of law, policy, and practice governing the circumstances of refugees and other non-nationals. Such an approach cannot account for structural xenophobic discrimination, which 'results from the disparate impact of measures on refugees and other groups on account of foreignness, when these measures interact with each other and with context'.[77] Typically, these measures are not ostensibly driven by explicit prejudice, and each on its own may even serve to advance unrelated, meritorious policy goals. An example from South Africa is a series of facially neutral regulations and practices in the housing, employment, education, and financial sector which together have the cumulative effect of depriving refugees of enjoyment of socio-economic rights to which they are legally entitled.[78] Such structural forms of exclusion on account of foreigner status—where they result in discriminatory rights violations—should be understood as prohibited at least under ICERD.[79] All the same, more scholarship is required to interrogate other possible protections against racial and xenophobic discrimination for refugees through ICERD, and through other areas of international law.[80]

4. Regime Analysis

This section revisits the scholarship, mostly by legal scholars, that has examined the structure, history, and development of the international refugee regime in relation to race. Much of this literature marks three prior periods in refugee policy trajectory: the post-Second World War regime creation phase, the Cold War politics phase, and the post-Cold War phase.[81] Scholars argue that international refugee law has always allowed for the protection of some who were racially or ethnically vulnerable, but also entirely excluded others on a discriminatory basis, according to the interests of powerful States.

In 'A Reconsideration of the Underlying Premise of Refugee Law', Hathaway advanced the argument that international refugee law and its policies and institutions function as 'a means of reconciling the sovereign prerogative of States to control

[76] Achiume (n 20) 365–6. A new guidance note released by UNHCR is a welcome development in this regard, and broadens its scope to engage with structural forms of racial and xenophobic discrimination. UNHCR, 'Guidance on Racism and Xenophobia' (2020) <https://www.unhcr.org/protection/operations/5f7c860f4/unhcr-guidance-on-racism-and-xenophobia.html> accessed 18 October 2020.

[77] Achiume (n 21) 337. [78] ibid 337–44. [79] ibid 361–6.

[80] For a recent example focusing on the customary international law prohibition of No, I've added the "of" that was missing. racial discrimination in the context of nationality laws, see Michelle Foster and Timnah Baker, 'Racial Discrimination in Nationality Laws: A Doctrinal Blindspot I fixed it of International Law?' (2020) 11 Columbia Journal of Race and Law (forthcoming). Looks like this is still forthcoming. Also, I think the citation should be for 11 Columbia Journal, not 10 (this would be more consistent with previous issues of the journal, plus see here where the article is cited as 11(1): https://law.unimelb.edu.au/centres/statelessness/research/research-projects/minorities-and-statelessness).

[81] See eg Hathaway (n 59). No, 59.

immigration with the reality of forced migrations of people at risk'.[82] Furthermore, this body of law is, at its core, shaped in accordance with the interests of States.[83] Hathaway's geopolitical account of the history and present of international refugee law detailed the legal and policy of non-entrée regimes through which European countries, North American countries, and Australia achieved the exclusion of refugees from former European colonies, and their containment beyond the Global North. The 'highly selective' definition of refugee States and the allocation of direct control over refugee determination processes had the cumulative effect of producing 'a two-tiered protection scheme that shields Western States from most Third World asylum seekers'.[84] He highlighted, amongst other things, how the race-based migration regimes of the settler colonies influenced the trajectory of the refugee regime to restrict international protection and burden-sharing of refugees to European refugees.[85] The regime excluded Third World, non-white refugees. The confluence of First World State interest meant that the Refugee Convention definition of a refugee, which restricted status to those fleeing events in Europe, by design and effect racialized the very first international legal definition of a refugee.[86] As Oberoi has shown, even at the time of the negotiation and adoption of the Refugee Convention, Third World States protested the discriminatory and exclusionary nature of the scope of the refugee definition.[87] Hathaway argues that the 1967 Protocol, which formally universalized the refugee definition, did not remedy the two-tier system, but instead aided in sustaining it because it retained a limited, Eurocentric definition of the conditions that would qualify individuals for refugee status, and failed to include the forms of hardship Third World involuntary migrants were likely to be fleeing.[88]

To Hathaway's realist geopolitical analysis, Chimni added, amongst other things, an emphasis on the salience of *empire* as one of the factors that have shaped the development of international refugee law and the field of refugee studies. Chimni's canonical 'The Geopolitics of Refugee Studies: A View From the South'[89] highlighted the role of hegemonic States in shaping both the international refugee regime and knowledge production regarding that regime within the field of refugee studies. He joined others in noting that international refugee law and policy following the Cold War shifted from a more permissive exilic basis to one targeted at repatriation, and, as a consequence, restrictive regional containment for which the term 'global apartheid' might

82 ibid 174. 83 ibid 133. 84 ibid 144.

85 ibid 154.

86 For an example of Third World State opposition to the definition adopted in the Refugee Convention on grounds of its discriminatory nature, see Pia Oberoi, 'South Asia and the Creation of the International Refugee Regime' (2001) 19(5) Refuge36, 41.

87 ibid. Third World States were not the only ones to oppose the geographic restrictions built into the refugee definition. For a discussion of the debate amongst 'universalists' and 'Europeanist' State positions, see Irial Glynn, 'The Genesis and Development of Article 1 of the 1951 Refugee Convention' (2012) 25 JRS 134, 138–44; See Chapter 22 in this volume.

88 Hathaway (n 58) 164. 89 Chimni (n 10).

be fit.[90] In this way, the regime treated Third World refugees in an inferior, discriminatory manner when compared to those from Europe. He argued that international refugee scholars, even while critiquing the rise of the non-entrée regime, had also participated in its legitimation by peddling what he called 'the myth of difference', according to which 'the nature and character of refugee flows in the Third World were represented as being radically different from refugee flows in Europe since the end of the First World War. Thereby, an image of a 'normal refugee' was constructed—white, male and anti-communist—which clashed sharply with individuals fleeing the Third World.'[91] In public discourse, Third World refugees were presented as opportunistic migrants intent on abusing a system designed only for worthy refugees. At the same time, First World States pushed away from the refugee resettlement emphasis deployed for First World refugees before and during the Cold War, and towards repatriation of those from the Third World. In Chimni's words, 'as the movement of refugees from the south to the north became the primary preoccupation, and when the cold war ended, the colonial logic of humanitarianism took over'.[92]

In *Asylum and Empire*, Mayblin rightly notes that despite Chimni's fundamental insights, the field of the legal study of refugees seems not to have internalized the implications of his imperial critique of refugee law and policy. Mayblin's own work expands Chimni's analysis by considering the colonial legacy of Third World refugee exclusion still operating through international law's application in national asylum law and policy. She argues that the demonization of Third World persons under colonialism persists in contemporary asylum law and requires legal remediation.[93] She insists that a racial critique of contemporary asylum regimes is incomplete if it cannot reckon with legacies of empire, and how these legacies shape contemporary refugee discourse and practice. Shah's book similarly contributes important analysis to the literature. He carefully charts the racially discriminatory evolution of asylum law, including at the international level, also marking the salience of colonial influences.[94] In an important recent article, Shahabuddin explains how through post-colonial boundaries, international law has contributed to producing the crisis of Rohingya persecution and displacement.[95]

[90] ibid 363, quoting Anthony H Richmond, *Global Apartheid: Refugees, Racism, and the New World Order* (OUP 1994).

[91] Chimni (n 10) 351. This 'myth of difference' was accompanied in refugee policy and studies by analysis that treated the root causes of refugee flows as completely internal to the Third World, thereby ignoring the role of external forces such as neo-colonial dynamics and international financial institutional policy. See also Chapter 22 in this volume.

[92] BS Chimni, 'The Birth of a "Discipline": From Refugee to Forced Migration Studies' (2009) 22 JRS 12, 20.

[93] Lucy Mayblin, *Asylum after Empire: Colonial Legacies in the Politics of Asylum Seeking* (Rowman & Littlefield International 2017).

[94] Prakash Shah, *Refugees, Race and the Legal Concept of Asylum in Britain* (Cavendish 2000) 117–35.

[95] Mohammad Shahabuddin, 'Post-Colonial Boundaries, International Law, and the Making of the Rohingya Crisis in Myanmar' (2019) 9 Asian Journal of International Law 334.

Nessel has shown how the contemporary non-entrée asylum regimes of the US and the European Union racially discriminate against black refugees and asylum seekers.[96] And finally, in relation to xenophobic discrimination, I have argued how gaps in the refugee regime—including many that are intentional—function as levers that exacerbate xenophobic anxiety, increasing the chaos and backlash against refugees, rendering international law part of the very problem of xenophobia.[97]

Whereas Chimni, Hathaway, and others have analysed the geopolitical, and, to an extent, the racial dimensions of the non-entrée regime, Ghezelbash explicitly connects the contemporary transnational legal transfer of these mechanisms to analogous historical legal transfers of mechanisms for race-based immigration that did not directly rely on race in the colonial era.[98] In the latter period, the shared settler colonial interest of the US, Canada, Australia, New Zealand, and South Africa to exclude certain migrants on a racial or ethnic basis fuelled the transnational legal transfer of mechanisms that could achieve this goal in the absence of any reference to race.[99] These mechanisms were landing taxes, passenger-per-ship restrictions, and literacy tests. Ghezelbash argues that a contemporary shared interest amongst Global North countries in excluding asylum seekers and undocumented migrants more generally is similarly fuelling legal transfer of mechanisms that allow these countries to circumvent the obligations of international refugee law.

5. Conclusions: Charting a Research Agenda

In sum, study of race and refugees in international law requires a structural and intersectional conception of race and discrimination. The range of the requisite research agenda for scholarship in international refugee law must include more sustained conceptual, theoretical, and doctrinal engagement with how this law mediates racial equality for refugees. For example, the non-entrée border externalization processes have been critiqued using the human rights and refugee law frameworks mostly on the basis of due process and other grounds, but less so from a racial equality perspective. The two-tier system of refugee protection sustained by the non-entrée regime enforces a racial hierarchy. And while some might quibble about whether or not the First World has an explicit or intentional geopolitical interest in racial hierarchy in refugee protection and admission, the *de facto* outcome of the pursuit of its interests remains the

96 Lori A Nessel, 'Externalized Borders and the Invisible Refugee' (2009) 40 Columbia Human Rights Law Review 625, 643–62, 696–7.

97 Achiume (n 20) 374–90.

98 Daniel Ghezelbash, 'Legal Transfers of Restrictive Immigration Law: A Historical Perspective' (2017) 66 ICLQ 235.

99 ibid 239.

continuing enforcement of exactly such a hierarchy. Can the prohibitions on racial discrimination (in international refugee law and international human rights law) be used to challenge the various pillars of the non-entrée regime, including practices that sustain it, such as racial profiling in border enforcement? Maybe, but maybe not. The answer depends in part on the ways in which existing equality and non-discrimination law is animated in the context of refugees—a process in which scholars have a key role.

As Chimni has noted, method matters considerably where refugee studies is concerned. A purely positivist approach to international refugee law often stands in the way of the worthy ideal he has described as 'legal scholarship which is committed to an inclusionary politics as an integral part of its efforts to state and expound the law'.[100] By way of example, two scholarly traditions stand to contribute significantly to the study of race and refugees from an international legal perspective, although other methods and perspectives should, of course, also be brought to bear. The first is Third World Approaches to International Law (TWAIL), which, amongst other things, engages international law from the perspective of the lived history and present of the Third World.[101] The vast majority of refugees today are from the Third World. A TWAIL approach lends itself to analysis of race as a structure that operates transnationally and according to imperial logics—allocating benefits and privileges while facilitating forms of exploitation on terms set by hegemonic States and their transnational corporations. Critical Race Theory (CRT) is a second tradition that offers scholars the tools to engage with law as itself implicated in the social construction of race, and as an artefact that can compound racial subordination, including through facially neutral institutions and mechanisms.[102] The point is not that all refugee scholars must adopt a TWAIL or CRT perspective, but rather that these two approaches offer useful methodological resources for scholarship on race, refugees, and international law.

[100] Chimni (n 10) 355.

[101] Antony Anghie and BS Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts' (2003) 2 Chinese Journal of International Law 77, 77–87.

[102] For a useful overview of CRT, see Devon Carbado, 'Critical What What?' (2011) 43 Connecticut Law Review 1593.

CHAPTER 3

A FEMINIST APPRAISAL OF INTERNATIONAL REFUGEE LAW

ADRIENNE ANDERSON
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1. Introduction

Due in large part to feminist advocacy and scholarship, the Refugee Convention now reflects gender concerns. Feminist critique of the original male bias inherent in refugee frameworks, together with the receptiveness of UNHCR, certain courts, and legislatures to these efforts, has resulted in important normative movement.[1] However, as will be explored, the precise meaning and content of gender is arguably less understood, and the full implications of a gendered approach have not been implemented.

This chapter appraises the gendering of refugee law, examining both feminist scholarship on cases involving persecution of people for their non-conformity to stereotypical gender roles, and wider questions related to refugee experiences. Accordingly, it is concerned with women and men who act outside patriarchal and gender-stereotypical bounds, including genderqueer, lesbian, gay, bisexual, transgender[2] and intersex (LGBTIQ+) people.

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[1] Efrat Arbel, Catherine Dauvergne, and Jenni Millbank, 'Introduction' in Efrat Arbel, Catherine Dauvergne, and Jenni Millbank (eds), *Gender in Refugee Law: From the Margins to the Centre* (Routledge 2014) 1, 3–4, 14.

[2] Transgender persons may be persecuted as a result of non-conformity with gender norms/identities because they challenge the expected modes of behaviour of their biological sex and associated socially constructed roles: Nicole LaViolette, 'Sexual Orientation, Gender Identity and the Refugee Determination

While there is an evident link between gender and sexual orientation/gender identity (SOGI),[3] this chapter primarily focuses on the experiences of women, though the overlap with the experiences of transgender and genderqueer persons, explored thoroughly in other chapters, is noted throughout.[4]

Taking a dynamic approach, the chapter tracks both normative movement and physical/geographical movement of refugees. In Section 2 we evaluate scholarship, policy, and law to assess whether refugee law has continued to interrogate and update its understanding of 'gender'. Given the rich scholarship on the topic, this section focuses on the refugee definition in individual refugee status determination (RSD).[5] Section 3 then broadens our focus, examining gender through the stages of the imagined refugee journey, from flight, to reception, to durable solutions. We ask in particular whether this process has been the subject of a gendered legal enquiry. We conclude with directions for gendered legal scholarship, across all aspects of the refugee cycle.

a. Gender Defined

UNHCR and other international bodies emphasize the socially constructed nature of gender, which 'refers to the relationship between women and men based on socially or culturally constructed and defined identities, status, roles and responsibilities that are assigned to one sex or another'[6] and which is historically and culturally contingent.[7] Gender-related persecution is not only persecution on account of being a woman,

Process in Canada' (2017) 18(1) Annals of Spiru Haret University Journalism Studies 5, 14–15. There is some limited scholarship that has considered the particular challenges for transgender refugees in establishing refugee status: see eg Jhana Bach, 'Assessing Transgender Asylum Claims' (2013) 42 Forced Migration Review 34; Victoria Neilson, 'Unchartered Territory: Choosing an Effective Approach in Transgender-Based Asylum Claims' (2005) 32 Fordham Urban Law Journal 265.

[3] UNHCR, 'Guidelines on International Protection 9: Claims to Refugee Status and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees', HCR/GIP/12/09 (23 October 2013) para 13. See also Nicole LaViolette '"UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity": A Critical Commentary' (2010) 22 IJRL 173, 181–3.

[4] See Chapters 4 and 42 in this volume.

[5] There is, however, little feminist analysis of the expanded definitions in regional instruments. Nor has there been significant scholarship on the gendered implications of *procedural* aspects of RSD, including of derivative refugee status, which female applicants often receive by virtue of a male family member's claim. See n 42.

[6] UNHCR, 'Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees', HCR/GIP/02/01 (7 May 2002) para 3. See further Committee on the Elimination of Discrimination against Women, 'General Recommendation No 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women', UN doc CEDAW/C/GC/28 (16 December 2010) para 5.

[7] UNHCR (n 6).

a man, or an intersex person,[8] but also includes harm to 'persons who refuse to conform to social criteria specific to men and women'.[9] Institutional and sociocultural systems of power determine gender norms and roles. These gendered lines are often policed with violence. Those who fall outside the gender binary, change gender, or do not conform to culturally-determined masculine and feminine roles are often targets of discrimination and violence. Therefore, gendered persecution must entail a 'contextual analysis of gender, gender relations and gender equality'.[10]

Gender is thus defined by contradistinction to sex.[11] However, the two concepts have been often conflated, particularly in the jurisprudence,[12] to deleterious effect. This conceptual confusion, coupled with the fact that women more commonly experience gender-related persecution, has led to an emphasis on *women* (and any risk arising from biological attributes) in gender claims. However, 'gender' is not to be equated 'solely with women's activities, beliefs, goals, or needs';[13] nor is it about women's (or men's, or transgender person's) experiences *per se*, but rather 'experiences *arising from* gendered power relations'.[14] Taking gender to be synonymous with women[15] has thus at times obscured the proper focus of these claims and prevented the application of gender-sensitive approaches to a broader range of cases including cases not involving gender-specific forms of harm.[16] As identified by feminist scholars, and elaborated below, the reading of 'gender' *qua* women has resulted in an overemphasis on the particular social group (PSG) ground (with its attendant conceptual challenges).[17] This has, in turn, contributed to the treatment of women as a homogeneous group of passive

[8] Intersex 'refers to a condition in which an individual is born with reproductive or sexual anatomy and/or chromosome patterns that do not seem to fit typical biological notions of being male or female': UNHCR (n 3) para 10.

[9] Nicole LaViolette, 'Gender-Related Refugee Claims: Expanding the Scope of the Canadian Guidelines' (2007) 19 IJRL 169, 182.

[10] Heaven Crawley, '[En]gendering International Refugee Protection: Are We There Yet?' in Bruce Burson and David J Cantor (eds), *Human Rights and the Refugee Definition: Comparative Legal Practice and Theory* (Brill 2016) 322, 348.

[11] UNHCR (n 6) para 3. While the emphasis on the social construction of gender is important, feminist theorist Judith Butler for example has argued that sex is also socially constructed. Judith Butler, *Gender Trouble: Tenth Anniversary Edition* (2nd edn, Routledge 1999) 9–11; in the refugee law context see Alice Edwards, 'Transitioning Gender: Feminist Engagement with International Refugee Law and Policy 1950–2010' (2010) 29(2) RSQ 21, 37; LaViolette (n 9) 182 fn 77.

[12] Alice Edwards (n 11) 37.

[13] Doreen Indra, 'Not a "Room of One's Own": Engendering Forced Migration Knowledge and Practice' in Doreen Indra (ed), *Engendering Forced Migration: Theory and Practice* (Berghahn Books 1999) 1, 2.

[14] Crawley (n 10) 325 (emphasis added).

[15] Feminists and advocates for women's rights also use gender as a synonym for women in international human rights law: Crawley (n 10) 342, citing Hilary Charlesworth, 'Not Waving but Drowning: Gender Mainstreaming and Human Rights in the United Nations' (2005) 18 Harvard Human Rights Journal 1.

[16] See Chapter 40 in this volume.

[17] ibid.

victims of (often sexual) violence, and the failure to appreciate fully the gendered aspects of men's and transgender persons' claims.

From the late 1980s, literature on gender and refugee law has proliferated,[18] so much so that it has been assumed that 'gender in refugee law "has been done"'.[19] But the concept of gender itself needs interrogation, particularly in light of new scholarship in fields such as gender and masculinity studies. We turn now to the historical treatment of gender in refugee law before returning to consider these questions in more detail.

2. Normative Movement(s)

a. Refugee Arrangements Pre-1951

The Refugee Convention definition's omission of sex or gender reflects its historical antecedents. Throughout the 1920s and 1930s, various League of Nations' instruments relating to refugees provided for specific ethnic or national groups, including Russian, Armenian, Assyrian, German, and Austrian refugees.[20] Inter- and post-war instruments continued to define 'refugee' by reference to certain demographic categories. From 1943 a more open yet still categorical approach appeared.[21]

While women and LGBTIQ+ persons certainly numbered among the post-Second World War displaced, the omission of sex/gender might be partially attributable to the focus on post-war political circumstances, particularly the group of refugees who were unable or unwilling to return for political reasons.[22] Like its precursors, article 1A(2) adopted category-based criteria, initially tied to events in a particular place and time. As Firth and Mauthe have observed, the definition reflected the situation of those in need of protection at the time the Convention was formulated; it 'was drafted with the situation

[18] See eg Audrey Macklin, 'Refugee Women and the Imperative of Categories' (1995) 17 Human Rights Quarterly 213; Deborah Anker, 'Refugee Status and Violence against Women in the "Domestic Sphere": The Non-State Actor Question' (2001) 15 Georgetown Immigration Law Journal 391; Deborah Anker, 'Refugee Law, Gender, and the Human Rights Paradigm' (2002) 15 *Harvard Human Rights Journal* 133; Thomas Spijkerboer, *Gender and Refugee Status* (Ashgate 2000); Heaven Crawley, *Refugees and Gender: Law and Process* (Jordan Publishing 2001); LaViolette (n 9); more recently Arbel, Dauvergne, and Millbank (n 1).

[19] Observed in Arbel, Dauvergne, and Millbank (n 1) 10.

[20] See Chapter 1 in this volume.

[21] See Tommie Sjöberg, *The Powers and the Persecuted: The Refugee Problem and the Intergovernmental Committee on Refugees (IGCR), 1938–1947* (Lund University Press 1991) 146–7. The International Refugee Organization (IRO) defined 'refugee' by reference to specific, though no longer exclusively ethnic/national, categories: Constitution of the IRO (adopted 15 December 1946, entered into force 20 August 1948) 18 UNTS 3, annex I.

[22] United Nations, 'Yearbook of the United Nations, 1946–47' (1947) 164–70. See also Louise Holborn, *The International Refugee Organization: A Specialized Agency of the United Nations, its History and Work, 1946–1952* (OUP 1956) 206; see Spijkerboer (n 18) 45 ff, noting the continuing resonance of the traditional conception of the 'political refugee' in approaches to RSD.

of male refugees in mind'.[23] This much is indicated by the Convention's *travaux préparatoires* which reveal the drafters' doubts that there would be any cases of sex-based persecution.[24] Subsequent regional refugee instruments similarly omit references to sex or gender.[25]

In the present day, it is not disputed that questions of gender, gender identity, and sexuality can be addressed within the Refugee Convention framework and that a gender perspective infuses all aspects of the refugee definition. There has been, then, a profound normative shift from the Convention's gender-blind origins. The following section outlines the contributions of feminist scholarship to this normative movement, as well as feminist critiques that query its depth and endurance.[26]

b. Normative Progress

From the late 1980s, feminist academics and advocates began identifying the gendered nature of the international law system. The critique was both structural and normative: a seminal piece by Charlesworth, Chinkin, and Wright argued that 'both the structures of international lawmaking and the content of the rules of international law privilege men'.[27] Early feminist critiques of refugee law mirrored their international law precursors. It was argued that women's experiences of persecution often took place in the 'private' sphere,[28] placing them outside the reach of refugee law at the time. Advocacy during the 1980s centred on the addition of sex or gender to the refugee definition as counter-measure.

While at times appeals to rework the refugee definition resurface,[29] pragmatic and principled reasons have weighed against this becoming the dominant theoretical approach. As early as 1985, UNHCR's Executive Committee, in combination with civil

[23] Georgina Firth and Barbara Mauthe, 'Refugee Law, Gender and the Concept of Personhood' (2013) 25 IJRL 470, 471–2; Macklin (n 18).

[24] Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 'Summary Record of the Fifth Meeting' (19 November 1951) UN doc A/CONF.2/SR.5 (President Larsen, Denmark).

[25] See Edwards (n 11) 23 in relation to the OAU Convention.

[26] A more detailed history has been chronicled elsewhere, see eg Edwards (n 11); Spijkerboer (n 18) 163–71; Firth and Mauthe (n 23) 475–80.

[27] Hilary Charlesworth, Christine Chinkin, and Shelley Wright, 'Feminist Approaches to International Law' (1991) 85 AJIL 613, 614–15. See also Alice Edwards, *Violence against Women under International Human Rights Law* (CUP 2011) 37, 43–7.

[28] Doreen Indra, 'Gender: A Key Dimension of the Refugee Experience' (1987) 6(3) Refuge: Canada's Journal on Refugees 3, 3 but note Jacqueline Greatbatch's critique of the assumption that persecution of women takes place solely in the private sphere in Jacqueline Greatbatch, 'The Gender Difference: Feminist Critiques of Refugee Discourse' (1989) 1 IJRL 518, 520.

[29] See eg Melanie Randall, 'Particularized Social Groups and Categorical Imperatives in Refugee Law: State Failures to Recognize Gender and the Legal Reception of Gender Persecution Claims in Canada, the United Kingdom, and the United States' (2015) 23 American University Journal of Gender, Social Policy and the Law 529.

society, spearheaded an interpretative approach,[30] advocating that the Convention encompassed gender-related persecution when construed in a gender-sensitive manner. This inclusive interpretation is consistent with the human rights object and purpose of the Convention.[31] The push to recognize that 'women's rights are human rights' translated as a deliberate decision to interpret aspects of the refugee definition through the prism of international human rights law given its (relative) gains in recognizing gender inequality.[32] By arguing that gender-specific harms such as rape, female genital mutilation (FGM), and domestic violence were human rights violations, feminists 'sought to mitigate th[e] bias in the interpretation of the refugee definition by making women's experiences of persecution in the "private" sphere more visible'.[33]

The principal success of this strategy has been the gendered interpretation of 'being persecuted'. There is now recognition that forms of harm disproportionately affecting women (and in relation to some forms of harm, sexual minorities) such as rape and sexual violence, trafficking, FGM, and domestic violence are serious forms of harm amounting to persecution; and, due to jurisprudential developments, that States have responsibility for failures to protect against these forms of harm.[34]

Moreover, there has been recognition, particularly among higher levels of the judiciary that, for the purposes of a PSG claim, sex/gender is an innate characteristic and that individuals who transgress gendered social mores, including women and members of sexual minorities, might be considered part of a particular social group.[35] Together these represent important shifts in understanding that have allowed women and men[36] in individual cases to bring themselves within the Refugee Convention's protection when they might have otherwise been excluded. The proliferation of State guidelines in some parts of the world illustrates the extent of this achievement.[37] Some States have entrenched sex/gender as an additional ground of persecution in national legislation while in others it is a relevant factor in determining membership of a PSG.[38]

[30] UNHCR Executive Committee Conclusion No 39 (XXXVI), 'Refugee Women and International Protection' (1985) para k; UNHCR (n 6) para 6.

[31] Rodger Haines, 'Gender-related Persecution' in Erika Feller, Volker Türk, and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (CUP 2003) 322–4.

[32] Anker 2002 (n 18) 138–9; Edwards, 'Age and Gender Dimensions in International Refugee Law' in Feller, Türk and Nicholson (n 31) 46, 49–50; UNHCR Executive Committee Conclusion No 77 (XLVI), 'International Protection' (1995) para g.

[33] Crawley (n 10) 324.

[34] *Islam v Secretary of State for the Home Department Immigration Appeal Tribunal, ex parte Shah* [1999] UKHL 20 [1999] 2 AC 629; *Refugee Appeal No 71427* [2000] NZRSAA 337 (16 August 2000); *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1.

[35] However, decision-makers in most jurisdictions continue to deny groups defined more broadly as 'women', preferring more narrowly confined groups. See Chapter 40 in this volume.

[36] Namely men who do not conform to gender roles, such as gay, bisexual, or transgender men.

[37] See eg Immigration and Refugee Board of Canada, 'Chairperson Guidelines 4: Women Refugee Claimants Fearing Gender-Related Persecution' (13 November 1996); United States Bureau of Citizenship and Immigration Services, 'Considerations for Asylum Officers Adjudicating Asylum Claims from Women' (26 May 1995).

[38] In the first category see eg El Salvador, Guatemala, Kenya, Mexico, Nicaragua, Paraguay, Spain, Sweden, Uganda, Uruguay, and Venezuela; in the second see eg recast EU Qualification Directive,

These gains have led to a sense that gender concerns have been adequately conceptualized in policy and practice. However, as highlighted in the scholarship canvassed below, consistently producing a gender-sensitive interpretation of the refugee definition, particularly at primary levels of decision-making, and on matters other than the meaning of 'being persecuted' and the PSG ground, remains more elusive.[39]

c. Progress Stalled

A substantial body of scholarship has identified inadequate and incomplete implementation of a gender perspective in practice. There is both a concern that gender gains have not been adequately implemented in jurisprudence and that ongoing theoretical gaps and misconceptions about gender exist which affect decision-making. For example, despite the increase in literature on SOGI claims and acknowledgement in key quarters of the relevance of gender to these cases,[40] scholarship and decision-making in this area has been 'insufficiently *gendered*' in that the connection between gender and sexuality has been rarely explored and women and men's different experiences of persecution on the basis of sexuality neglected.[41]

In addition, there are substantial gaps in our knowledge of the extent to which gender is adequately addressed in RSD undertaken by UNHCR—itself a significant actor in the field, due to its adjudicator role across the globe. This is an issue ripe for research and analysis, particularly from the perspective of post-colonial feminism given that the UNHCR's RSD work mainly takes place in the Global South.

In terms of the scholarship that has examined RSD, focusing mainly in the Global North, it is widely acknowledged that the implementation of existing policy guidance—as well as of leading common law decisions—has been inconsistent. Barriers to the successful recognition of many gender claims remain, including in relation to issues of access to RSD procedures;[42] the establishment of credibility;[43] satisfaction of the nexus requirement, that is, whether the harm feared was 'for reasons' of gender; the assessment of State protection particularly in cases involving persecution by a non-State

Germany, Ireland, and South Africa. See also CGRS, Review of Gender, Child, and LGBTI Asylum Guidelines and Case Law in Foreign Jurisdictions: A Resource for US Attorneys (May 2014) <https://cgrs.uchastings.edu/sites/default/files/Review_Foreign_Gender_Guidelines_Caselaw_0.pdf> accessed 10 June 2020.

[39] With some limited exceptions. See eg *Refugee Appeal No 76044* [2008] NZRSAA 80 (11 September 2008) on the interpretation of the political opinion ground.

[40] See eg UNHCR (n 6); UNHCR (n 3).

[41] Arbel, Dauvergne, and Millbank (n 1) 5. See also LaViolette (n 2) 20, 21.

[42] For example, in individualized RSD processes, the principal applicant for refugee status in many cases is the male head-of-household, with female applicants receiving derivative status, Jane Freedman, *Gendering the International Asylum and Refugee Debate* (2nd edn, Palgrave MacMillan 2015) 27, 86–7.

[43] See eg Debora Singer, 'Falling at Each Hurdle: Assessing the Credibility of Women's Asylum Claims in Europe' in Arbel, Dauvergne, and Millbank (n 1) 98. See further Chapter 40 in this volume.

actor;[44] the gender-sensitive interpretation of race, religion, nationality, and political opinion grounds; and significantly, given the reliance on it, the proper application of the PSG ground.

Another issue is the almost automatic default to using PSG in gender cases, further distancing gender claimants from the 'mainstream' claimant who can benefit from the application of any or all of the Convention grounds and consequently, in many cases, a more straightforward analysis of the nexus clause. As has been identified in relation to women's claims, for example, the failure to recognize the political nature of gender persecution,[45] or the relevance of other overlapping grounds of persecution, has contributed to a focus on gender to the exclusion of other aspects of identity and experiences.[46] Gender is not the only form of discrimination that may be relevant to the assessment of risk; it is often linked with, or compounded by, discrimination on the basis of other factors such as age, race/ethnicity, class, caste, religion, or sexual orientation.

As indicated at the outset, misconceptions of the meaning of 'gender' have contributed to difficulties in assessing gender claims. For example, equating 'gender' exclusively or largely with being a woman—as opposed to contingent on power relations and non-conformity to gender norms—has engendered a particular construction of women, particularly women from the Global South, as innately vulnerable. This has been roundly criticized,[47] and constitutes a barrier to bringing claims within the refugee definition, whereby women have had to conform to a particular narrative of submissiveness in order to be successful.[48] The gendered and racialized nature of RSD has contributed to the one-dimensional, problematic portrayal of women in some cases. It has been observed that these harmful narratives have permitted and reinforced the tendency of decision-makers to privilege claims involving 'exotic' forms of harm (such as FGM) over pervasive forms of violence which are present in decision-makers' own societies (in the Global North), such as domestic violence.[49]

Post-colonial scholars have argued that exploring forms of oppression which intersect with gender, such as race and poverty, would counteract the framing of women as a homogeneous group because it would allow for recognition of the differences among women and the varying levels of power that different groups of women may hold in particular contexts.[50] In refugee law, it has been identified that an intersectional

[44] Firth and Mauthe (n 23) 473.

[45] Arbel, Dauvergne, and Millbank (n 1) 7.

[46] Crawley (n 18); Susan Kneebone, 'Women within the Refugee Construct: "Exclusionary Inclusion" in Policy and Practice—the Australian Experience' (2005) 17 IJRL 7, 31. SOGI claims may also be assessed using a political opinion analysis, see UNHCR (n 3) para 50.

[47] See eg Kneebone (n 45). See also Thomas Spijkerboer, 'Gender, Sexuality, Asylum and European Human Rights' (2018) 29 Law and Critique 221, 227.

[48] Sherene Razack, 'Domestic Violence as Gender Persecution: Policing the Borders of Nation, Race, and Gender' (1995) 8 Canadian Journal of Women and the Law 45; Efrat Arbel, 'The Culture of Rights Protection in Canadian Refugee Law: Examining the Domestic Violence Cases' (2013) 58 McGill Law Journal 729.

[49] See eg Macklin (n 18), and Chapter 40 in this volume.

[50] See eg Razack (n 48). For an anti-essentialist critique more generally, see eg Chandra Talpade Mohanty, 'Under Western Eyes: Feminist Scholarship and Colonial Discourses' (1988) 30 Feminist

approach would enable a more contextualized analysis of the causes of gender-related persecution, with the impact of colonialism, racism, and other country-specific factors on the perpetration of, and vulnerability to, harm able to be assessed. In this way, the simplistic portrayal of certain religions, cultures, or States as particularly violent and patriarchal, and the women from these countries as inherently vulnerable, may be avoided.[51]

There has been a lack of focus, particularly in the jurisprudence, on others (ie male, transgender, lesbian, gay, and bisexual claimants) affected by both gender and other types of power relations, including those reflecting additional structures of discrimination such as heterosexism which might compound claimants' risk, affect their experiences of harm, and their ability to seek protection.[52]

In response, some scholars have long advocated for a shift away from PSG as the default ground and towards the political opinion ground by focusing on the political aspects of gendered harm through analyses of gender relations and other structural causes of inequality[53] rather than assumptions based on fixed notions of 'traditional' politics and sex/gender.

Some commentators have discussed the reframing of gender claims to include the experiences of men as victims of stereotypical constructions of masculinity.[54] It has been accepted in policy, scholarship and—in a more limited way—jurisprudence, that men are also the subject of gender-based persecution in some circumstances. In jurisprudence, this is most often recognized in relation to sexuality claims;[55] however, there is more to be done to recognize the gendered discrimination suffered by transgender and genderqueer people, as well as the fact that men may be punished when they challenge, or do not conform to, gender norms.[56] Examples of forms of gendered harm identified in the literature as affecting men include the imposition

Review 61. Intersectionality 'refers to particular forms of intersecting oppressions, for example intersections of race and gender, or of sexuality and nation' and that 'oppressions work together in producing injustice': Patricia Hill Collins, *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment* (Routledge Classics 2008) 6. The term was coined by Kimberlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' [1989] University of Chicago Legal Forum 139.

[51] Razack (n 48) 50, 86–8.

[52] See UNHCR (n 3) para 3. See also Committee on the Elimination of Discrimination against Women, 'General Recommendation No 32 on the Gender-Related Dimensions of Refugee Status, Asylum, Nationality and Statelessness of Women', UN doc CEDAW/C/GC/32 (14 November 2014) paras 6, 16.

[53] Crawley (n 10) 345–6; Kneebone (n 45) 41–2; Spijkerboer (n 18) 91–3. cf in relation to domestic violence claims, Audrey Macklin, 'Cross-Border Shopping for Ideas: A Critical Review of United States, Canadian, and Australian Approaches to Gender-Related Asylum Claims' (1998) 13 Georgetown Immigration Law Journal 25, 59.

[54] LaViolette (n 9) 204; Edwards (n 11) 40–4. However, as Edwards notes at 41, questions remain around the effect that acknowledging men's victimization may have on the women's rights agenda.

[55] Edwards (n 32) 54–5. See also Arbel, Dauvergne, and Millbank (n 1) 5 on the link between gender and sexuality claims.

[56] See Catherine Dauvergne, 'Toward a New Framework for Understanding Political Opinion' (2016) 37 Michigan Journal of International Law 243, 287–8.

of compulsory military service, honour crimes,[57] forced sterilization, human trafficking, and forced labour.[58]

Others have suggested applying feminist and gender scholarship to a broader range of topics within refugee law than those which have obvious gender implications, such as exclusion,[59] or, in the analogous human rights context, for the use of queer theory in conjunction with feminist advocacy to move beyond male–female binary thinking and better reflect developments in the construction of gender and sex.[60]

Given the dissonances between academic commentary, policy guidance, and implementation, we might conclude that the normative shift within RSD—while significant—has not been as revolutionary as perhaps perceived. Nevertheless, the refugee definition has been the subject of a (partial) gendering project with relative success. It is equally important, however, to consider other aspects of the refugee cycle in an assessment of gender reform, given that those who reach formalized status determination mechanisms are only a percentage of the refugee population.

3. Physical Movement

In this section we widen our gaze to examine the extent to which refugee law and scholarship have engaged a gendered analysis of the stages in refugee movement, focusing on three key sites: 'flight', refugee reception, and resettlement. While RSD has been (perhaps inevitably) dominated by feminist *legal* scholarship, such analysis is much less prevalent, even largely absent, in some aspects of the wider refugee experience. The refugee 'journey' is characterized by containment, with the ability to flee, to move onwards in search of adequate protection, and to experience freedom on arrival in a putative country of 'refuge', constrained in many respects. Yet, the extent to which this containment has been subjected to a feminist analysis varies across issues and disciplinary perspectives.

We acknowledge that most refugees do not leave their home country, remaining *in situ* often as internally displaced persons, and that this is gendered, as is widely accepted in scholarship.[61]

57 LaViolette (n 9) 205–7.

58 Edwards (n 11) 41.

59 Kate Ogg, 'The Future of Feminist Engagement with Refugee Law: From the Margins to the Centre and Out of the "Pink Ghetto"' in Susan Harris-Rimmer and Kate Ogg (eds), *Research Handbook on Feminist Engagement with International Law* (Edward Elgar Publishing 2019) 175.

60 Kathryn McNeilly, 'Sex/Gender is Fluid, What Now for Feminism and International Human Rights Law? A Call to Queer the Foundations' in Harris-Rimmer and Ogg (n 59) 430.

61 Arbel, Dauvergne, and Millbank (n 1); See also Kopalapillai Amirthalingam and Rajith WD Lakshman, 'Impact of Displacement on Women and Female-Headed Households: A Mixed Method Analysis with a Microeconomic Touch' (2013) 26 JRS 26. We note that the capacity to leave may also be gendered, and also reflect intersectional disadvantage, as in the case of the feminization of Algerian forced migration in which 'highly skilled women' fled during the so-called 'Black Decade': see Latefa Guemar, 'The Feminization of Forced Migration during Conflict: The Complex Experiences of Algerian Women who Fled in the "Black Decade"' (2018) 32 JRS 482.

a. Transit

The increasing securitization of borders—especially by countries in the Global North—is a well-documented and analysed phenomenon, given the significant impact of such policies on access to refugee protection over recent decades.[62] However, until recently, there has been very little scholarship on the gendered nature or impact of transit and border crossings.

Over the past decade scholars from disciplines including criminology, political science, and social science have begun to rectify the lacuna in knowledge of the gendered nature of border crossings.[63] Research has been conducted in relation to specific important border sites, for example in Europe, the United States, and Australia, and has concluded that 'extra-legal border crossing has significant gendered dimensions'.[64] While it is acknowledged that there is insufficient data on the prevalence and proportion of women in the overall number of border crossings,[65] as well as inadequate accounting for 'border deaths',[66] recent qualitative research has provided important insight into the particular experiences and risks entailed in irregular movement for women.[67]

Such research has revealed that women as a group 'face a higher risk of death at the physical frontier than at internal border sites during illegalized travel',[68] that pregnancy is 'a feature of women who die by drowning while attempting to cross a border irregularly',[69] and that of the known deaths (in the case of the EU and Australia) the proportion of women who drowned was larger than the proportion of men who drowned.[70] Research focused on those who survived the journey has revealed the significantly heightened vulnerability of women to violence, especially sexualized violence, during the journey.[71] Research conducted of women in transit in Greece revealed that the lack of access to basic facilities and services, while presenting a source of insecurity for all migrants, had a particularly severe impact on women given their heightened risk of

[62] See Chapter 27 in this volume.

[63] The work of a new group, Feminist Researchers Against Borders, is significant, see Anna Carastathis, Natalie Kouri-Towe, Gada Mahrouse, and Leila Whitley, 'Introduction' (2018) 34(1) Refuge: Canada's Journal on Refugees 3–15.

[64] Sharon Pickering and Brandy Cochrane, 'Irregular Border-Crossing Deaths and Gender: Where, How and Why Women Die Crossing Borders' (2012) 17 Theoretical Criminology 27, 33.

[65] ibid 33. [66] ibid 30–2.

[67] Alison F Gerard and Sharon Pickering, 'Gender, Securitization and Transit: Refugee Women and the Journey to the EU' (2013) 27 JRS 338, 342.

[68] Pickering and Cochrane (n 64) 28.

[69] Sharon Pickering, *Women, Borders and Violence*: *Current Issues in Asylum, Forced Migration, and Trafficking* (Springer 2010) cited in Pickering and Cochrane (n 64) 33; Jørgen Carling, 'Migration Control and Migrant Fatalities at the Spanish–African Borders' (2007) 41 International Migration Review 316.

[70] Pickering and Cochrane (n 64) 37.

[71] Jane Freedman, 'Engendering Security at the Borders of Europe: Women Migrants and the Mediterranean "Crisis"' (2016) 29 JRS 568, 576. See also Nurcan Özgür-Baklacioglu, 'Gendering Migration Across Euro-Mediterranean Borders: Syria Refugee Women on the Way to Europe' (2017) 4(2) Turkish Journal of Middle Eastern Studies 75, 88. See also Gerard and Pickering (n 67) 346.

sexual violence.[72] The impact of irregular migration on families, and specifically changes in relations of power and gender relations within families, has been found to manifest in increased risk of domestic violence.[73]

Some scholarship has explicitly recognized the causal connection between tightening securitization policies of developed States and increased irregular border crossings by women, for example in the US and Australia.[74] In the context of the EU, Gerard and Pickering conclude that there 'is a strong relationship between the sites of women's experiences of violence and the efforts of the EU to secure its external borders to exclude illegalized travellers'.[75]

Notwithstanding these insights offered by a variety of scholarly disciplines, there are two important limitations. First, the scholarship that has been produced is largely limited to examining the plight of women in transit rather than gendering transit, which would entail a more structural critique.[76] Secondly, there has been little analysis of the significance of these findings in legal discourse. While there is a wealth of scholarship analysing the legality of the myriad practices employed by developed States such as boat pushbacks, offshore processing, concepts such as 'country of first arrival' and 'safe third country', and immigration detention, very little attention has been paid to the impact of gender on States' legal obligations under international and regional refugee and human rights law in this context. One notable exception is the scholarship pertaining to the Safe Third Country Agreement (STCA) between the US and Canada, in relation to which many legal scholars pointed at its inception to the potentially disproportionate impact on women of the implementation of this agreement.[77] Yet, even in that context, Arbel notes that, nine years after the STCA's implementation, the 'adverse gender consequences . . . are so difficult to identify'.[78] Accordingly she opines that in mapping a future agenda for refugee scholarship and advocacy in relation to the STCA the question is not so much 'what about gender' but rather 'where is gender?'.[79]

The question 'where is gender?' is in our view one that must be posed in relation to legal scholarship on transit and border crossings more broadly. It is an area in which gender has most certainly not 'been done',[80] but rather is ripe for considered analysis.

[72] Freedman (n 71) 578. [73] ibid.

[74] See Pickering and Cochrane (n 64) 35. Eileen Pittaway and Linda Bartolomei, 'Refugees, Race and Gender: The Multiple Discrimination against Refugee Women' (2002) 21(1) Dialogue 16.

[75] Gerard and Pickering (n 67) 355.

[76] cf B Camminga, *Transgender Refugees and the Imagined South Africa: Bodies over Borders and Borders over Bodies* (Palgrave Macmillan 2019) 2.

[77] See eg Audrey Macklin, 'Disappearing Refugees: Reflections on the Canada–US Safe Third Country Agreement' (2005) 36 Columbia Human Rights Law Review 365; Karen Musalo and Marcelle Rice, 'The Implementation of the One-Year Bar to Asylum' (2008) 31 Hastings International and Comparative Law Review 693.

[78] Efrat Arbel, 'Gendered Border Crossings' in Arbel, Dauvergne, and Millbank (n 1) 243, 258.

[79] ibid 258–9. [80] Arbel, Dauvergne, and Millbank (n 1) 10.

b. Refugee Reception

For a range of reasons, including the effectiveness of the so-called non-entrée measures of developed States, most refugees remain in their own region, often in situations of severely constrained freedom, including in refugee camps. Very large numbers of refugees are hosted by States that are not party to the Refugee Convention but permit the presence of UNHCR and other agencies to protect and deliver humanitarian aid.

While most refugees today do not live in camps,[81] their role as a conspicuous, accessible and long-standing feature of the refugee system has enabled much research on their nature and the lived experience of those within camps, including from a gendered perspective. In this scholarship, the particular vulnerability of women and girls to sexual violence and exploitation is explored, perpetrated often by the very agencies vested with the obligation to protect them.[82] Other research has explored the particular needs of refugee women living in camps in specific contexts.[83] Some scholarship expanded its focus beyond women and girls to undertake a truly gendered analysis. Fiddian-Qasmiyeh's important work, for example, challenges 'idealized depictions' of Sahrawi camps as characterized by gender equality, encouraging a critique of the accepted discourse and an examination of its motivations and implications.[84]

Legal analysis of the refugee camps has emerged more recently, with the work of leading scholars such as Janmyr rapidly addressing the previous lacuna in legal analysis.[85] In terms of a specific gendered legal analysis, Donnelly and Muthiah's recent study on States' obligations under international law to protect women and girls in camps offers an important contribution.[86]

Scholars from a range of disciplines have also examined the gendered nature of reception, identifying, for example, the gendered nature of vulnerability to sexual and

[81] Rosenberg explained in 2016 that 'nearly 60% of all refugees now live in cities, a trend that will continue as camps increasingly become an option of last resort': Jennifer S Rosenberg, '"This Group is Essential to Our Survival": Urban Refugees and Community-based Protection' (2016) 53 Forced Migration Review 14.

[82] See eg Olusola Oladeji, Bibilola Oladeji, Dick Chamla, Garba Safiyanu, Sule Mele, Helni Mshelia, and John Agbor, 'Sexual Violence-Related Pregnancy among Internally Displaced Women in an Internally Displaced Persons Camp in Northeast Nigeria' (2018) Journal of Interpersonal Violence 1; Mariastella Pulvirenti and Gail Mason, 'Resilience and Survival: Refugee Women and Violence' (2011) 23 Current Issues in Criminal Justice 37.

[83] See eg Nof Nasser-Eddin, 'Palestinian Refugees: A Gendered Perspective' (2015) 3 Exchanges: The Warwick Research Journal 96–112.

[84] Elena Fiddian-Qasmiyah, *The Ideal Refugees: Gender, Islam, and the Sahrawi Politics of Survival* (Syracuse University Press 2014). See also Kerrie James, 'Domestic Violence within Refugee Families: Intersecting Patriarchal Culture and the Refugee Experience' (2010) 31 Australian and New Zealand Journal of Family Therapy 275; Holly Ritchie, 'Gender and Enterprise in Fragile Refugee Settings: Female Empowerment amidst Male Emasculation—A Challenge to Local Integration?' (2018) 42(1) Disasters S40.

[85] Maja Janmyr, *Protecting Civilians in Refugee Camps: Unwilling and Unable States, UNHCR and International Responsibility* (Brill 2014).

[86] Elizabeth R Donnelly and Viknes Muthiah, 'Protecting Women and Girls in Refugee Camps: States' Obligations under International Law' (2019) <http://www.lse.ac.uk/women-peace-security/assets/documents/2019/LSE-WPS-refugees-camp.pdf> accessed 23 May 2020.

gender-based violence in European reception centres.[87] Studies of the gendered experience of urban refugees and asylum seekers have similarly predominantly focused on gender-based violence,[88] although compelling work of Fassin, Wilhelm-Solomon, and Segatti on 'asylum as a form of life' in South Africa highlights that gender is an 'essential element' in terms of 'migration patterns, increased vulnerabilities, specific opportunities and particular experiences'.[89] Recent scholarship has also begun to examine the particular reception and integration challenges for transgender refugees.[90] Turner's important work is unique in highlighting the assumptions of many humanitarian actors that refugee men can 'perform versions of masculinity that endow them with power, agency and independence', rendering their position as 'objects of humanitarian care' uncertain.[91]

Yet, as in the case of camps, refugee law scholars have tended to overlook the implications of gendered experiences of reception for international law. However, Ogg's innovative work on 'protection from refuge' examines domestic jurisprudence that has begun to explore the constraints under international law on State discretion to deport refugees back to camps and other reception conditions that fall short of minimum standards. While such jurisprudence has not primarily focused on women, Ogg has noted the ramifications for this reasoning in the context of women.[92]

c. Resettlement

Resettlement has long served an important function as one of the core durable solutions for refugees, as well as historically one of the only methods (albeit very limited) of

[87] See eg Ines Keygnaert and others, 'Sexual and Gender-based Violence in the European Asylum and Reception Sector: A Perpetuum Mobile?' (2014) 25(1) European Journal of Public Health 90. For a different focus of study, see Ruth Abraham, Lars Lien, and Ingrid Hanssen, 'Coping, Resilience and Posttraumatic Growth among Eritrean Female Refugees Living in Norwegian Asylum Reception Centres: A Qualitative Study' (2018) 64 International Journal of Social Psychiatry 359.

[88] See eg Diane F Morof, 'A Cross-Sectional Survey on Gender-based Violence and Mental Health among Female Refugees and Asylum Seekers in Kampala, Uganda' (2014) 127 International Journal of Gynaecology and Obstetrics 138; Ines Keygnaert, Nicole Vettenburg, and Marleen Temmerman, 'Hidden Violence is Silent Rape: Sexual and Gender-based Violence in Refugees, Asylum Seekers and Undocumented Migrants in Belgium and the Netherlands' (2012) 14 Culture, Health and Sexuality 505.

[89] Didier Fassin, Matthew Wilhelm-Solomon, and Aurelia Segatti, 'Asylum as a Form of Life: The Politics and Experience of Indeterminacy in South Africa' (2017) 58 Current Anthropology 160, 175.

[90] Emma Bassetti, 'Integration Challenges Faced by Transgender Refugees in Italy' in Arzu Güler, Maryna Shevtsova, and Denise Venturi (eds), *LGBTI Asylum Seekers and Refugees from a Legal and Political Perspective* (Springer 2019); Marshall K Cheney and others, 'Living Outside the Gender Box in Mexico: Testimony of Transgender Mexican Asylum Seekers' (2017) 107 American Journal of Public Health 1644.

[91] Lewis Turner, 'Syrian Refugee Men as Objects of Humanitarian Care' (2019) 21 International Feminist Journal of Politics 595, 611.

[92] Kate Ogg, 'Protection from "Refuge": On What Legal Grounds Will a Refugee be Saved from Camp Life?' (2016) 28 IJRL 384.

rebalancing the disproportionate distribution of refugees as between the Global South and Global North.[93] Given its long history, it is not surprising that there is a wealth of scholarship exploring various aspects of resettlement, particularly in the key resettlement countries of the US, Canada, and Australia.

The rich and varied research explores particular populations within a resettlement country,[94] or compares experiences of similar groups of refugees in different resettlement countries,[95] analyses and identifies the risk factors for ongoing trauma or obstacles to resettlement,[96] and conversely identifies positive integration practices.[97] Within this scholarship, much attention has been focused on the particular needs, susceptibilities, and appropriate integration support for resettled female refugees. There is also important work on assessing the success of the UNHCR's women-at-risk scheme, which is specifically incorporated into the programmes of some resettlement countries.[98] This wide range of research emerges from a variety of disciplines, spanning both the social sciences and humanities through to medical fields including psychiatry and psychology.[99]

A notable exception, however, is legal analysis of resettlement schemes, whether generally or from a feminist perspective. There is a lack of legal research on how resettlement decisions are undertaken, both in terms of process and legitimacy, or the basis on

[93] See Chapter 60 in this volume. For an excellent analysis of the gendered nature of durable solutions, see Elena Fiddian-Qasmiyeh, 'Gender and Forced Migration' in Elena Fiddian-Qasmiyeh, Gil Loescher, Katy Long, and Nando Sigona (eds), *Oxford Handbook of Refugees and Forced Migration Studies* (OUP 2014).

[94] See eg Linda Bartolomei, Rebecca Eckert, and Eileen Pittaway, '"What Happens There . . . Follows Us Here": Resettled but Still at Risk: Refugee Women and Girls in Australia' (2014) 30(2) Refuge 45.

[95] Hurriyet Babacan, *Women, Citizenship and Migration: The Resettlement of Vietnamese Refugees in Australia and Japan* (Nakanishiya Publishers 2011).

[96] See eg Suzy Casimiro, Peter Hancock, and Jeremy Northcote, 'Isolation and Insecurity: Resettlement Issues among Muslim Refugee Women in Perth, Western Australia' (2007) 42 Australian Journal of Social Issues 55; Olivia Catolico, 'Psychological Well-Being of Cambodian Women in Resettlement' (1997) 19(4) Advances in Nursing Science 75.

[97] See eg Reed Coughlan and Sarah E Hermes, 'The Palliative Role of Green Space for Somali Bantu Women Refugees in Displacement and Resettlement' (2016) 14 Journal of Immigrant and Refugee Studies 141; Marianne Holm Pedersen, 'Going on a Class Journey: The Inclusion and Exclusion of Iraqi Refugees in Denmark' (2012) 38 Journal of Ethnic and Migration Studies 1101.

[98] Eileen Pittaway and Linda Bartolomei, 'Refugee Women at Risk: Evaluating a Program' (2005) 17(3/4) The Sydney Papers 102; Lyn Vromans and others, '"Her Cry Is My Cry": Resettlement Experiences of Refugee Women at Risk Recently Resettled in Australia' (2018) 158 Public Health 149.

[99] For an excellent overview of the state of scholarship on resettlement, see Adèle Garnier, Lilian Lyra Jubilut, and Kristin Bergtora Sandvik, 'Introduction: Refugee Resettlement as Humanitarian Governance: Power Dynamics' in Adèle Garnier, Lilian Lyra Jubilut, and Kristin Bergtora Sandvik (eds), *Refugee Resettlement : Power, Politics, and Humanitarian Governance* (Berghahn Books 2018) 3. It is important to note, however, that little research has studied those left behind, or the burdens on the resettled to provide for them. For an exception, see Cindy Horst, 'Connected Lives: Somalis in Minneapolis, Family Responsibilities and the Migration Dreams of Relatives', UNHCR New Issues in Refugee Research, Research Paper 124 (2006).

which they are made.[100] In many respects this is due to the absence of either a clear legal obligation or governing criteria regarding resettlement in the Refugee Convention or in international law more broadly. It is often thus viewed as a discretionary programme that is not strictly trammelled by international law. Extensive guidance is provided in the UNHCR Resettlement Handbook, which draws on international refugee and human rights law, UNHCR guidelines, and State practice. Yet, there is little critique of the Handbook, nor research that explores compliance with the Handbook of resettlement decision-making in practice, or that brings a feminist lens to the legal issues at the foundation of resettlement schemes.

On the other hand, there is an increasingly significant body of legal scholarship on international responsibility-sharing, solidarity, and international cooperation—concepts that underpin the foundation of resettlement schemes. While some of this scholarship pertains to the deterrence-based measures discussed above, more recent scholarship attempts to scope out a vision for a positive, truly cooperative model of responsibility-sharing.

The most significant development in decades in terms of international cooperation is the New York Declaration on Refugees, whose principles are now embodied in the Global Compact on Refugees, which establishes, *inter alia*, a three-year plan for settlement. While women and girls are mentioned throughout the Global Compact, there has been virtually no legal analysis of this significant development from a gendered perspective.[101] On the other hand, the Global Compact for Migration has been the subject of feminist critique, which questions its protective framing,[102] repeated references to women's vulnerability to sexual violence and human trafficking,[103] and lack of focus and development of women's rights.[104] These and other significant questions, including how the Global Compact on Refugees comports with international legal frameworks particularly relevant to women, might be examined in a considered feminist analysis of the Global Compacts.[105]

[100] A rare exception is Tom de Boer and Marjoleine Zieck, 'The Legal Abyss of Discretion in the Resettlement of Refugees: Cherry-Picking and the Lack of Due Process in the EU' (2020) 32 IJRL 1.

[101] The IJRL's 2018 special issue on the Global Compacts on Refugees and Migration (vol 30(4)), has 25 articles and an editorial dedicated to the Global Compact on Refugees, none of which are dedicated to gender or mention gender in any significant way. We note, however, that there is an important developing project on women and the Global Compact underway at the University of New South Wales.

[102] Including multiple references to 'women-and-children' and women's 'special needs', see Jenna L Hennebry, 'The Global Compact for Migration: From Gender-rhetoric to Gender-responsive?' (2018) 18 Global Social Policy 332.

[103] ibid. See also Carolina Gottardo and Paola Cyment, 'The Global Compact for Migration: What Could It Mean for Women and Gender Relations?' (2019) 27 Gender and Development 67.

[104] Gottardo and Cyment (n 103).

[105] See eg Diane Otto, 'The Exile of Inclusion: Reflections on Gender Issues in International Law over the Last Decade' (2009) 10 Melbourne Journal of International Law 11; Diane Otto, 'Power and Danger: Feminist Engagement with International Law through the UN Security Council' (2010) 32 The Australian Feminist Law Journal 97.

4. Directions for Future Normative Movement

Much feminist scholarship examines gender-inclusive interpretations of the refugee definition. However, practice lags behind, as reflected in out-dated gender guidance. The US's gender guidelines were issued in 1995, and Canada's last updated in 1996. UNHCR's Gender Guidelines date back to 2002 and are focused on gender-related persecution alone. Even more recent State guidelines continue the trend of largely focusing on women and girls. Australia's 2015 guidelines are largely procedural[106] while the UK's 2018 guidelines embody a retreat from a prior, more progressive stance.[107] This stagnation perhaps reflects an institutional complacency, in spite of scholarly developments in feminist and gender scholarship.

Gendered knowledge gaps persist. Although States are obliged to provide UNHCR with implementation information,[108] as Arbel, Dauvergne, and Millbank observe, very few provide gender disaggregated data.[109] UNHCR reveals that 48 per cent of refugees are women,[110] but little else is known. How can we adequately and seriously address an issue if we do not understand its scope? Research and advocacy around the gendered collection and interpretation of data is an appropriate starting point, particularly given calls in the Global Compact on Refugees for States and other stakeholders to collect and analyse gender disaggregated data.[111]

The main challenge is how 'women and men [are] represented and analytically characterized',[112] how, rather than whether, a full range of experiences is included. To meet this challenge, we must engage in research and advocacy with new and innovative methods and seek out neglected narratives to allow better appreciation of gendered harms and persecution involving women, men, and transgender people. The endeavour should engage not only with legal scholarship, but more broadly with feminist theories,

[106] Administrative Appeals Tribunal, 'Migration and Refugee Division: Guidelines on Gender' (July 2015) <https://www.aat.gov.au/AAT/media/AAT/Files/MRD%20documents/Legislation%20Policies%20Guidelines/Guidelines-on-Gender.pdf> access 31 March 2020.

[107] UK Home Office, 'Gender Issues in the Asylum Claim: Version 3.0' (April 2018) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/699703/gender-issues-in-the-asylum-claim-v3.pdf> accessed 31 March 2020. This latest version arguably represents an improvement on its 2010 equivalent, but contrast these with the former Immigration Appellate Authority, 'Asylum Gender Guidelines' (November 2000).

[108] Article 35 of the Refugee Convention.

[109] Arbel, Dauvergne, and Millbank (n 1) 8. For example, Freedman notes, in discussing the so-called Mediterranean 'crisis', 'there is no sex-disaggregated data for asylum applicants from Syria across the EU member states . . .': Freedman (n 71) 572.

[110] See UNHCR, 'Global Trends: 2018' (2019) <https://www.unhcr.org/uk/statistics/unhcrstats/5d08d7ee7/unhcr-global-trends-2018.html> accessed 23 May 2020.

[111] Global Compact on Refugees, para 46.

[112] Heaven Crawley, 'Women and Refugee Status: Beyond the Public/Private Dichotomy in UK Asylum Policy' in Indra (n 13) 309, citing Indra (n 28) 4 (emphasis omitted).

masculinity studies, and queer theory. A gendered interpretation of refugee law must revisit the concept of gender, and its relation to sex. There is more work to be done to apply intersectional theory to refugee law[113] and to understand men and transgender/genderqueer persons as victims of stereotypical gender norms, while being conscious of the need to continue to improve on the assessment of gender in women's claims.

While much scholarly attention is focused on the pressing concerns of refugee containment,[114] these topics offer the opportunity to reinvigorate gender scholarship and advocacy to counter State conservatism and the effects of a wider anti-feminist backlash. It is not a question of prioritizing *either* gender concerns *or* responses to anti-immigration policies. They do not exist in isolation from each other.[115] Moreover, a gendered approach to the broader refugee framework, in particular responsibility-sharing, alternatives to resettlement, and State accountability for wrongdoing, is urgently needed. As the Global Compact on Refugees acknowledges in relation to alternatives to resettlement, 'there is a need to ensure that such pathways are made available on a more systematic, organized, sustainable and *gender-responsive basis*'.[116]

In sum, further normative movement across the refugee law framework is needed; we are not yet at the end of the journey. This renewed effort requires greater empirical and interdisciplinary engagement.

[113] See brief attention in Firth and Mauthe (n 23) 495–6. See also Razack (n 48).
[114] Arbel, Dauvergne, and Millbank (n 1) 14.
[115] Crawley (n 10) 334.
[116] Global Compact on Refugees, para 94 (emphasis added).

CHAPTER 4

QUEERING INTERNATIONAL REFUGEE LAW

NUNO FERREIRA AND CARMELO DANISI*

1. Setting the Scene

Asylum law and policy, sexual orientation, and gender identity are nowadays intrinsically interwoven. Queer migration scholars have explored how sexuality and gender relate with several other characteristics in constituting the scope and nature of migration,[1] and refugees are no exception to this.[2] Although human rights have been increasingly recognized irrespective of one's sexual orientation and gender identity (SOGI) at international, regional, and domestic levels,[3] legal frameworks do not yet tackle violations of such rights effectively. As a result, members of SOGI minorities may be forced to flee their countries of origin, often making SOGI-based asylum claims in host countries.

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[1] Eithne Luibhéid, 'Queer/Migration: An Unruly Body of Scholarship' (2008) 14 GLQ: A Journal of Lesbian and Gay Studies 169.

[2] For a thorough collection of wide-ranging sources on SOGI asylum and refugees, see 'Database' (*SOGICA* 2020) <http://www.sogica.org/en/sogica-database/> accessed 13 October 2020.

[3] Human Rights Council, 'Human Rights, Sexual Orientation and Gender Identity,' UN doc A/HRC/RES/17/19 (14 July 2011); 'The Yogyakarta Principles. The Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity' (March 2007) <http://yogyakartaprinciples.org/wp-content/uploads/2016/08/principles_en.pdf> accessed 13 October 2020.

Since the inception of the Refugee Convention, there has been a continuous battle for recognition of SOGI claims within a system that was not designed with SOGI minorities in mind.

SOGI asylum claims raise particular issues in the context of any legal system, including the role of private actors and widespread social stigma, the role of legislation criminalizing same-sex conduct in the country of origin, the assessment of credibility, and the assessment of internal relocation alternatives.[4] Moreover, some evidence suggests these claims are disproportionately refused.[5] Scholars from various disciplines have explored how SOGI claims are often treated in an inappropriate and stereotyped way in several jurisdictions, at legal, cultural, and social levels, with particular repercussions in relation to claimants' proof of membership of a particular social group (PSG), risk of persecution, and credibility.[6]

Geographical location, political context, and internal governance structures all considerably influence the way domestic systems construct their asylum frameworks, including SOGI asylum claims. Several elements of the international refugee and human rights legal frameworks have progressively been used as the basis of SOGI claims, including the Refugee Convention, the ICCPR, the ECHR, and the EU Common European Asylum System (CEAS).[7] Even if not always at the speed or standard desired, human rights instruments and bodies have been instrumental in developing a stronger line of argument for SOGI asylum claims, which reinforces the need to read international refugee law (IRL) in the light of (SOGI-relevant) human rights.[8]

There are no reliable statistics on the global number of SOGI claimants, but it is clear, based on numerous media and NGO reports and estimates, that thousands of SOGI claimants seek international protection every year.[9] This occurs both through claimants submitting to the refugee status determination (RSD) process in host countries, and through resettlement.[10] The great majority of these individuals, however, are forced to take the asylum route, making journeys that are often very dangerous in their search for a safe(r) destination.[11]

[4] Carmelo Danisi, Moira Dustin, Nuno Ferreira, and Nina Held, *Queering Asylum in Europe: Legal and Social Experiences of Seeking International Protection on Grounds of Sexual Orientation and Gender Identity* (Springer 2021) ch 7.

[5] UKLGIG, 'Failing the Grade. Home Office Initial Decisions on Lesbian and Gay Claims for Asylum' (UKLGIG 2010).

[6] Sabine Jansen and Thomas Spijkerboer, 'Fleeing Homophobia: Asylum Claims Related to Sexual Orientation and Gender Identity in Europe' (Vrije Universiteit Amsterdam 2011); Moira Dustin, 'Many Rivers to Cross: The Recognition of LGBTQI Asylum in the UK' (2018) 30 IJRL 104.

[7] To our knowledge, the Inter-American Court of Human Rights, Inter-American Commission on Human Rights and African Commission on Human and Peoples' Rights have not yet dealt directly with a SOGI asylum claim.

[8] Danisi, Dustin, Ferreira, and Held (n 4) ch 3.

[9] See Jansen and Spijkerboer (n 6) 15–16.

[10] Jennifer Rumbach, 'Towards Inclusive Resettlement for LGBTI Refugees' (2013) 42 Forced Migration Review 40.

[11] Danisi, Dustin, Ferreira, and Held (n 4) ch 5.

While popular perception is that people escape to countries in the Global North from homophobia and transphobia in countries in the Global South, that perception has increasingly been contested. It is now better understood that members of SOGI minorities in the Global South flee to other countries in the region, on the same continent—also within the Global South. In the African context, refugees from Uganda, for example, often escape to Kenya;[12] South Africa, in particular Cape Town, has become the destination of many SOGI refugees from across the African continent,[13] including gender identity refugees.[14] In the Middle East, Syrian, Iraqi, and Iranian SOGI refugees often find refuge in Lebanon and Jordan.[15] In the Eastern Asian context, where countries have historically been less compliant with international refugee obligations, some countries such as South Korea have also gradually opened their doors to SOGI refugees.[16] Finally, in the Americas, Mexico and Costa Rica have become key destinations of Salvadoran, Guatemalan, and Honduran SOGI claimants,[17] and Brazil has a large community of African and Latin American SOGI refugees.[18] Without disregarding the homophobia, transphobia, and xenophobia that SOGI refugees face in these countries—including within the RSD process—it is undeniable that such movements implode the vision of the Global North welcoming and protecting SOGI minorities persecuted in the Global South.

No matter where in the globe, in the process of adjudicating SOGI claims, asylum authorities engage in the 'biopolitical practice of classifying asylum seekers, rendering sexual identities visible and thus amenable to the State's regulatory oversight'.[19] We thus witness a two-way process: the asylum system simultaneously incorporates and excludes SOGI claimants and refugees, thus harbouring strong tensions between queering and

[12] Gitta Zomorodi, 'Responding to LGBT Forced Migration in East Africa' (2016) 52 Forced Migration Review 91.

[13] Ali Bhagat, 'Forced (Queer) Migration and Everyday Violence: The Geographies of Life, Death, and Access in Cape Town' (2018) 89 Geoforum 155.

[14] B Camminga, ' "Gender Refugees" in South Africa: The "Common-Sense" Paradox' (2018) 53 Africa Spectrum 89.

[15] Ryan Greenwood and Alex Randall, 'Treading Softly: Responding to LGBTI Syrian Refugees in Jordan' (The Institute for Middle East Studies Capstone Paper Series 2015); Henri Myrttinen, Lana Khattab, and Charbel Maydaa, ' "Trust No One, Beware of Everyone": Vulnerabilities of LGBTI Refugees in Lebanon', in Jane Freedman, Zeynep Kivilcim, and Nurcan Özgür Baklcioglu (eds), *A Gendered Approach to the Syrian Refugee Crisis* (Routledge 2017).

[16] Andrew Wolman, 'Asylum for Persecuted Homosexuals in the Republic of Korea' (2013) 42 Forced Migration Review 30.

[17] Dennis Castillo Fuentes, 'Necesidades de Las Poblaciones LGBTIQ En Desplazamiento Forzado—Costa Rica' (Instituto sobre Migración y Refugio LGBTIQ para Centroamérica 2019); Ailsa Winton, ' "I've Got to Go Somewhere": Queer Displacement in Northern Central America and Southern Mexico' in Arzu Güler, Maryna Shevtsova, and Denise Venturi (eds), *LGBTI Asylum Seekers and Refugees from a Legal and Political Perspective* (Springer 2019).

[18] Vítor Lopes Andrade, 'Gay African Refugees in Brazil: A Diaspora?' in Harjinder Singh Majhail and Sinan Dogan (eds), *World of Diasporas: Different Perceptions on the Concept of Diaspora* (Brill-Rodopi 2019).

[19] Stefan Vogler, 'Legally Queer: The Construction of Sexuality in LGBQ Asylum Claims' (2016) 50 Law & Society Review 856, 883.

de-queering asylum law and policy. To analyse these processes, we need to call and build on the body of queer literature that explores the socio-cultural nature, diversity, and fluidity of gender and sexuality,[20] and uses 'queer' as a tool of critique in the field of migration.[21] Although there are considerable differences between queer scholars, the key message in this theoretical field is that sex, gender, and sexuality—and the relationship between these—are not natural or biologically determined, but rather socially, legally and historically produced, thus being the product of social processes that are constantly changing. Simultaneously, queer theorists destabilize hetero/homo, male/female and masculine/feminine binaries by decoupling sex, gender, and sexual desire, and assert that one's sexual orientation is fluid and may change throughout one's lifetime. Applying a queer lens allows us to see 'the fundamental ways in which sexuality undergirds the organization and boundaries of nation-state, citizenship and national identity projects' and how 'migration and sexuality [are connected] to transnational capitalism and neo-imperialism'.[22] This approach is further strengthened by an awareness that SOGI interacts with a range of other characteristics such as ethnicity, age, religion, and social class, to shape one's experiences, as queer intersectional studies rightly point out.[23] Drawing from queer literature insights, we can better understand where SOGI asylum law and policy is failing queer refugees, identify scope for improvement, and set out future avenues. A queer theoretical lens will also support our analysis of whether human rights frameworks sufficiently protect SOGI refugees, namely by moving beyond the right to privacy and vindicating a thorough application of the right to equality.

In this contribution, we use a queer lens to explore key aspects of SOGI asylum that ultimately question the heteronormative relations of power in asylum law and to highlight how legal and policy frameworks may be reformed. In Section 2, we consider how refugee law has been progressively queered. In Section 3, we expand on the range of legal and policy instruments that play a role in this queering process, and, in Section 4, we analyse the key actors that have contributed to the development of SOGI refugee law. In Section 5, we concentrate on the specific needs of SOGI asylum claimants and refugees, and in Section 6, we explore future avenues of reform.

Before proceeding, a few notes on terminological choices. First, we opted for 'asylum claimant' as opposed to 'asylum seeker' owing to the increasingly negative charge the latter expression has gained in popular discourses. Secondly, we favour 'SOGI asylum claim' to 'LGBTIQ+ asylum claim', in order to focus on characteristics rather than

[20] eg Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge 1990); Michael Warner (ed), *Fear of a Queer Planet: Queer Politics and Social Theory* (University of Minnesota Press 1993); Eve Kosofsky Sedgwick, *Epistemology of the Closet* (Updated with a New Preface) (University of California Press 2008).

[21] Bina Fernandez, 'Queer Border Crossers: Pragmatic Complicities, Indiscretions and Subversions' in Diane Otto (ed), *Queering International Law: Possibilities, Alliances, Complicities, Risks* (Routledge 2017).

[22] David AB Murray, 'Real Queer: "Authentic" LGBT Refugee Claimants and Homonationalism in the Canadian Refugee System' (2014) 56 Anthropologica 21, 23.

[23] Yvette Taylor, Sally Hines, and Mark E Casey, *Theorizing Intersectionality and Sexuality* (Palgrave Macmillan 2010); Danisi, Dustin, Ferreira, and Held (n 4) ch 3.

Western-biased identities and identifiers.[24] Thirdly, although sexual orientation and gender identity are separate characteristics, they raise connected issues,[25] namely in relation to individuals 'failing to conform to gender-prescribed social norms and mores or for claiming their rights'.[26]

2. Integrating SOGI into Refugee Law

The Refugee Convention was produced mainly to address the plight of (male) political activists and members of religious/ethnic minorities victimized by European mid-twentieth-century fascist regimes.[27] Although SOGI minorities were persecuted by the Nazi regime,[28] SOGI minorities were not the object of explicit consideration during the *travaux préparatoires* of the Refugee Convention,[29] an omission that has been critiqued by commentators.[30] SOGI minorities waited three decades to see their claims for international protection acknowledged by legal systems. It has slowly become legal dogma that SOGI minorities fall within a PSG,[31] with only very rare instances of decision-makers finding it difficult to connect SOGI to one of the Refugee Convention grounds.[32] Nonetheless, the dominance of the PSG ground in SOGI asylum claims has the cost of neglecting other aspects of the lives of SOGI minorities—their political activism, religious beliefs, ethnicity, etc—and the very political nature of their non-conforming identities and expressions, thus reducing SOGI claimants to unidimensional individuals, defined only by their SOGI.[33]

[24] Characteristics such as sexual characteristics (or intersex variations) and gender expression are also relevant in this context, so it would also have been appropriate to use the acronym SOGIESC (sexual orientation, gender identity and expression, and sexual characteristics), but we have opted for SOGI for being a more widely used—but still encompassing—acronym.

[25] UNHCR, 'Guidelines on International Protection: Gender-Related Persecution within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol relating to the Status of Refugees', HCR/GIP/02/01 (7 May 2020).

[26] CEDAW, 'General Recommendation No 32 on the Gender-Related Dimensions of Refugee Status, Asylum, Nationality and Statelessness of Women', UN doc CEDAW/C/GC/32 (14 November 2014) para 15.

[27] Satvinder Juss, 'Recognising Transnational Refugee Law' (2018) TLI *Think!* Paper 14/2018.

[28] Günter Grau and Claudia Shoppmann (eds), *The Hidden Holocaust? Gay and Lesbian Persecution in Germany 1933–45* (Routledge 2013).

[29] UNHCR, *The Refugee Convention, 1951: The Travaux Préparatoires Analysed with a Commentary by Dr Paul Weis* (1990) 36.

[30] Jane McAdam, 'Rethinking the Origins of "Persecution" in Refugee Law' (2014) 25 IJRL 667.

[31] Tim Sahliu Braimah, 'Divorcing Sexual Orientation from Religion and Politics: Utilizing the Convention Grounds of Religion and Political Opinion in Same-Sex Oriented Asylum Claims' (2015) 27 IJRL 481.

[32] Tribunal of Palermo (Italy), decision of 31 May 2017.

[33] Françoise Stichelbaut, 'L'application de la Convention sur les réfugiés aux demandeuses d'asile lesbiennes: de quel genre parlons-nous?' (2009) 28 Nouvelles Questions Feministes 66, 70.

It was not until the 1980s that national jurisdictions started granting international protection—including refugee status—to SOGI minorities under the PSG ground. The gradual but steady acknowledgement of SOGI as a ground for asylum that followed is the consequence of a combination of elements, including sociocultural factors (growing movements on 'gay rights' and the fight against AIDS); institutional and personnel changes in asylum systems; incremental progress in asylum authorities' procedures and policies; theoretical breakthroughs (especially feminist and queer theories); international and supranational legal and policy advancements; as well as the growing recognition of SOGI-related rights claims.[34] Yet, this trajectory has been full of challenges and moments of regression, owing to increasingly vocal movements of a political and religious reactionary nature fostering an environment hostile to migrants (including refugees) and SOGI minorities.[35]

Furthermore, asylum systems may be willing to protect the 'gay refugee', but only to a certain extent: the conception of 'gay refugee' adopted is deeply impregnated by Western gay culture, shaped by white middle classes in urban areas, thus severely constrained socially, temporally, and spatially.[36] Domestic asylum systems become power apparatuses aimed at sorting and sanctioning sexual identities, thus claiming the right to determine which gender and sexuality performances are legitimate.[37] This authentication exercise obscures emotion, desire, and feeling, which fall victim to 'a largely ethnocentric administrative method of verification'.[38] In clear tension with the insights of queer scholarship that SOGI are anything but immutable, these systems determine that sexuality is 'fixed, deep-rooted, hidden but visualizable and narratable'.[39]

Moreover, SOGI asylum adjudication tends to prioritize identity (through a Western lens) over conduct, which clashes with the way many claimants experience and express their SOGI in light of their socio-cultural background and personal preferences. In this process, 'the legal system both reflects the dynamics of sexual stratification within our culture and influences them through its own internal developments'.[40] Simultaneously, asylum systems determine who are the 'real' queer refugees, and 'this privileged configuration of sexual orientation reflects a particular historical configuration of gendered, raced and classed interests and experiences',[41] necessarily intertwined with

[34] Ahmed Hamila, 'Les persécutions liées à l'orientation sexuelle: un "nouveau" motif pour octroyer le statut de réfugié en Belgique?' (2019) 38 Politique et Sociétés 157, 160–1; Carolina Kobelinsky, 'Juger l'homosexualité' (*La vie des idées*, 17 December 2015) <https://laviedesidees.fr/Juger-l-homosexualite-attribuer-l-asile.html> accessed 28 April 2020.

[35] Marie-Bénédicte Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (OUP 2015).

[36] Carolina Kobelinsky, 'L'asile gay: jurisprudence de l'intime à la Cour nationale du droit d'asile' (2012) 82 Droit et société 583, 599.

[37] Maja Hertoghs and Willem Schinkel, 'The State's Sexual Desires: The Performance of Sexuality in the Dutch Asylum Procedure' (2018) 47 Theory and Society 691.

[38] Senthorun Raj, 'Affective Displacements: Understanding Emotions and Sexualities in Refugee Law' (2011) 36 Alternative Law Journal 177, 177.

[39] Hertoghs and Schinkel (n 37) 695.

[40] Vogler (n 19) 885.

[41] Murray (n 22) 22.

hetero-normative and homo-normative legal and social experiences.[42] Consequently, many SOGI asylum decisions betray a neo-liberal, capitalist, consumeristic, and individualistic mind-set, which expects claimants to engage with public social spaces and LGBTIQ+ venues, and erases or fetishizes cultural, social, economic, and individual differences.[43] If certain sexualities or gender identities are not legible to the decision-maker according to the dominant social and cultural register they follow, then claimants are quickly labelled as undeserving.

Considering the different experiences within the cohort of SOGI claimants also underscores that we should not homogenize them. It is increasingly recognized that all 'categories' included within the LGBTIQ+ acronym have very different experiences in general, but also of the asylum system. While the variety of their experiences are an obvious consequence of the richness of queer lives and the fluid and uncategorizable nature of their sexuality and gender, asylum systems have clearly not yet come to grips with such variety. Bisexual and lesbian claimants are the greatest victims of this inability to deal with non-normative sexualities and gender non-conforming identities, obsessed as asylum systems are with 'sexual veracity', the 'facticity of sexuality', and visible performances of one's SOGI recognizable to a Western spectator.[44] In short, 'the rhetoric of gayness used by courts does not provide ample discursive maneuverability for a range of experiences of sexual desire and practice'.[45] Consequently, the essentialist discourses used by the asylum system on what truly constitutes 'queer' fail many SOGI claimants.

Both progress and failures in this journey of queering refugee law and policy depend to a considerable extent on the legal tools available, to which we now turn.

3. Ensuring Protection

While the Refugee Convention has laid the necessary foundations for SOGI claims by including a ground—PSG—that can accommodate such claims, several other legal tools are available to SOGI claimants to strengthen international protection claims. At an international level, the UNHCR SOGI Guidelines on International Protection No 9 stand out as a lever with significant global reach.[46] The SOGI Guidelines have been crucial in empowering decision-makers and support organizations, sensitizing them to the specificities of SOGI asylum claims. That does not make the Guidelines exempt from

[42] Tanya Aberman, 'Gendered Perspectives on Refugee Determination in Canada' (2014) 30(2) Refuge: Canada's Journal on Refugees 57.

[43] Raj (n 38) 179; Fernandez (n 21) 202, 205.

[44] Stichelbaut (n 33) 76; Hertoghs and Schinkel (n 37); Sean Rehaag, 'Bisexuals Need Not Apply: A Comparative Appraisal of Refugee Law and Policy in Canada, the United States, and Australia' (2009) 13 The International Journal of Human Rights 415.

[45] Sara L McKinnon, *Gendered Asylum: Race and Violence in US Law and Politics* (University of Illinois Press 2016) 114.

[46] See further Chapter 42 in this volume.

criticism from a queer perspective, as, for example, the terminology adopted ('LGBTI') could be more inclusive and culturally neutral, and evidentiary matters could be more thoroughly addressed to offer queer-sensitive guidance. Other tools subsequently developed by UNHCR have contributed further to addressing SOGI claims in a more effective and adequate manner, including staff operational guidance, risk identification tools, and resettlement assessment tools.[47]

The specific instruments developed by UNHCR are complemented by more general legal instruments at the UN level, such as the ICCPR (in particular article 7 on prohibition of inhuman and degrading treatment) and the CAT (in particular article 3 on prohibition of return in case of danger of subjection to torture, also known as the principle of *non-refoulement*).[48] Yet, although UNHCR and UN bodies have increasingly added references to SOGI asylum claimants to their recommendations and reports since the late 1990s,[49] these improvements have not always been accompanied by greater recognition of claims at international level.[50]

The more recent Global Compacts on Migration and on Refugees might have been a positive development for SOGI refugees and migrants generally. Yet, neither Compact includes any actionable commitments in relation to SOGI minorities, instead merely incorporating references to 'gender', 'equality', 'empowerment', and 'sexual and gender-based violence', thus providing no specific protection to SOGI minorities fleeing persecution. The international community thus resisted further queering IRL and missed a crucial opportunity to raise awareness of the needs and rights of SOGI refugees.

Regional human rights mechanisms such as the ECHR also play an important role in enhancing—even if not always securing—respect for the right to *non-refoulement*. The European Court of Human Rights (ECtHR) offers asylum claimants protection mostly on the basis of article 3 ECHR (prohibition of torture),[51] and, to a lesser extent, article 2 ECHR (right to life).[52] The limited protection offered by the ECHR is compounded by an excessively high threshold for finding a violation of these articles by requiring that they be 'systematically' violated, thus limiting the Convention's potential for SOGI (and all other) asylum claimants and contributing to the dehumanization of queer foreign bodies.[53] Similarly, in the Inter-American human rights

[47] UNHCR, 'Protecting Persons with Diverse Sexual Orientations and Gender Identities. A Global Report on UNHCR's Efforts to Protect Lesbian, Gay, Bisexual, Transgender, and Intersex Asylum-Seekers and Refugees' (2015).

[48] See Chapter 36 in this volume.

[49] Julie Bissland and Kathleen Lawand, 'Report of the UNHCR Symposium on Gender-Based Persecution' (1997) 9 IJRL 11.

[50] eg CAT, *KSY v The Netherlands*, UN doc CAT/C/30/D/190/2001 (15 May 2003) regarding a gay man from Iran; *EA v Sweden*, UN doc CAT/C/61/D/690/2015 (11 August 2017) regarding a gay man from Bangladesh.

[51] eg *Chahal v United Kingdom*, App No 70/1995/576/662 (ECtHR, 11 November 1996).

[52] *Bahaddar v Netherlands* (1998) 26 EHHR 278.

[53] Nuno Ferreira, 'An Exercise in Detachment: The Strasbourg Court and Sexual Minority Refugees' in Richard Mole (ed), *Queer Migration and Asylum in Europe* (UCL 2021).

system, there is some acknowledgement of the issues affecting SOGI asylum claimants,[54] but the full potential of the Inter-American Convention on Human Rights in relation to SOGI asylum has not yet been realized, either for lack of opportunity or willingness of enforcement bodies.

Broader regional integration efforts also have an impact on SOGI refugees. In the context of the EU, for example, the CEAS has slowly developed a body of statutory instruments, complemented by jurisprudence of the Court of Justice of the EU (CJEU), that has enhanced protection of SOGI refugees mainly by asserting the membership of SOGI minorities to a PSG and scrutinizing the assessment of credibility of SOGI claimants and the evidence required of them.[55] Despite some positive features, however, there is much scope to further queer CEAS, namely in relation to the use of accelerated procedures and country of origin information, the deployment of the notion of 'safe country of origin', the distribution of the burden of proof, the insufficient emphasis on the principle of benefit of the doubt, as well as the restrictive definitions of a PSG and persecution in the context of SOGI.[56]

Finally, at a national level, we often find SOGI-specific guidelines that support the work of decision-makers and legal representatives in SOGI asylum claims. In the UK, for example, the Home Office 2011 guidance on gender identity and 2016 guidance on sexual orientation,[57] complemented by SOGI-specific Country Policy Information Notes,[58] have been commended for their awareness of the particular issues that affect SOGI claimants.[59] Nonetheless, these tools require improvements, including in their use of the 'discretion argument',[60] and their failure to fully grasp the non-externally visible nature of SOGI.[61] The main issue, however, remains the fact that these guidance tools are not respected by decision-makers or applied in a consistent manner by all decision-makers.[62] Similarly, in

[54] Inter-American Commission on Human Rights (IACHR), 'Forced Migration of Nicaraguans to Costa Rica' (7 September 2019) paras 134, 140, 157, 308.

[55] Nuno Ferreira and Denise Venturi, 'Testing the Untestable: The CJEU's Decision in Case C-473/16, F v Bevándorlási És Állampolgársági Hivatal' (*European Database of Asylum Law*, 28 June 2018) <https://www.asylumlawdatabase.eu/en/journal/testing-untestable-cjeu%E2%80%99s-decision-case-c-47316-f-v-bev%C3%A1ndorl%C3%A1si-%C3%A9s-%C3%A1llampolg%C3%A1rs%C3%A1gi-hivatal> accessed 13 October 2020.

[56] Nuno Ferreira, 'Reforming the Common European Asylum System: Enough Rainbow for Queer Asylum Seekers?' (2018) 5 GenIUS 25.

[57] Home Office, 'Asylum Policy Instruction. Sexual Orientation in Asylum Claims. Version 6.0' (2016); Home Office, 'Gender Identity Issues in the Asylum Claim: Transgender' (2011).

[58] UK Visas and Immigration, 'Collection: Country Policy and Information Notes' (*GOV.UK*, 26 February 2020) <https://www.gov.uk/government/collections/country-policy-and-information-notes> accessed 13 October 2020.

[59] Independent Chief Inspector of Borders and Immigration (ICIBI), 'An Investigation into the Home Office's Handling of Asylum Claims Made on the Grounds of Sexual Orientation March–June 2014' (October 2014).

[60] This refers to the practice of rejecting SOGI claims on the basis that claimants can avoid persecution by 'living discreetly' their SOGI upon return to the country of origin. See Chapter 42 in this volume.

[61] Jhana Bach, 'Assessing Transgender Asylum Claims' (2013) 42 Forced Migration Review 34, 35; ICIBI (n 59) 11.

[62] ICIBI (n 59).

Canada, 'Guideline 9: Proceedings before the IRB Involving Sexual Orientation and Gender Identity and Expression' (SOGIE Guideline) constitutes a positive tool for claimants and legal representatives alike, but falls short of prohibiting the submission of sexualized evidence and uses odd language such as 'diverse SOGIE'.[63] In other countries, in the absence of domestic SOGI-specific guidance, domestic decision-makers often refer to the UNHCR SOGI guidelines,[64] which, as seen above, also have scope for improvement.

Although many of these instruments offer useful and generally appropriate guidance, it is clear that human rights frameworks at domestic, regional, and international level are very much resistant to being queered, favouring an interpretation and application of human rights that restrict the range and scope of rights of SOGI minorities.[65]

4. Shaping a Queer International Refugee Law

The variety of legal and policy tools ensuring protection of SOGI claimants sheds light on the multiplicity of 'actors'—individuals and organizations—that shape what we describe as the queering of IRL. These actors include regional, supranational, and domestic courts, as well as civil society. When these actors have based their activity on the equal enjoyment of human rights by SOGI minorities, IRL and international human rights law (IHRL) have developed so as to benefit SOGI claimants.[66] Where, instead, domestic and regional courts have resisted queer theoretical influences and equality claims, raising doubts about human rights as a truly 'liberating process',[67] there have been significant setbacks and a revival of the privacy/equality divide that permeates SOGI asylum.

To start with, domestic courts have strongly contributed to the queering of asylum law by embracing progressive interpretations of the Refugee Convention's key concepts. Besides the seminal judgment of the High Court of Australia in *S395/2002*,[68] which set the path for rejecting the 'discretion requirement', a queer reading of the Refugee Convention's

[63] Moira Dustin and Nuno Ferreira, 'Canada's Guideline 9: Improving SOGIE Claims Assessment?' (2017) 56 Forced Migration Review 80.

[64] Danisi, Dustin, Ferreira, and Held (n 4) ch 4.

[65] Ryan Richard Thoreson, 'Queering Human Rights: The Yogyakarta Principles and the Norm That Dare Not Speak Its Name' (2009) 8 Journal of Human Rights 323.

[66] Carmelo Danisi, 'Crossing Borders between International Refugee Law and International Human Rights Law in the European Context: Can Human Rights Enhance Protection against Persecution Based on Sexual Orientation (and Beyond)?' (2019) 37 Netherlands Quarterly of Human Rights 359.

[67] As Kapur puts it, 'the idea of human rights as a project (…) is already affected by—and overtly and covertly implicated in—structures of power': Ratna Kapur, *Gender, Alterity and Human Rights: Freedom in a Fishbowl* (Elgar 2018) 2.

[68] High Court of Australia, *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473, paras 40 ff.

notion of persecution was advanced, albeit unconsciously sometimes, in Europe. In 2012, the Italian Supreme Court found that maintaining criminal sanctions against homosexuality or same-sex activity prevents an individual from enjoying the 'fundamental right to live freely their sexual and emotional life',[69] and may accordingly constitute a risk of persecution even if such sanctions are not enforced.[70] This recognizes—at least implicitly—the power relations in heteronormative societies that are reflected in criminalizing and discriminatory laws, as queer theories suggest.

Even more significant in shaping IRL are judgments such as those adopted in the Netherlands[71] and in France[72] which have insisted on a qualitative assessment of the *effective* availability of protection in the claimants' country of origin, and in particular whether legislative measures have led to a change in society. Consequently, 'social discrimination', instead of legal discrimination, may become the central feature in determining a well-founded fear of persecution.

Finally, an increasing number of domestic courts have also espoused the idea that a decision-maker is not required to prove that claimants are 'truly' LGBTIQ+, but only whether they may be persecuted on SOGI grounds.[73] Whether or not inspired by queer theories, this position also rejects the idea of static identities to move the focus to the perpetrators' willingness to reproduce through persecution an unequal system of power dominated by a heterosexual majority.[74]

European courts' decisions illustrate some persisting dilemmas. The interpretation of the CEAS by the CJEU is a case in point. In two preliminary rulings, the court made it clear that, when assessing SOGI claims, decision-makers cannot rely 'exclusively' on stereotypes, request claimants to explain their sexual practices or to undergo medical exams,[75] or use projective personality tests.[76] These decisions reinforce the idea that self-identification should be the starting point of any assessment. Yet, in such cases, the CJEU still operated within the realm of the right to privacy along Western and white expectations and understandings. Statements like 'it must be stated at the outset that the fundamental rights *specifically linked* to the sexual orientation (…) as the right to respect for private and family life'[77] are symptomatic of the inherent tensions around the true understanding of SOGI. The limitations of the privacy approach were clear when the CJEU found that the mere existence of legislation criminalizing homosexual acts could

[69] Italian Supreme Court, decision no 15981, 20 September 2012.

[70] In this respect, see also the French decision by CNDA, 8 February 2018, case 17014970 C.

[71] Dutch Rechtbank Den Haag, 25 May 2018, case NL 17.12618 (transgender woman).

[72] CNDA, 14 May 2018, case 17052687, paras 3–4 (gay man).

[73] Italian Supreme Court, 6 February 2018, decision no 2875, p 3; Greek Piraeus Administrative Court of Appeal, 12 June 2019, case A401. At supranational level, see the position of the CJEU in Case C-473/16 *F v Bevándorlási és Állampolgársági Hivatal* (ECJ, 25 January 2018) paras 31–2.

[74] See in relation to the administrative practice in Italy, including decisions reiterating such interpretations, Danisi, Dustin, Ferreira, and Held (n 4) ch 7.

[75] *A, B and C v Staatssecretaris van Veiligheid en Justitie* (Joined Cases C-148/13, C-149/13 and C-150/13) (CJEU, 2 December 2014).

[76] Case C-473/16 (n 73).

[77] *Minister voor Immigratie en Asiel v XYZ* (Joined Cases C-199/12 to 201/12) (CJEU, 7 November 2013) para 54 (emphasis added).

not amount to persecution.[78] Despite affirming that 'a person's sexual orientation is a characteristic so fundamental to his identity that he should not be forced to renounce it',[79] the CJEU denied the detrimental effect of such laws on a person's identity, signalling a lack of understanding of the challenges that refugee law faces with SOGI. As Hathaway and Pobjoy argued, SOGI claims bring to the fore new forms of harms that originate from the 'intimate modification' of oneself imposed by the surrounding society and the laws in force therein.[80]

Surprisingly, the lowest point in this ambivalent approach to SOGI asylum was reached in the context of a human rights system, the ECHR. In fact, the first time the ECtHR decided on the merits of a case involving a person fearing persecution on sexual orientation grounds, it espoused the idea that SOGI claimants can be sent back to their countries of origin in a continuous attempt to confine SOGI within one's private life.[81] This approach reflected a worrying detachment from the realities of sexual minorities in many countries around the world and from their experiences when claiming international protection in Europe.[82] Moreover, by maintaining the claim within the scope of private life (article 8 ECHR), the ECtHR's position obscures the discriminatory relations of power in countries of origin. Further, such international interpretations may contribute to the revival or reinforcement of questionable domestic positions that perpetuate the privacy/equality divide in SOGI asylum.[83] In this context, it is therefore remarkable to find national courts that instead, by adopting decisions inspired by queer and intersectional approaches, resist these setbacks. For instance, the Italian Supreme Court has clearly rejected the 'private dimension' of SOGI as a reason for denying international protection, on the grounds that 'socialization' is a fundamental aspect for individuals to enjoy the full spectrum of human rights.[84] Significantly, the 'public dimension' thus becomes relevant for the fulfilment of the individual, and hence relevant to a risk of being persecuted.[85]

The role of civil society in queering IRL, at least indirectly, should also be recognized. From a macro-perspective, a remarkable example is provided by a group of academics and activists who, in 2007, adopted the so-called Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity,[86] which included a specific principle on asylum (Principle 23). Not only have the Yogyakarta Principles informed international and local campaigns for

[78] ibid para 55. [79] ibid para 70.

[80] James C Hathaway and Jason Pobjoy, 'Queer Cases Make Bad Law' (2012) 44 New York University Journal of International Law and Politics 315. In response, see Jenni Millbank, 'The Right of Lesbians and Gay Men to Live Freely, Openly and on Equal Terms is not Bad Law: A Reply to Hathaway and Pobjoy' (2012) 44 New York Journal of International Law and Politics 497.

[81] *ME v Sweden*, App No 71398/12 (ECtHR, 26 June 2014) paras 76–90. [82] Ferreira (n 53).

[83] See for example *HJ (Iran) v Secretary of State for the Home Department* [2010] UKSC 31, [2011] 1 AC 596, paras 32 ff.; *LC (Albania) v Secretary of State for the Home Department* [2017] EWCA Civ 351, [2017] 1 WLR 4173. On this evolution, Dustin (n 6).

[84] Italian Supreme Court, 3 December 2019, decision no 2458, 6.

[85] See Janna Wessels, '"Discretion", Persecution and the Act/Identity Dichotomy' (2016) 12 Vrije University Migration Law Series 19.

[86] The Yogyakarta Principles (n 3).

SOGI equality,[87] but they also influenced the drafting of the subsequent UNHCR SOGI Guidelines on International Protection No 9 for an inclusive human rights-based IRL.[88] Ten years after their adoption, Principle 23 was updated in light of the intersection between developments in IHRL and, as the authors explained, 'the emerging understanding of violations' suffered on SOGI grounds, as well as 'the recognition of the distinct and intersectional grounds of gender expression and sex characteristics'. Evoking queer theories, it was recognized that analysis of SOGI alone fails to cover the range of violations suffered by SOGI minorities, that grounds including gender expression and sex characteristics need to be autonomously incorporated in the refugee discourse and, as we will explore in the next section, that the RSD process is only a limited part of the process of queering IRL.

From a micro-perspective, the essential role played by LGBTIQ+ or refugee organizations, or a combination of both, is a case in point. Along with their lobbying activity, transnational organizations like the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) or Organization for Refuge, Asylum & Migration (ORAM) and local associations operate to promote a queer IRL by offering training to decision-makers and people working with SOGI claimants. Empirical research shows that these actors not only fill an existing gap in training, but are also essential in raising awareness amongst SOGI claimants themselves about their rights under IHRL and IRL and in their respective domestic orders, besides supporting their asylum claims by—for instance—gathering appropriate country of origin information (COI) or requesting procedural arrangements.[89] When the 'culture of disbelief' in asylum bodies is contested rather than encouraged,[90] these micro-efforts also discourage stereotypical views of SOGI minorities. When this role is further strengthened by the involvement of UNHCR in national asylum decision-making, thus influencing directly the national adjudication system through a consistent reference to its SOGI Guidelines,[91] there are greater chances of developing from the very bottom an international environment favourable to the queering process of IRL.

Given the relative paucity of studies on aspects of SOGI asylum beyond RSD, a (non-exhaustive) analysis of SOGI claimants' needs is necessary.

5. Addressing Specific Needs

Queering IRL entails understanding the specific needs of SOGI claimants. Exploring the rationale behind States' obligation to address those needs is essential. There is an

[87] Thoreson (n 65).
[88] UNHCR, 'Guidelines on International Protection No 9: Claims of Refugee Status on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees', HCR/GIP/12/09 (23 October 2012) para 7.
[89] Danisi, Dustin, Ferreira, and Held (n 4) ch 6.
[90] Thomas Spijkerboer, 'Gender, Sexuality, Asylum and European Human Rights' (2018) 29 Law Critique 221.
[91] See Danisi, Dustin, Ferreira, and Held (n 4) ch 4.

increasing international consensus that people who claim asylum on SOGI grounds are 'vulnerable', as demonstrated by the UN reports that highlight the 'unique vulnerability and specific needs of lesbian, gay, bisexual, trans, intersex and gender diverse (LGBTI) asylum-seekers and refugees'.[92] Marginalization and exclusion in their country, as well as lack of support within their community of origin and/or of other refugees after fleeing persecution, are the primary reasons for this identification. Although the resulting increased visibility of SOGI claimants should be generally welcomed, this identification may also lead to stigmatization and stereotyping,[93] and to the homogenization of people belonging to SOGI minorities. In fact, the 'vulnerability label' risks replicating victimizing notions of refugees by focusing attention on harm and violence, while neglecting asylum claimants' agency and unique personhood.[94] In short, only if framed through a queer and intersectional lens can the notion of 'vulnerability' avoid reproducing unequal relations of power within refugee law and the broader asylum system.[95] When applying this principled approach to IRL and IHRL, the use of 'vulnerability' has the advantage of signalling a greater exposure of SOGI claimants to human rights violations that may be replicated in the process of accessing, requesting, and enjoying asylum, if the surrounding environments fail to identify their specific needs. Therefore, from a positive perspective, 'vulnerability' may call upon States and other involved actors to elaborate specific solutions following *individual* assessments, owing to a presumption of a *collective* 'vulnerability'.

The contradictions around this concept may explain the, sometimes diverse, approaches of systems of protection. The developments within the European human rights and asylum frameworks are a case in point. On the one hand, in deciding the case of a gay claimant who alleged a violation of his right to liberty and security (article 5 ECHR) after entering Hungarian territory, the ECtHR identified the applicant as a 'vulnerable individual' and 'part of a vulnerable group in the country which he had to leave'.[96] Placed in the wider context of the ECtHR's migration jurisprudence, it is noticeable that the court has attempted to differentiate between migrants and asylum claimants and, within asylum claimants, specific groups of claimants, in order to tailor the degree of protection offered.[97] Yet, the 'vulnerability label' seemed essential here to allow the court's finding that national authorities should exercise particular care 'to avoid situations which may reproduce the plight that forced these persons to flee in the first place'.[98] Consequently, an increasing range of positive obligations, either substantial or procedural, has emerged to reduce the condition of 'vulnerability' experienced by asylum claimants belonging to SOGI minorities. Ideally, such identification would not

[92] OHCHR, 'UN Rights Experts Urge More Protection for LGBTI Refugees' (2019).

[93] Martha Fineman and Anna Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Routledge 2013).

[94] Georgina Firth and Barbara Mauthe, 'Refugee Law, Gender and the Concept of Personhood' (2013) 25 IJRL 470.

[95] Fineman and Grear (n 93).

[96] *OM v Hungary*, App No 9912/15 (ECtHR, 5 July 2016) para 53.

[97] See *Ilias v Hungary*, App No 47287/15 (ECtHR, Grand Chamber, 21 November 2019).

[98] *OM v Hungary* (n 96) para 53.

only require the individual assessment of each claimant's needs, but also lower the threshold for finding a serious risk of exposure to inhuman or degrading treatment if such claimants were returned to their country of origin, with positive implications for recognition of refugee status.

On the other hand, the risk of stigmatization and stereotyping entailed by using the 'vulnerability label' has prompted the EU to depart from its current reading of IRL embedded in the CEAS. Both the Qualification Directive (article 20(3)) and the Reception Directive (article 21) identify some groups of claimants as vulnerable, such as minors, victims of human trafficking, or persons who have been subjected to torture, rape, or other serious forms of psychological, physical, or sexual violence.[99] In light of the lived experience of many SOGI claimants, often including accounts of psychological, physical and sexual abuse, including rape,[100] the more favourable provisions for 'vulnerable' people may apply to SOGI claimants, although SOGI minorities have not been labelled collectively as vulnerable under EU law. Significantly, in the context of the CEAS proposed reform, the notion of 'specific needs' has replaced that of 'vulnerability', in the broader attempt to tailor the asylum system to individual needs while avoiding stigmatization and stereotyping,[101] as a queer and intersectional approach suggests.

In short, the debate on SOGI claimants as a 'vulnerable group' signals, at the very least, that there is consensus around the fact that their needs, primarily as individuals, should also be addressed under IHRL, with vital implications for IRL. In practice, national authorities are required to assess each case, taking into account SOGI-related aspects and, as UNHCR's SOGI Guidelines on International Protection No 9 point out,[102] the intersections between SOGI and other characteristics. These include, for instance, sex, age, nationality, ethnicity/race, social/economic, and HIV status, and may add layers of discrimination and/or explain every person's unique experience of their SOGI, as well as their gender or their sex characteristics, as the revised Yogyakarta Principles remind us. While it is impossible to address the variety of SOGI refugees' needs here, it is worth noting that every aspect of the asylum process may raise specific concerns for SOGI claimants, including their life beyond that process. A few aspects, which also show how IRL and IHRL interact in this field expanding SOGI claimants' protection, are useful to illustrate these points.

First, leaving aside most RSD process-related issues,[103] a queer IRL calls for a revision of concepts like 'internal relocation alternative'[104] and practices related to COI.[105]

[99] Council Directive 2013/33/EU of 26 June 2013 Laying Down Standards for the Reception of Applicants for International Protection (recast) OJ L180/96.

[100] Danisi, Dustin, Ferreira, and Held (n 4) ch 5.

[101] Ferreira (n 56).

[102] UNHCR (n 88) para 3.

[103] See Chapter 42 in this volume and Danisi, Dustin, Ferreira, and Held (n 4) ch 7.

[104] See Jessica Young, 'The Alternate Refuge Concept: A Source of Systematic Disadvantage to Sexual Minority Refugee Claimants' (2009) 60 University of New Brunswick Law Journal 294.

[105] Nicole LaViolette, 'Independent Human Rights Documentation and Sexual Minorities: An Ongoing Challenge for the Canadian Refugee Determination Process' (2009) 13 The International Journal of Human Rights 437; Danisi, Dustin, Ferreira, and Held (n 4) ch 6.

The former should not apply to SOGI claimants if it is considered that, even where no criminalization is in force, social discrimination and exclusion may play a significant role in finding that protection is not available in any part of the country of origin. Yet, where SOGI-specific COI is absent, including on the role of private actors in perpetuating persecution, asylum authorities may be inclined to deny refugee status on one or other of these grounds.[106] A queer reading of IRL would instead require avoiding 'generic' and 'stereotyped' references to the country of origin in question, and identifying 'specific' and 'up-to-date' COI for each case.[107]

Secondly, another turning point in the queering of IRL relates to the notion of 'safe country of origin'.[108] While this notion falls short of any consideration on the equal enjoyment of human rights by SOGI minorities, from a procedural perspective the use of 'safe countries' opens the door to the application of accelerated procedures with shorter timeframes for evaluating one's fear of persecution. In this respect, marking a significant step towards a queer IRL, a case examined by the High Court in England and Wales suggests that fast-track procedures are inherently unfair for those who claim asylum on SOGI grounds, owing to the longer timeframe needed to obtain relevant evidence in such cases.[109]

Thirdly, only a safe environment for SOGI claimants during asylum interviews is conducive to self-identification and better decision-making. A case of 'late disclosure' is particularly significant here. By reversing two previous judgments based on the lack of credibility of an Iraqi national, the Supreme Administrative Court of Finland found that the claimant had sufficiently explained why he had not disclosed his homosexuality during the asylum interview, namely because of the presence of an interpreter of a particular ethnic background and the fear of abuse in the reception centre.[110] IHRL may play a greater role here in creating a safe environment at least in two ways: (1) by requiring that States ensure an adequate number of trained staff, including interpreters;[111] (2) by demanding that national authorities promote a human rights culture, for example by ensuring that principles of non-discrimination of SOGI minorities are included in the training initiatives of all actors involved in the system, like asylum adjudicators and interpreters.

Fourthly, a queer approach to SOGI asylum requires us to look beyond RSD and address other needs that have been neglected in the literature.[112] The ECtHR has made it clear that national authorities have to identify reception conditions for SOGI

[106] eg in Germany, Administrative Court of Kassel, 1 K 6981/17.KS.A, 6 June 2018, or in UK, *Secretary of State for the Home Department v SMR* UKUT PA/05912/2017 (IAC); *BF (Tirana—gay men) Albania* [2019] UKUT 0093 (IAC).

[107] Italian Supreme Court, 26 April 2019, decision no 11312, 3–4.

[108] See Cathryn Costello, 'Safe Country? Says Who?' (2016) 28 IJRL 601.

[109] *PN v Secretary of State for the Home Department* [2019] EWHC 1616 (Admin).

[110] Decision KHO:2017:14 (22 September 2017) (Supreme Administrative Court, Finland).

[111] For instance, *MA and Others v Lithuania*, App No 59793/17 (ECtHR, 11 December 2018) para 108 ff.

[112] eg Carmelo Danisi, 'What "Safe Harbours" are there for Sexual Orientation and Gender Identity Asylum Claims? A Human Rights Reading of International Law of the Sea and Refugee Law' (2018) 2 GenIUS 9.

claimants by taking into account the possible presence in accommodation centres of people coming 'from countries with widespread cultural or religious prejudice against' SOGI minorities.[113] Consequently, the placement of SOGI claimants in large camps should be discouraged. Moreover, the revised version of the Yogyakarta Principle 23 adds, amongst other things, that SOGI claimants should also be granted access to medical care as appropriate for each specific case, thus including hormonal or other therapy and gender-affirming treatment. Similar considerations apply for life beyond asylum, when SOGI claimants' needs may overlap considerably with those of SOGI minorities in the host country. From a general perspective, in light of the different and intersecting layers of discrimination suffered by SOGI claimants, including SOGI and 'refugeeness', international, supranational, and domestic anti-discrimination law should, at a minimum, be applied in a way that protects against multiple and intersectional forms of discriminatory treatment in the enjoyment of the right to work, education, and health. Leading again the way, the ECtHR has found that a transgender refugee enjoys the right to have their gender identity recognized and have access to the name-change legal procedure in Hungary as any Hungarian citizen.[114] Although the case falls again within the realm of private life, the court has overall emphasised that, in implementing their positive obligations under the ECHR, States party should take into account the specific reasons for which refugees have fled their countries in order to ensure that the Convention rights are always practical and effective, rather than 'theoretical or illusory'. From a more specific point of view, considering family reunification as an essential tool for the integration of refugees, a queer IRL requires the contestation of the heteronormative reading of the relevant norms. While the notion of family should certainly include same-sex unions for the purpose of family reunification, the evaluation of SOGI claimants' requests should consider both their difficulty in having their relationships recognized in their countries of origin or transit and the connected struggle to provide evidence of such unions.

Fifthly, and finally, addressing SOGI claimants' needs requires the adoption of a holistic approach to asylum that also looks at new tools for facilitating access to asylum as well as to resettlement of people in need of international protection on SOGI grounds. In comparison to the extensive literature available on RSD, only a few studies have, for instance, investigated obligations under international law to provide resettlement options for, or ensure legal avenues to access asylum to, SOGI claimants[115] or examined the transit and resettlement experiences of SOGI claimants.[116] These studies make it clear that these people's destiny cannot be left to discretionary policies, such as the Pilot Project of Canada.[117] Further research is also required in relation to the responsibility of

[113] *OM v Hungary* (n 96) para 53.
[114] *Rana v Hungary*, App No 40888/17 (ECtHR, 16 July 2020) paras 39–42.
[115] Danisi (66) section 3.
[116] In addition to Rumbach (n 10), see relevant chapters in Arzu Güler, Maryna Shevtsova, and Denise Venturi (n 17).
[117] House of Commons Canada, 'LGBTQ+ at Risk Abroad: Canada's Call to Action: Report of the Standing Committee on Citizenship and Immigration' (2017).

UNHCR and the role it plays in resettlement schemes (which are often based on the above analysed notion of 'vulnerability'[118] and the debatable inclusion of SOGI claims) and in the management of large camps (especially in the Global South, where accounts of attacks on SOGI claimants and refugees are increasingly reported).[119]

6. Looking to the Future

For many years, IRL has gone through a process of reinterpretation to respond to the challenges posed by the legal and social experiences of people persecuted on grounds of their SOGI. Despite the influence of the seminal studies of Millbank, Dauvergne, LaViolette, Spijkerboer, and Jansen, to name a few, and of developments within IHRL, the 'queering of IRL' is still far from complete. For this reason, new studies suggest an approach that, drawing from feminist studies, combines a human rights approach to IRL with a queer and intersectional lens, thus highlighting the need for more interdisciplinarity and the use of different theoretical frameworks to support this ongoing challenge. Relying only on a human rights-based reading of the Refugee Convention or on IHRL as 'surrogate' protection is insufficient to queer IRL.[120] Equality remains an ideal to be achieved in many societies and it is challenging to overcome resistance to uncover heteronormative relations of power, as the recurring revival of privacy arguments in IRL indicates. It is precisely this failure, as well as the rising levels of racism, xenophobia, homophobia, and transphobia in many countries, that can turn SOGI claimants' and refugees' search for a safer haven into a never-ending process, even after the recognition of refugee status. Given the relative paucity of work on aspects of SOGI asylum beyond RSD, including access to asylum and resettlement, the comparison between Global North and Global South countries' experiences, as well as specific groups within SOGI minorities (including bisexual, intersex, and asexual),[121] there is still much scope for further research and critique. In doing so, research should also pay more attention to claimants' agency and explore new frameworks to avoid the analysed 'vulnerability trap'.

The queering of IRL requires a 'cultural revolution' as well as the establishment of creative transnational networks. First, new queer theory-informed and culturally appropriate guidelines and transversal training of all actors involved in SOGI asylum are urgently required to address poor understanding of SOGI, and may include equal consideration of gender and sexual expression as the revised Yogyakarta Principles suggest. The effect of better training does not lie only in the consolidation of anti-stereotyping,

[118] ibid 4.

[119] See eg Josh Milton, 'Transphobes Stabbed a Vulnerable Trans Refugee in the Head in a Brutal and Bloody Attack', *Pink News* (20 January 2020) <https://www.pinknews.co.uk/2020/01/30/trans-refugee-kenya-kakuma-camp-stabbed-stephen-sebuuma/> accessed 13 October 2020.

[120] For instance, *LC (Albania)* (n 83).

[121] For instance, see Dutch Council of State decision 201,703,038/1/V1, 21 March 2018.

non-heteronormative, and culturally unbiased attitudes. Improved understanding of the concepts at stake may help adjudicators question how queer foreign bodies have been constructed within asylum systems, to call into question the cultural pertinence of terminology commonly used, and to consider, through a new lens, every IRL concept. For instance, as suggested by Vogler in relation to persecution grounds,[122] mastering a queer intersectional approach to asylum would lead to recognition of marginalized queer identities, which may potentially allow unique identity claims in light of the fluidity of sexuality and gender. 'Thinking outside the box' could also result in interrogating heteronormative interpretations of human rights when these are used to shape refugee law. Family rights provide a good example owing to the continuous invisibility of same-sex couples' asylum claims, despite the potential implications in terms of resettlement.

Secondly, given the range of actors involved in the queering of IRL explored here, new connections should be established between decision-makers, NGOs in countries of origin/transit/destination of claimants, refugees, lawyers, policymakers, and academics with different backgrounds, to better inform this ongoing process. As Lewis argues, 'coalitions between feminist, queer, immigrant, and anti-racist advocates' are a matter of urgency to break down the unequal structures of power that still permeate asylum.[123] The positive effect of the queering of IRL may therefore benefit other claims when the suggested methodologies, concepts, and procedural arrangements are flexible enough to accommodate claims based on different grounds.

To conclude, IRL (as well as IHRL) is not structurally resistant to queer theories. The developments here scrutinized have shown that consideration of SOGI through queer lenses can effectively shape, both substantially and procedurally, fair asylum systems, even if that does not yet occur to a sufficient extent. By marking a persistent lack of consensus in this area of asylum, the failure of the international community to include considerations based on SOGI grounds in the Global Compacts risks slowing down this queering process. While a meaningful path has been certainly set, IRL still has a long way to go before fully accommodating SOGI claims.

122 Vogler (n 19).

123 Rachel A Lewis, '"Gay? Prove It": The Politics of Queer Anti-Deportation Activism' (2014) 17 Sexualities 958, 971.

CHAPTER 5

THE POLITICS OF INTERNATIONAL REFUGEE LAW AND PROTECTION

REBECCA HAMLIN

1. Introduction

Politics and power dynamics permeate the story of international refugee law and protection. Historically, however, scholars of politics have been more likely to study the *causes* of displacement: war, conflict, resistance, protest, authoritarianism, repression, corruption, and State failure. There have been fewer studies focused on the politics of reception, that is, how displaced people are treated, processed, and categorized when they flee. Part of the explanation for this puzzling feature of the scholarly literature is that the discipline of political science has tended to study immigration politics as part of domestic politics, assuming immigrants are economically motivated, and bracketing refugees as a niche foreign policy issue. A further explanation is that international refugee protection is often assumed to be simply a legal matter, not shaped by politics.

In contrast to those historic trends in the study of border crossing, the premise of this chapter is that the global refugee regime looks the particular way it does because powerful political forces and dynamics have shaped and constrained it. Further, this chapter argues that in order to understand the politics of international refugee law and protection we cannot just look at the law itself.[1] To understand what the law means in practice, we must examine protection law in the context of both international geopolitics

[1] On the importance of context and interpretation, see Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (OUP 2012). In particular, this book has a long chapter about the role of UNHCR.

and the domestic politics of border control, State formation, and ongoing nation-building. These politics are crucially important for understanding how, when, and why displaced people are likely to be protected.

To elaborate on this point, the following sections of this chapter outline seven key facets of the politics of international refugee law and protection, and highlights existing research on each. These seven categories naturally overlap and interact with one another. Nevertheless, they each raise distinct questions which suggest avenues where continued study may be fruitful.

2. The Politics of Refugee Construction

Politics is embedded in international refugee law and protection at the most basic level, because the concept of a refugee is itself a political construct. There is no essential quality of 'refugeeness' that clearly distinguishes some border crossers from others. Rather, the act of designating one group of border crossers as particularly vulnerable, needy, or deserving is political. Inherently, the process of refugee construction sets up dichotomies between forced and voluntary migration, and between political and economic motivations which privilege certain forms of suffering over others, and carves them out as a special exception to the generally accepted rule that sovereign States have the right to exclude people from entering their territories.[2]

As such, the concept of a refugee has a close relationship to the development of the modern State. Since the seventeenth century, the world has become more strictly organized into territorially bound States, and the expectation that people should be rooted to a place has intensified.[3] With these changes came greater expectations that States would be organized around 'imagined communities' of people with a shared ethno-national identity.[4] As empires gave way to newly independent post-colonial States, the borders of these States were set by colonial powers. Post-colonial transition gave rise to conflict and mass displacement in many instances.[5] The capacity of States to control borders and enforce the notion of territoriality was further enabled by the rise of the passport in the early twentieth century.[6] This period was also characterized by

[2] Patricia Tuitt, *False Images: Law's Construction of the Refugee* (Pluto Press 1996).

[3] For discussions on the relationship between the concepts of 'the refugee' and 'the State', see Nevzat Soguk, *States and Strangers, Refugees and the Displacements of Statecraft* (University of Minnesota Press 1999), Emma Haddad, 'The Refugee: The Individual Between Sovereigns' (2003) 17 Global Society 297, and Rebecca Hamlin, *Crossing: How We Label and React to People on the Move* (Stanford University Press 2021).

[4] Benedict Anderson, *Imagined Communities: Reflections on the Origins and Spread of Nationalism* (Verso Books 1983).

[5] Vanshaj Jain, 'Frozen Frontier: Uti Possidetis and the Decolonization of South Asia' (MSc thesis, University of Oxford 2019); Mohammad Shahabuddin, 'Post-colonial Boundaries, International Law, and the Making of the Rohingya Crisis in Myanmar' (2019) 9 Asian Journal of International Law 2.

[6] John Torpey, *The Invention of the Passport: Surveillance, Citizenship and the State* (CUP 2000).

extremely high levels of displacement, and subsequent efforts by the international community to create global governance structures designed to assist particular displaced people. Along with the notion of an international obligation to protect came the practice of defining who was a refugee, and therefore who was deserving of protection. Thus, the concept of refugee protection is deeply intertwined with the rise of the modern, often post-colonial, State.

While it was certainly not the first attempt, the most recent and longest-lasting iteration of an international definition of a refugee was created by a group of almost entirely European States in the aftermath of the Second World War. The Refugee Convention definition, created in 1951, was heavily influenced by the context of the Cold War, and has a clear liberal and 'exilic' bias, focused on protecting people who have been individually targeted and persecuted by their home country's government because of their identity or political beliefs.[7] Somewhat remarkably, this definition has lasted far longer than any other attempt to define a refugee, continuing decades past the end of the Cold War that birthed it.

Legal interpretation of the Refugee Convention definition has expanded over time, due largely to two avenues for change. First, domestic advocates in many liberal democratic host States have brought cases to court and made innovative legal arguments about which types of people should fall within the bounds of the definition. Precedent-setting cases have frequently allowed for broader interpretation of the definition in their particular jurisdiction, and have been referenced by courts in other jurisdictions when they consider similar questions. This judicial 'borrowing' has not always been consistent or expansive, and has sometimes misunderstood the domestic legal context from which concepts are borrowed, but it has nevertheless been an influential driver of expansion.[8] Secondly, UNHCR has worked as an expansive force, issuing regular soft law guidance which sometimes highlights the logic of a particular domestic decision that interprets the Convention definition in a way UNHCR endorses. Conversely, domestic courts sometimes reference UNHCR guidance in making their decisions.

Despite a generally expansive trajectory over decades, especially in the area of 'particular social group' to include gender and sexuality-based persecution, and in the area of persecution by non-State actors, the bare bones of the Refugee Convention definition remain limited. The definition does not explicitly include protection for people displaced by climate change[9] or desperate poverty, and its application to those fleeing generalized war or violence remains contested.[10] Yet, in this political moment, the Refugee Convention definition is unlikely to be revisited. Despite UNHCR's recognition of broader regional refugee definitions in Africa and Latin America,[11] at the global level, the Refugee Convention remains the dominant frame which must be stretched and strained if it is to accommodate other forms of border crossing.[12]

[7] BS Chimni, 'The Geopolitics of Refugee Studies: A View from the South' (1998) 11(4) JRS 350.
[8] Gary J Jacobsohn, 'The Permeability of Constitutional Borders' (2004) 82 Texas Law Review 1763.
[9] See Chapter 46 in this volume. [10] See Chapter 45 in this volume.
[11] See Chapters 15, 17 and 34 in this volume. [12] See Chapter 34 in this volume.

Future research on international refugee law and protection should examine both the politically constructed nature of the concept of a refugee, and its heavily European origins. While the concept of a refugee is frequently viewed as an international or universal concept which is merely adopted into domestic legislation for implementation purposes, by its very nature, the determination of refugee status remains in the eye of the beholder/adjudicator. With each decision to admit or deny someone, receiving States are (re)constituting their sovereignty.

3. The Geopolitics of Responses to Displacement

Geopolitics, otherwise known as international power politics, significantly affects how major episodes of displacement are managed. The contemporary geopolitical framework of refugee protection is shaped by many factors, but two powerful ones are the enduring legacies of colonialism and the Cold War. The end of both of these world orders has had significant ramifications for international relations and border crossing.

The incentives of States to admit refugees have changed significantly since the Cold War, when 'Western' States strategically welcomed people who were displaced by Communism. Today, asylum seekers carry far less strategic value, and the geopolitical message to be sent by admitting an asylum seeker or resettling a refugee has significantly declined. Some observers have claimed that the so-called 'new asylum seekers' of the post-Cold War era are less likely to fit the Convention definition, and instead are more likely to be economically motivated.[13] Other scholars have reframed this point, highlighting the fact that the asylum seekers arriving in the Global North today tend to be black or brown and poor and are often coming from places that were colonized to places that were colonizers or settler States.[14] These dynamics are not ancillary to, but are a central feature of, the politics of contemporary refugee protection.

Today, States and regions in the Global North attempt to contain major episodes of displacement in the Global South. This arrangement is not a coincidence, but the product of a global power play designed to protect the sovereignty and privilege of Global North States. Events that are constructed as humanitarian crises are often the result of calculations that have been made by wealthy and powerful States to limit, contain, and keep at arm's-length the responsibility to assist people whose protection holds no political value. This reality is maintained by Global North States through massive border security spending and the

[13] David A Martin, *The New Asylum Seekers: Refugee Law in the 1980s* (Martinus Nijhoff 1988). For a critique of this concept, see Chimni (n 7).

[14] See Chapter 2 in this volume.

creation of new markets related to border control and deterrence. Global North States also pressure their less wealthy and powerful neighbours to engage in more draconian border control efforts on their behalf.[15]

Another dimension of the geopolitics of containment takes the form of the so-called 'grand compromise' through which Global North States provide aid to host States in the Global South, in part to keep large-scale episodes of displacement at arm's-length.[16] UNHCR plays a direct role in facilitating the compromise, by collecting funds from Global North donor States and using them to manage refugee populations within the territories of host States.[17] In response to these dynamics, Global South 'refugee rentier States' leverage their position as hosts for material gain, threatening to send hordes of refugees towards the Global North if resources do not keep coming their way.[18]

Many of the bilateral or regional State relationships that emerge around migration control are hierarchical and mirror colonial dynamics, such as the efforts of the EU to contain potential asylum seekers in Africa and the Middle East, or attempts of the United States to control migration from Central America by pressuring Mexico to police its southern border. However, the geopolitics of migration control has also led to more complex and counter-intuitive inter-State relations. For example, internal hierarchies have been exacerbated between EU Member States, as the Dublin system resulted in disproportionate numbers of asylum seekers lodging claims in Greece and Italy, creating incentives for such States to flout their EU obligations, as well as for asylum seekers to live in unauthorized status in other Member States.[19] While there are occasional examples of burden-sharing within the context of the EU, the predominant dynamic is one of the more powerful States pushing the burden of refugee protection onto less powerful actors.[20]

The role of Turkey as the world's largest refugee hosting State is fascinating and warrants further study. It is a former imperial power, and yet it has many features of a refugee rentier State. Thus, it does not fit neatly into the Global North/South dichotomy. In 2016, the EU and Turkey made a deal to collaborate in preventing the arrivals of people from the Syrian civil war into Europe. The deal essentially paid Turkey to take diverted asylum seekers who had attempted to enter Europe irregularly, even though conditions in Turkey for refugees are not comparable to Europe, and come with limited hope of full integration to Turkish citizenship. The deal has also weakened the EU in its

[15] Ruben Andersson, 'Europe's Failed "Fight" against Irregular Migration: Ethnographic Notes on a Counterproductive Industry' (2016) 42 Journal of Ethnic and Migration Studies 7.

[16] Mariano-Florentino Cuéllar, 'Refugee Security and the Organizational Logic of Legal Mandates' (2006) 37 Georgetown Journal of International Law 583.

[17] Rawan Arar, 'The New Grand Compromise: How Syrian Refugees Changed the Stakes in the Global Refugee Assistance Regime' (2017) 9 Middle East Law and Governance 298.

[18] Gerasimos Tsourapas, 'The Syrian Refugee Crisis and Foreign Policy Decision-Making in Jordan, Lebanon, and Turkey' (2019) 4 Journal of Global Security Studies 4.

[19] Heath Cabot, *On the Doorstep of Europe: Asylum and Citizenship in Greece* (University of Pennsylvania Press 2014).

[20] Eiko R Thielemann, 'Between Interests and Norms: Explaining Burden-Sharing in the European Union' (2003) 16(3) JRS 253.

dealings with Turkey as President Erdogan routinely threatens to send refugees to Europe to further his political aims.[21]

Future research should consider the political incentives of various different types of States, not just the prototypical liberal democratic receiving State.[22] The shifting power dynamics between—but also within—the Global North and South deserve closer attention, especially as the Cold War recedes and colonial legacies morph into neo-colonial relations.[23]

4. The Politics of Compliance and Implementation

Despite the fact that the principle of *non-refoulement* is widely considered to have achieved the status of international customary law,[24] problems with compliance and implementation of international refugee law and protection standards are rampant. Notably, there is a wide gap between the formal ratification of international treaties and outcomes on the ground. Many of the major host States in the world have not actually ratified the Refugee Convention, yet still do provide some degree of protection. Meanwhile, many Contracting States actively engage in avoidance tactics designed to limit or circumvent their obligations under the Convention. There is an extensive political science literature on the diffusion of international law and compliance.[25] However, this literature has not focused on international refugee law, as much as human rights instruments and other international legal norms. Studies asking why States have not ratified the Refugee Convention have tended to examine particular States, rather than taking a systematic global approach to the question of compliance, and what difference ratification makes, if any.

The detailed regional chapters in this volume demonstrate unequivocally that political considerations often take precedence over legal commitments, and conversely,

[21] Patrick Wintour and Helena Smith, 'Erdogan in Talks with European Leaders over Refugee Cash for Turkey' *The Guardian* (17 March 2020).

[22] Fiona B Adamson and Gerasimos Tsourapas, 'The Migration State in the Global South, Nationalizing, Developmental, and Neoliberal Models of Migration Management' (2019) 54(3) International Migration Review 1; Katerina Natter, 'Rethinking Immigration Policy Theory beyond "Western Liberal Democracies"' (2018) 6 Comparative Migration Studies 4.

[23] Tendayi E Achiume, 'Migration as Decolonization' (2019) 71 Stanford Law Review 1509.

[24] Cathryn Costello and Michelle Foster, 'Non-refoulement as Custom and *Jus Cogens*? Putting the Prohibition to the Test' (2015) 46 Netherlands Yearbook of International Law 273.

[25] See eg Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change' (1998) 52 International Organization 887; Judith Kelley, 'Who Keeps International Commitments and Why? The International Criminal Court and Bilateral Nonsurrender Agreements' (2007) 101 American Political Science Review 573; Ellen L Lutz and Kathryn Sikkink, 'International Human Rights Law and Practice in Latin America' (2000) 54 International Organization 633; Beth A Simmons, 'Compliance with International Agreements' (1998) 45 Annual Review of Political Science 75.

that countries can protect refugees without signing onto treaties if their political interests drive them to do so. Formal law does matter to refugee protection, but the question of when it matters and how it matters varies based on political considerations.

There are currently 147 States that are Contracting States to the Refugee Convention or its 1967 Protocol. On its face, this looks like a very high level of commitment, especially when compared with other international human rights instruments protecting the rights of migrants who have not been classified as refugees.[26] Some Contracting States, such as Egypt, have only signed on with a list of reservations which limit its obligations to provide social benefits to refugees. However, most of the concerns raised by the international community about compliance have focused on the non-signatory States. In particular, the two regions of the world with the fewest Contracting States are the Middle East and Asia, with countries such as Lebanon, Jordan, Iraq, Saudi Arabia, India, Pakistan, Indonesia, Malaysia, and Thailand all remaining non-signatories.[27] As is obvious from this list, many of the States that host large numbers of refugees have not ratified the Refugee Convention. Nevertheless, many non-signatories still provide some protection for refugees via domestic legislation or practice, though they may choose to prioritize refugees who are geopolitically strategic or who share a religious affinity.[28] Further, UNHCR undertakes refugee status determination (RSD) and is engaged in humanitarian assistance, sometimes including formal camp management, in non-signatory States such as Thailand, Malaysia, and Lebanon.

Studies of State non-compliance frequently conclude with one of three explanations: reluctance to criticize or intervene in the sensitive issues of one's neighbours, fear of overly burdensome economic impact, and the desire to protect the particular ethnic balance of the State based on the assumption that refugee status entails the right to permanent settlement. Lebanon, for example, hosts proportionately more refugees per its population size than any other State, but has declined to ratify the Refugee Convention because of political calculations about what specific new obligations it would create, and because there is some benefit to having UNHCR bear the cost of refugee management.[29] Other studies have noted that reluctance in Asia is also reflective of a more general sense that international law is a European product, designed to serve European interests.[30] For Global South States more generally, the Refugee Convention can be seen as an unfunded mandate, and pressure from the international community can be interpreted as condescending.

[26] Martin Ruhs, 'The Human Rights of Migrant Workers: Why Do So Few Countries Care?' (2012) 56 American Behavioral Scientist 9.

[27] For a detailed discussion of the politics of compliance in these regions, see Chapters 18 and 23 in this volume.

[28] For an interesting story of local protection efforts in a non-signatory State, see Anne McNevin and Antje Missbach, 'Hospitality as a Horizon of Aspiration (or, What the International Refugee Regime Can Learn from Acehnese Fishermen)' (2018) 31(3) JRS 292.

[29] Maja Janmyr, 'No Country of Asylum: "Legitimizing" Lebanon's Rejection of the 1951 Refugee Convention' (2017) 29 IJRL 438.

[30] Sara E Davies, '"The Asian Rejection?": International Refugee Law in Asia' (2006) 52 Australian Journal of Politics and History 562.

Even in States that have ratified, implementation and compliance is not guaranteed. First, the Asian States that have ratified the Convention, such as China, South Korea, Japan, Cambodia, and the Philippines, simply recognize, host, and resettle few refugees, despite the formal commitment of the Convention. Further, scholars have found that despite fairly widespread commitments to both the Refugee Convention and the Organization of African Unity's expanded definition of a refugee across the continent of Africa, there are systematic problems with compliance and implementation in that region as well.[31] Some authors have argued that protection is inconsistent on the African continent because of variation in the domestic legislation that implements Convention obligations, and because UNHCR does not always view particular vulnerable groups as within its mandate.[32] Similarly, other authors have emphasized the fact that most displaced people in Africa live beyond the reaches of the international protection regime, or even formal domestic law. For these people, local social networks are the most important factor determining whether they will receive any kind of material assistance or base-level protection.[33]

In Global North States, which tend to be more geographically removed from mass displacement situations, non-compliance with the Refugee Convention often takes the form of externalization and deterrence policies which limit States' obligations by keeping people who might make claims for asylum away from their territories.[34] In recent years, these States have developed increasingly elaborate deterrence techniques in a 'cat and mouse' game of law and politics, where attempts at deterrence are met with a legal response, only to be redesigned in another form. Examples of these policies have included, but are not limited to: interdiction of boats at sea to prevent asylum seekers making territorially based claims; carrier sanctions for airlines that transport people using fraudulent documents; the development of 'Safe Third Country' agreements which purport to divert asylum seekers elsewhere; the transfer of people from one country to another; externalization of border control spending to focus on keeping people in 'transit' States; offshore or otherwise remote detention facilities that isolate and contain asylum seekers away from access to legal counsel; and stricter visa requirements to prevent potential asylum seekers from coming as a student, tourist, or businessperson. Some deterrence measures are specifically targeted at asylum seekers, while others take the form of generalized border control measures which aim to prevent all kinds of arrivals, including ones with protection needs. Measures such as the rapid growth of immigrant detention are also driven by political economies that are tied to

31 Marina Sharpe, 'The Supervision (or Not) of the 1969 OAU Refugee Convention' (2019) 31 IJRL 261.

32 Alexander Betts, 'Survival Migration: A New Protection Framework' (2010) 16 Global Governance 361.

33 Loren B Landau and Roni Amit, 'Wither Policy? Southern African Perspectives on Understanding Law, "Refugee" Policy and Protection' (2014) 27(4) JRS 534.

34 See Chapter 27 in this volume; Maribel Casas-Cortes, Sebastian Cobarrubias, and John Pickles, 'Riding Routes and Itinerant Borders: Autonomy of Migration and Border Externalization' (2015) 47 Antipode 894; David S FitzGerald, *Refuge Beyond Reach: How Rich Democracies Repel Asylum Seekers* (OUP 2019).

larger logics of the increasingly privatized carceral State. All of these practices raise pressing questions about sovereignty and its relationship to territoriality.[35]

A particular difficulty with this kind of non-compliance is that it is politically sensitive for UNHCR to push back on powerful donor States when they contravene their obligations. Often, UNHCR will restrict itself to back-channel diplomacy on these matters, avoiding public criticism when possible. UNHCR is only likely to raise public concerns when externalization and deterrence policies are particularly egregious, such as UNHCR's November 2019 statement on the US Trump administration's use of bilateral 'Asylum Cooperative Agreements' with the governments of Guatemala, Honduras, and El Salvador, which return asylum seekers to States where they may face extreme danger.[36]

In sum, the literature on the politics of compliance with international refugee law has not taken a systematic approach to tracing compliance trends. More research is needed that uses a geopolitical or post-colonial lens to explore the power dynamics of the international refugee regime and develop nuanced, contextual explanations for why States might resist formal declarations of commitment to international refugee protection instruments, or why they might make formal declarations and then avoid the obligations they create. It is clear that non-compliance can take many forms and needs to be explored in the particular political context in which it arises. Very frequently, implementation of the norms of refugee protection comes down to political will. However, sometimes it is a matter of State capacity. As a result of the combined lack of will and capacity, many vulnerable people live beyond the reach of international protection, either by law or in fact.

5. The Politics of Reputation

While politics are usually a force for exclusion, especially in democratic States,[37] there are also notable instances in which politics can be used to help enforce international refugee protection law. One of the political factors that can push States to be more generous towards refugees and asylum seekers is a concern about reputation. Very few States in the world have no regard for their international reputation. The vast majority have at least a putative desire to be viewed as part of the international community. Especially for States that are not amongst the biggest global power players, but who

[35] Michael Flynn, 'There and Back Again: On the Diffusion of Immigration Detention' (2018) 2 Journal on Migration and Human Security 165.

[36] UNHCR, 'Statement on New US Asylum Policy' (19 November 2019) <https://www.unhcr.org/uk/news/press/2019/11/5dd426824/statement-on-new-us-asylum-policy.html> accessed 11 March 2020. See further Chapter 28 in this volume.

[37] David S FitzGerald and David Cook-Martin, *Culling the Masses: The Democratic Origins of Racist Immigration Policy* (Harvard University Press 2014).

aspire to have a seat at the table, honing a reputation for internationalism can bring visibility and legitimacy.

While realist scholars in the political science sub-field of international relations might predict that States would never act outside of their narrow national interests, so-called 'middle powers' frequently promote human rights as part of their foreign policy agenda.[38] These States, bolstered by active civil societies and compelling leaders, have developed international reputations and constructed identities around the promotion of international human rights norms. One example of this phenomenon is Canada, where middle power internationalism has been almost a 'religion' in Canadian politics.[39] In the realm of refugee protection, this commitment to international human rights norms has resulted in Canada resettling a very large number of refugees over the years in proportion to its relatively small population. In 1986, it also led Canada to be awarded the Nansen medal, the UN distinction granted each year for exemplary action in promoting refugee protection. In 2017, when US President Trump unveiled his executive order proposing to ban people from a list of predominantly Muslim countries, Canadian Prime Minister Justin Trudeau tweeted: 'To those fleeing persecution, terror & war, Canadians will welcome you, regardless of your faith. Diversity is our strength #WelcomeToCanada'. The timing of such public statements was clearly designed to distinguish Canada from the actions of its neighbour to the south by promoting and continuing its reputation as a country committed to refugee protection.

While Ecuador does not qualify in the global arena as a middle power, a similar set of factors seems to explain the reputation Ecuador has carved out for itself for welcoming displaced people from around its region of Latin America. Notably, over the years Ecuador has publicly prided itself on openness to refugees, and has frequently drawn attention to this fact on the international stage.[40] Ecuador's choice to position itself in this way is particularly notable given that it is nowhere near as wealthy or powerful as Canada.

A third variation of the role of internationalism in promoting refugee protection is Japan. In that case, in the decades after the Second World War, advocates for immigrants and refugees within Japan used international norms to push for the protection of non-citizens by leveraging Japan's desire to raise its international profile. They successfully convinced the Japanese government to ratify several treaties, including the Refugee Convention in 1982, in part by arguing that it would make Japan look like a regional leader to openly support the post-war liberal international human rights regime.[41]

In all three of these cases, government officials believed that taking a public stand in favour of refugees would raise the international profile and increase the legitimacy of

[38] Alison Brysk, *Global Good Samaritans: Human Rights as Foreign Policy* (OUP 2009).

[39] Don Munton and Tom Keating, 'Internationalism and the Canadian Public' (2001) 34(3) Canadian Journal of Political Science 517.

[40] Stephen Meili, 'The Human Rights of Non-Citizens: Constitutionalized Treaty Law in Ecuador' (2017) 31 Georgetown Immigration Law Journal 347.

[41] Amy Gurowitz, 'Mobilizing International Norms: Domestic Actors, Immigrants, and the Japanese State' (1999) 51 World Politics 413.

the State in the eyes of the world. But there are also some key differences worth exploring. While reputational concerns are a factor in each place, Ecuador and Canada actually take in a lot of people, and Japan does not. Future research could explore the mechanisms of the politics of reputation in more detail, especially in cases beyond the classic middle power States. In particular, more work is needed on the ways in which law is harnessed by activists and NGOs for greater political leverage as they push for compliance with international refugee protection norms.

6. The Politics of Categorization

While the international legal definition of a refugee suggests that there is a distinct category of border crossers called refugees, the distinction between forced and voluntary migration that underlies the concept is far less clear-cut in practice than in theory. Ethnographic studies reveal that the vast majority of people decide to leave home for a combination of complicated factors, making it difficult to sort people into distinct groups.[42] While some people feel compelled to leave their homes due to a pressing threat, they still exhibit some agency regarding precisely when to leave, how to leave, and where to go.[43] Since refugees are migrants until and unless they are labelled otherwise, the politics of categorization can be a life or death matter for many people who cross borders.[44]

Beyond any practical and conceptual challenges to legal categorization, there are also political factors that affect how receiving States apply the definition of a refugee. One piece of evidence that can be used to measure the political factor in categorization is the degree of cross-national variation in RSD rates for people from the same country of origin. For example, within the EU, recognition rates for asylum seekers vary tremendously by Member State, even for applicants from places like Syria, where one might expect to see uniformly high acceptance rates.[45] Similarly, the United States,

[42] See eg Heaven Crawley and Dimitris Skleparis, 'Refugees, Migrants, Neither, Both: Categorical Fetishism and the Politics of Bounding in Europe's "Migration Crisis"' (2018) 44 Journal of Ethnic and Migration Studies 48; Marta Bivand Erdal and Ceri Oeppen, 'Forced to Leave? The Discursive and Analytical Significance of Describing Migration as Forced and Voluntary' (2018) 44 Journal of Ethnic and Migration Studies 981; Sang Lee, 'Between Displacement and Migration: Neoliberal Reform and the Residues of War in Rural Nicaragua' in Khalid Koser and Susan Martin (eds), *The Migration-Displacement Nexus: Patterns, Processes, and Policies* (Berghahn Books 2011).

[43] For an excellent discussion of how the concepts of forced and voluntary migration are normatively loaded, see Valeria Ottonelli and Tiziana Torresi, 'When is Migration Voluntary?' (2013) 47 International Migration Review 783.

[44] Jorgen Carling, 'Refugee Advocacy and the Meaning of "Migrants"' (2017) Peace Research Institute Oslo Policy Brief <https://www.prio.org/utility/DownloadFile.ashx?id=326&type=publicationfile> accessed 24 March 2020; Lamis Abdelaaty and Rebecca Hamlin, 'Migrants or Refugees? It's the Wrong Question. Here's How to Help the People Fleeing to Europe' *Washington Post* (23 October 2015).

[45] Nick Gill and Anthony Good, *Asylum Determination in Europe: Ethnographic Perspectives* (Palgrave Macmillan 2019) 12.

Canada, and Australia have very different RSD grant rates, even for people coming from the same country of origin. Comparative institutional analyses have suggested that even amongst liberal democracies with strong, independent judiciaries, cross-national variation in RSD rates can be attributed to the degree to which States have designed their administrative RSD processes to insulate them from the exclusionary politics of immigration control.[46] The intensity of these politics can also vary over time, as the political salience of a particular asylum situation can influence the degree to which politicians get involved to influence RSD outcomes.[47]

Drawing to some degree on these kinds of empirical studies, some scholars have convincingly argued that the RSD practices of receiving States in the Global North are transparently political. These scholars have pointed to the hypocrisy of how geopolitics, not law, ultimately determines who gets classified as a refugee.[48] In contrast, other scholars have emphasized and explicitly defended the political value of granting refugee status to someone fleeing a repressive or enemy regime, because it sends a strong message of condemnation to the origin State.[49] Scholars on both sides of this debate acknowledge the fact that the dynamics of using RSD as a political tool have changed dramatically since the end of the Cold War.

Given that the vast majority of displaced people remain in their region of origin, too much scholarly discussion of categorization is focused on the Global North. There has been far less academic study of State responses to arrivals in the Global South. Yet, variation in State response also occurs in the Global South, though perhaps for slightly different reasons. A comparative study of six African States found a great degree of variation in response to arrivals, and concluded that responses had little to do with the needs of the people seeking help, and a great deal to do with the capacity and willingness of the States to devote substantial resources to assistance.[50] Similarly, in-depth comparative case studies of Egypt, Turkey, and Kenya's refugee politics found that State responses to asylum seekers can be predicted by a combination of the relations between the sending and receiving State, and whether the ethnic make-up of the people seeing refuge matches that of the government in power in the host State.[51] Global South States are also more likely to have UNHCR conduct RSD within their territories, or to engage in what is known as *prima facie*, or group-based recognition, rather than individualized RSD.

[46] Rebecca Hamlin, *Let Me Be a Refugee: Administrative Justice and the Politics of Asylum in the United States, Canada, and Australia* (OUP 2014).

[47] Idean Salehyan and Marc R Rosenblum, 'International Relations, Domestic Politics, and Asylum Admissions in the United States' (2008) 61 Political Research Quarterly 104.

[48] Chimni (n 7); Chandran Kukathas, 'Are Refugees Special?' in Sarah Fine and Leah Ypi (eds), *Migration in Political Theory: The Ethics of Movement and Membership* (OUP 2018).

[49] Matthew E Price, *Rethinking Asylum: History, Purpose, and Limits* (CUP 2009).

[50] Alexander Betts, *Survival Migration: Failed Governance and the Crisis of Displacement* (Cornell University Press 2013).

[51] Lamis Abdelaaty, *Discrimination and Delegation: Explaining State Responses to Refugees* (OUP 2021).

The politics of categorization have also been affected by the ongoing so-called 'war on terror'. Article 1f of the Refugee Convention, which outlines situations in which someone who might otherwise qualify for refugee status can be excluded from protection, has gained much more prominence in the past two decades as it has come to be viewed as a potential tool for preventing the admission of undesirable people.[52] Receiving States in the Global North increasingly cooperate and collaborate on international evidence collection in order to better screen people out who have some association with atrocity, and deny them refugee status. The process of categorizing some people as human rights violators and war criminals involves a complex new blend of domestic criminal and international criminal law, domestic immigration law, and international refugee law.[53]

In sum, across the globe, the question of whether border crossers are categorized as refugees often has more to do with the politics of the receiving State than the individual characteristics of the person seeking protection. This fact is perhaps ironic, given the highly individualized nature of the definition outlined in the Refugee Convention. Thus, understanding the politics of categorization is an important area of research within the study of international refugee law and protection. The way in which international legal definitions are interpreted within domestic contexts, and the ways that politics might shape those interpretations, is a ripe area for future research. Existing studies have shown that it is overly simplistic to argue that receiving States resist granting people refugee status. Exclusionary and inclusionary factors are both at play, and have different levels of influence in particular institutional contexts and political moments. More research is needed to understand how politics affects categorization, particularly in destinations beyond the Global North.

7. The Politics of Public Opinion and Domestic Electoral Politics

Decisions about how to categorize, and whether to protect, people who arrive at a State's borders are shaped by politics, which (at least in democracies) is closely linked to public opinion. Politicians must contend with the fact that public reactions to border crossers are rarely enthusiastic. Spontaneous arrivals can be viewed as an economic threat, an expensive burden whose costs will have to be balanced against the needs of the local population. Reactions are also frequently linked to racialized beliefs about who the arriving people are, what their values are, and how they will change or impact the ethno-religious culture of the host State. Host State publics also frequently worry that refugees and asylum seekers are a threat to national security, because terrorists or war criminals might embed themselves amongst refugee populations in order to gain access to host

[52] See Chapter 39 in this volume.

[53] Rebecca Hamlin and Jamie Rowen, 'From Redress to Prevention: How the International Politics of "No Safe Haven" Became the Politics of "Not in My Backyard"' (2020) 42 Human Rights Quarterly 623.

States. Concerns about economic impact, xenophobia, and national security are common in host States across the globe; they are not limited to States under extreme economic and political strain. Aware of these dynamics, politicians often invoke the language of 'crisis' to perpetuate anxiety about arrivals and shore up political support for strong border control measures.[54]

Historically, public opinion research has focused on attitudes towards immigrants as a much broader category, and has not disaggregated attitudes towards specific groups, such as refugees and asylum seekers. A relatively recent but growing body of survey research is focused on understanding public attitudes about refugees specifically. These studies have attempted to discern whether host States with more internal ethnic diversity are more or less open to welcoming refugees, with mixed results depending on how scholars measure diversity.[55] Other studies have found that public opinion about arriving refugees is shaped by beliefs about the potential economic contribution of the group, beliefs about the group's humanitarian need, and in many cases, anti-Muslim bias.[56]

Other studies have found particularly negative attitudes towards asylum seekers who enter host States irregularly, even though the Refugee Convention protects their right to do just that. Narratives about 'queue jumpers' can pit some humanitarian migrants against others in the public mind.[57] Further, publics frequently imagine asylum seekers to be a larger proportion of the immigrant population than they actually are, which drives overall attitudes about immigration in a negative direction.[58]

Media coverage of refugees and asylum seekers also shapes public perceptions of these groups, but not in the same ways in each host State. Contexts of reception, that is, a combination of the media culture of the State, the ways in which immigrants are incorporated into each society, and the historic associations that particular immigrant

[54] See Cecilia Menjivar, Marie Ruiz, and Immanuel Ness (eds), *The Oxford Handbook of Migration Crises* (OUP 2019).

[55] Marcel Coenders, Merove Gijsberts, and Peer Scheepers, 'Resistance to the Presence of Immigrants and Refugees in 22 Countries' in Mérove Gijsberts, Louk Hagendoorn, and Peer Scheepers (eds), *Nationalism and Exclusion of Migrants: Cross-National Comparisons* (Ashgate 2004); Liza G Steele and Lamis Abdelaaty, 'Ethnic Diversity and Attitudes towards Refugees' (2019) 45(11) Journal of Ethnic and Migration Studies 1833.

[56] Kirk Bansak, Jens Hainmueller, and Dominik Hangartner, 'How Economic, Humanitarian, and Religious Concerns Shape European Attitudes Towards Asylum Seekers' (2016) 354(6309) Science 217; Claire L Adida, Adeline Lo, and Melina R Platas, 'Perspective Taking Can Promote Short-Term Inclusionary Behavior toward Syrian Refugees' (2018) 115(38) Proceedings of the National Academy of Sciences of the United States of America 9521; Hagen von Hermanni and Robert Neumann, '"Refugees Welcome?" The Interplay between Perceived Threats and General Concerns on the Acceptance of Refugees—A Factorial Survey Approach in Germany' (2019) 45(3) Journal of Ethnic and Migration Studies 349.

[57] Fiona H McKay, Samantha L Thomas, and Susan Kneebone, '"It Would Be Ok if They Came through the Proper Channels": Community Perceptions and Attitudes toward Asylum Seekers in Australia' (2012) 25(1) JRS 113.

[58] Scott Blinder, 'Imagined Immigration: The Impact of Different Meanings of "Immigrants" in Public Opinion and Policy Debates in Britain' (2015) 63 Political Studies 80.

statuses carry, can affect both the tone and rate of media coverage.[59] Even the concept of a refugee differs by national reception context, which is reflected in the tone of media coverage about refugees. For example, in the United States, refugees have historically been portrayed in a more positive light, which focused on their deservingness in contrast to the more politically unpopular framing of 'illegal immigrants'.[60] In contrast, European media coverage of refugees has historically been relatively more negative.[61] More recent studies of European media have found that news outlets vary substantially in terms of the words they use to describe people coming across the Mediterranean. Media in some countries tends to refer to such people as 'migrants' whereas the media in other countries calls the same people 'refugees'.[62] More research is needed to unpack the degree to which such terminological differences might affect public attitudes.

In the past several decades, concerns about security and terrorism have been deeply entangled with public opinion about refugees and asylum seekers. Politicians have capitalized on public fears about terrorism for political gain, and to justify harsh border control measures and crackdowns on refugee resettlement.[63] Public fears about the link between refugees and terrorism can put refugee communities at risk. A recent study found that refugees are particularly vulnerable to physical attack in the aftermath of terrorist attacks in their host State, as they are scapegoated for the event.[64]

Much more research is needed on public opinion about refugees and asylum seekers in countries beyond the liberal democratic receiving States of the Global North. More analysis of how the new media landscape, and in particular social media, affects public opinion about refugees and asylum seekers, would be useful. Finally, as a right-wing populist backlash sweeps the globe, future studies should examine the ways in which politicians of all political ideologies feel compelled to scapegoat and demonize immigrants and refugees, or to invoke crisis narratives in order to gain political power.

[59] Irene Bloemraad, Els de Graauw, and Rebecca Hamlin, 'Immigrants in the Media: Civic Visibility in the United States and Canada' (2015) 41 Journal of Ethnic and Migration Studies 874.

[60] Rebecca Hamlin, Irene Bloemraad, and Els de Graauw, 'Political Stories: Media Narratives of Political Participation by Asian Immigrants in the United States and Canada' (2016) 4 Politics, Groups, and Identities 425.

[61] Ron Kaye, 'Redefining the Refugee: The UK Media Portrayal of Asylum Seekers' in Khalid Koser and Helma Lutz (eds), *The New Migration in Europe* (Palgrave 1998); Alexandria J Innes 'When the Threatened Becomes the Threat: The Construction of Asylum Seekers in British Media Narratives' (2010) 24 International Relations 456.

[62] Mike Berry, Inaki Garcia-Blanco, and Kerry Moore, 'Press Coverage of the Refugee and Migrant Crisis in the EU: A Content Analysis of Five European Countries' (UNHCR 2016).

[63] Evelien Brouwer, 'Immigration, Asylum and Terrorism: A Changing Dynamic. Legal and Practical Developments in the EU in Response to the Terrorist Attacks of 11.09' (2002) 4 EJML 399; Elspeth Guild, 'International Terrorism and EU Immigration, Asylum and Borders Policy: The Unexpected Victims of 11 September 2001' (2003) 8 European Foreign Affairs Review 331; Jef Huysmans, *The Politics of Insecurity: Fear, Migration and Asylum in the EU* (Routledge 2006).

[64] Burcu Savun and Christian Gineste, 'From Protection to Persecution: Threat Environment and Refugee Scapegoating' (2019) 56 Journal of Peace Research 88.

8. The Politics of Data and Statistics

Both scholars and practitioners of international refugee law deploy statistics frequently, to emphasize the scale of a problem, to suggest that global displacement is at an all-time high, and as a hook to grab the attention of funders and the general public. Very rarely are the origins and reliability of these data questioned or even elaborated upon when they are presented. The confidence with which refugee statistics are presented is surprising, given how many obstacles exist to collecting accurate and reliable information about exactly how many refugees there are in the world. It is also surprising how few scholarly analyses there have been of this topic, when such data is centrally important to refugee protection and advocacy.[65]

The first challenge to data collection is definitional. While most States in the world rely on the Refugee Convention definition, some do not. They use their own statutory definition, or a broader regional definition. Some non-governmental organizations which collect refugee statistics also use definitions other than the one outlined in the Refugee Convention. This variation can lead to non-comparable cross-national or cross-regional data being aggregated.

It is also hugely logistically difficult to count people who are moving. Refugees can be intermingled with local populations, who may themselves be internally displaced, or who may have incentives to blend in with refugee groups in order to access international aid. A really thorough registration and record-keeping programme may not always be a priority for States or aid organizations in unfolding situations of displacement, and may not be worth the cost, which could otherwise be spent on providing direct aid.

Beyond these logistical and definitional hurdles, politics can play a direct role in shaping how refugees are counted and how statistics are reported.[66] Numbers are often linked to resources and humanitarian assistance. So, aid organizations and receiving States may have incentives to inflate numbers in order to increase international sympathy and assistance. In other circumstances, host States may have incentives to downplay numbers so as not to alarm their own citizens, or antagonize neighbouring sending States and exacerbate diplomatic tensions. There is no hard and fast rule that determines in which direction these incentives point. It is highly dependent on the particular political context.

Large-scale refugee numbers have been used by Global North powers to justify military intervention, or at the very least to level criticism against the State of origin. No State wants to be viewed as a 'refugee producing country', so sending States often have an

[65] For a detailed discussion of the challenges of collecting accurate refugee statistics, with many specific examples, see Jeff Crisp, 'Who Has Counted the Refugees? UNHCR and the Politics of Numbers', UNHCR New Issues in Refugee Research Series Working Paper No 12 (1999).

[66] Peter Andreas, 'The Politics of Measuring Illicit Flows and Policy Effectiveness' in Peter Andreas and Kelly M Greenhill (eds), *Sex, Drugs, and Body Counts: The Politics of Numbers in Global Crime and Conflict* (Cornell University Press 2010).

incentive to downplay the numbers of people leaving their country. There have been instances of countries of origin actively challenging statistics claiming that their State had produced large numbers of refugees. In an extreme recent example, the State of Myanmar has disavowed accusations that it drove Rohingya people out of its territory, claiming that the residents of camps in the disputed Bangladesh–Myanmar border region are foreigners. These actions are now part of a pending case with the International Criminal Court (ICC).[67]

When faced with large-scale direct arrivals, Global North asylum States rarely count those people as refugees. Instead, they often label the asylum seekers as irregular or illegal migrants, with no legitimate claim to access their territories. Later, these States have strong political incentives to frame their reporting of RSD statistics to show how low acceptance rates support the claim that many asylum seekers are not 'genuine refugees'. In this sense, the politics of statistics is directly linked to the politics of categorization.

This overview of the politics of refugee statistics should serve as a sobering reminder that critical analysis of how numbers are presented and framed is advisable, since data is rarely, if ever, neutral. Even well-meaning advocates can slip into the habit of deploying refugee statistics in ways that inadvertently further a crisis narrative. More research is sorely needed to better understand the particular dynamics of refugee data production on the ground in both Global North and Global South receiving States, and to critically analyse the use of statistics in public debate about refugee policy.

9. Conclusion

This chapter provided a brief overview with the aim of orienting the reader to an awareness of the politics of refugee law and protection. It also flagged some gaps in the literature where future research would be most welcome. Many political dynamics were doubtless overlooked. Many others are elaborated much more fully in later chapters of this *Handbook*. But, the overarching goal of the chapter was simply to persuade readers of the centrality of politics to outcomes that affect the lives of people seeking protection. Because refugee protection implicates politics at the global, national, and local levels, there are many political variables at play. These politics fundamentally shape how law is developed, how law is interpreted, and whether law is implemented and enforced. In other words, politics is the key variable that can explain why 'law in books' is not always translated into 'law in action' that protects refugees' lives.[68]

[67] Payam Akhavan, 'The Radically Routine *Rohingya* Case: Territorial Jurisdiction and the Crime of Deportation under the ICC Statute' (2019) 17 Journal of International Criminal Justice 2.

[68] Roscoe Pound, 'Law in Books and Law in Action' (1910) 44 American Law Review 12.

CHAPTER 6

THE ETHICS OF INTERNATIONAL REFUGEE PROTECTION

SEYLA BENHABIB AND NISHIN NATHWANI

1. Introduction

The normative foundations of refugee admission and protection are contested. On the one hand, the human rights origins and orientation of the international refugee protection regime ushered in by the Refugee Convention and its 1967 Protocol are firmly established. Most recently, the Global Compact on Refugees reaffirms that international refugee protection 'emanates from fundamental principles of humanity and international solidarity', as guided *inter alia* by 'relevant international human rights instruments'.[1] In this sense, refugee law and the protections it affords are instances of the operationalization of international human rights law, insofar as we understand the varieties of persecution suffered by refugees to be a subset of serious human rights violations and the remedies offered by refugee law as a form of international human rights protection.[2]

On the other hand, the Global Compact equally maintains that international refugee protection operates within a framework rooted in 'the principle of sovereign equality of States'[3] that recognizes the 'primary responsibility and sovereignty of States'.[4] The document reasserts 'the primacy of national ownership and leadership'[5] of refugee protection programmes and the importance of proceeding in 'consultation with national authorities and in respect of relevant [national and local] legal frameworks'.[6] If, as Hathaway argues, 'international human rights law is fundamentally a means of delimiting

[1] Global Compact on Refugees, para 5.

[2] For discussion of the link between refugee protection and human rights see eg Chapter 11 in this volume.

[3] Global Compact on Refugees, para 2.

[4] ibid para 33.

[5] ibid para 35.

[6] ibid para 37.

state sovereignty',[7] then this dual emphasis on international human rights and the priority of State sovereignty reflects a conceptual and practical tension. This tension frames the various ethics of refugee protection explored in this chapter.

The Global Compact carefully but irresolutely negotiates between the cosmopolitan lexicon of 'responsibility-sharing', 'burden-sharing', 'human rights', and 'dignity',[8] and the more sovereigntist language of 'generosity', 'national security', 'limited resources', and 'national legislation, policies, and priorities'.[9] Several disjunctive logics are thus at play in the text of the Global Compact: cosmopolitanism versus State sovereignty, charity versus legal obligation, national security versus humanitarian necessity, international versus national law.

In this chapter, we outline two diverging strands in the literature on the ethics of refugee protection: first, what we call the 'statist ethics of refugee protection', of which the positions of liberal nationalists and liberal internationalists are paradigmatic; and second, what we call the 'cosmopolitan ethics of refugee protection', which we subdivide into three dominant positions: the agency-centric view, the power-centric view, and the postcolonial view. Our aim is to outline each of these positions, and then to sketch briefly the contours of a sixth position based on Benhabib's concept of jurisgenerativity.[10]

2. Statist Ethics of Refugee Protection

The English term 'refugee' in its current usage originated to describe the roughly 400,000 French Huguenot *réfugiés* who fled to England in 1685 following Louis XIV's revocation of the Edict of Nantes that had granted religious liberty to French Calvinists almost a century earlier in 1598.[11] While some scholars argue that the concept of the 'refugee' is thus endogenous to the modern nation-State system,[12] the experience that prompted the Huguenots' flight from France—what we now call 'persecution'—is transhistorical and transcultural. The nascent field of refugee history has started to map how migratory populations fleeing harm have been variously constituted across time and space.[13] Broadly understood, the refugee is in fact a much older figure than the citizen.[14]

[7] James C Hathaway, 'Reconceiving Refugee Law as Human Rights Protection' (1991) 4 JRS 113.

[8] Global Compact on Refugees, paras 5, 7, 9, 11.

[9] ibid paras 1, 5, 14, 56.

[10] Seyla Benhabib, *The Rights of Others: Aliens, Residents, and Citizens* (CUP 2004).

[11] Laura Barnett, 'Global Governance and the Evolution of the International Refugee Regime' (2002) 14 IJRL 238, 239.

[12] See eg Emma Haddad, 'Who Is (Not) a Refugee?', EUI Working Paper SPS No 2004/6, 4 n 11.

[13] Olaf J Kleist, 'The History of Refugee Protection: Conceptual and Methodological Challenges' (2017) 30 JRS 161.

[14] See eg Anne Dufourmantelle, 'Hospitality under Compassion and Violence' in Thomas Claviez (ed), *The Conditions of Hospitality* (Fordham University Press 2013) 14. Dufourmantelle argues that hospitality has been at the root of primitive societies because 'you could immediately become the very stranger that you opened your door to'. The term 'hospitality' derives from the Latin terms *hospitalia* or *hospitia*, which were dwellings specifically for foreigners (*hospites*), a practice also found amongst the ancient Greeks. cf James A Chamberlain, 'Responsibility for Migrants: From Hospitality to Solidarity' (2019) Political Theory 1.

The protection of the most vulnerable escaping targeted harm and natural disaster has long been central to the predominant ethical systems of the world—both ancient and modern, religious and secular.[15] Of course, the parameters of these ethical, as opposed to legal, obligations have traditionally depended not only upon whom we recognize as the most vulnerable, but also on how we understand the causes of their vulnerability. It is widely accepted that those who cause refugees to flee may have remedial obligations to them, as reflected, for example, in the financial compensation that successive German governments pay to Jews and other minorities persecuted in the Holocaust.[16]

In what we call the 'statist ethics of refugee protection', such ethical obligations are assessed in relation to the proper 'balancing' between the moral rights of the vulnerable and the ethical obligations of those who are in a position to offer them protection. Importantly, these duties are not 'perfect',[17] in that they do not oblige unconditionally, but depend on the circumstances underlying the vulnerability in question and past ethical relations between the implicated parties. From this standpoint, refugee protection becomes an act of beneficence and of compensatory or remedial justice. In contemporary debates, two versions of this view are dominant—what we call the 'liberal nationalist' and the 'liberal internationalist' positions.

a. Liberal Nationalism

Liberal nationalists subscribe to the view that assessing responsibilities towards refugees requires weighing the interests of 'people who are liable to be severely harmed as a result of the persecution they are undergoing with those of bounded political communities that are able to sustain democracy and achieve a modicum of social justice but need closure to do this'.[18]

Underpinning this view is the notion that democratic self-governance is predicated on well-protected territorial borders. According to liberal nationalists, a centralized agent is required to assume responsibility for protecting a country's natural and material assets and to ensure continuity of its public culture and democratic values. Immigration is permitted, but it remains a privilege regulated through the sovereign determinations of a State's legislature.

[15] See eg Kleist (n 13) 162–3. For an overview of the biblical conception of the 'cities of refuge', see Moshe Greenberg, 'The Biblical Conception of Asylum' (1959) 78 Journal of Biblical Literature 125.

[16] 'Summary of Major Holocaust Compensation Programs' (Claims Conference: The Conference on Jewish Material Claims against Germany 2000).

[17] Henry Sidgwick outlines a distinction between *imperfect* moral duties—that is, conditional duties subject to exceptions and limitations based on legitimate grounds of self-preservation—and *perfect* moral duties—that is, duties that oblige unconditionally without exceptions or limitations. For Sidgwick, obligations towards refugees are imperfect duties of charity rather than perfect duties of justice. For a longer discussion, see Benhabib (n 10) 36–7.

[18] David Miller, *Strangers in Our Midst: The Political Philosophy of Immigration* (Harvard University Press 2016) 93.

Although liberal nationalists consider it desirable that legislatures should act in accordance with international law, what counts in the first place, is 'our' law, 'our' precedents, and 'our' values. The liberal nationalist position has a formidable array of adherents, including, amongst others, Rawls, Walzer, Nagel, and Miller.[19] For the purposes of this discussion, we briefly sketch Miller's and Rawls' versions of this argument, which we take to be paradigmatic.

Miller and Rawls both underline the priority of democratic self-determination in assessing States' duties towards immigrants and refugees. For Miller, this entails the twofold right of a population with a shared national identity to (a) occupy a territory that it has 'transformed' over time and endowed with 'material and symbolic value',[20] and (b) to determine policy in that territory via a representative State within the limits prescribed by human rights.[21]

Rawls similarly emphasizes territorial sovereignty as a precondition of self-determination, but offers a more Lockean justification in arguing that a territory is ultimately an 'asset' that, like other forms of property, would deteriorate unless a defined agent, namely a 'people', assumes responsibility for its maintenance.[22] However arbitrary a given border regime might appear from a transhistorical viewpoint, Rawls maintains that control of human flows across borders is therefore necessary (in the absence of a world State) to secure 'in perpetuity'[23] the fundamental asset on which the existence of a 'people' depends—its territory.[24]

Nonetheless, for Rawls and Miller alike, the right of territorially predicated self-determination is subject to constraints. For Rawls, self-determination cannot entail the subjugation of another people;[25] but this constraint means equally that another people cannot be compensated for their 'irresponsibility in caring for their land and its natural resources by…migrating into other people's territory without their consent'.[26] For Miller, the right of self-determination is restricted insofar as States are committed to human rights. This commitment generates both ethical obligations towards displaced persons in general—irrespective of whether their claims stem from 'state persecution, state collapse, or natural disaster'[27]—and more particular obligations to refugees when the receiving State is at least partly responsible for the factors leading to their displacement.

Still, both agree that these limitations to territorial sovereignty do not *ipso facto* obligate States to admit refugees. Miller argues that the right of self-determination justifies substitutive measures by States to fulfil their duties towards refugees without offering full admission. These measures include refugee-trading schemes between receiving States (including cash transfers agreements),[28] skills-based admission

[19] John Rawls, *The Law of Peoples* (Harvard University Press 1999) 38–9; Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (Basic Books 1983) 51; Thomas Nagel, 'The Problem of Global Justice' (2005) 33 Philosophy and Public Affairs 113. For a trenchant critique of Nagel, see Joshua Cohen and Charles Sabel, 'Extra Rempublicam Nulla Justitia?' (2006) 34 Philosophy & Public Affairs 147; Miller (n 18).

[20] Miller (n 18) 60. [21] ibid 62. [22] Rawls (n 19) 39. [23] ibid. [24] ibid.

[25] ibid 38. [26] ibid 39. [27] Miller (n 18) 93. [28] ibid 88–92.

policies,[29] national admission quotas,[30] and, in certain instances, 'outside intervention' in States of origin (such as humanitarian aid, investments, or support to create 'safe havens').[31] Rawls, by contrast, emphasizes that liberal-democratic peoples have a 'duty of assistance' to support 'burdened societies' 'to manage their own affairs reasonably and rationally and eventually to become members of the Society of well-ordered Peoples',[32] principally by establishing 'just basic institutions for a free constitutional democratic society'.[33] He does not, however, extend this duty of assistance to protect those who seek asylum at a State's border. Similarly, Miller asserts that when a State 'sincerely and reasonably believes it has done enough, taking into account the cost of accepting refugees', it is 'better to say honestly that not every one [sic] can be rescued'.[34]

Undergirding Miller's and Rawls' shared commitment to territorial sovereignty as a 'trump card' against obligatory refugee admission is a common concern for cultural self-preservation. For Miller, immigrants in significant numbers change the 'self' in 'self-determination' by altering the composition of the *body politic*, and therefore also the public culture of a society. Miller thus reasons that political self-determination entails a right on the part of the representative State to limit immigration to serve this end.[35]

Rawls likewise invokes the protection of liberal-democratic culture as a justification for discretionary immigration control, citing Michael Walzer.[36] But he goes a step further in implying that the ills facing individuals in 'burdened societies' stem from certain 'religious, philosophical, and moral traditions', rather than from material constraints or inequalities in global distributive justice.[37] Accordingly, he insists that while the causes of migration are multifaceted, including the 'persecution of religious and ethnic minorities, the denial of their human rights', migration would cease to be of concern once 'religious freedom and liberty of conscience, political freedom and constitutional liberties, and equal justice for women' are instituted globally.[38]

Rawls' and Miller's accounts reflect the broader liberal nationalist position that the right of territorial self-determination means that any ascertainable State obligations to protect refugees can be subsumed under a broader duty of care to remedy the causes of displacement in various 'burdened' countries of origin. Admission is not the *sine qua non* of ethical standard through which States must fulfil such duties towards refugees. As we later discuss in the context of power-centric and postcolonial critiques of refugee protection, some iterations of the liberal nationalists' prescription for 'outside assistance' are worryingly conducive to justifications of cultural, economic, and perhaps even military imperialism, however inadvertently.

[29] ibid 91. Miller maintains that skills-based or other economic admissions considerations are only defensible at the second stage of assessment, namely, in determining whether a recognized refugee should be admitted with a form of permanent residence to the country of asylum or transferred to another safe State, and not at the first stage of assessment, namely, adjudicating claims for refugee status as claims about 'the necessity of escaping a serious threat to human rights'.

[30] ibid 88. [31] ibid 82. [32] Rawls (n 19) 111. [33] ibid 107. [34] Miller (n 18) 93.

[35] ibid 60–1. [36] Rawls (n 19) 39 n 48. [37] ibid 108. [38] ibid 9.

b. Liberal Internationalism

Liberal internationalists interrogate the treatment of territorial sovereignty as the preponderant consideration in assessing our duties towards refugees. They highlight that sovereignty is not an intrinsic property or 'first principle' of isolated States, but emerges from an international system of mutual recognition whereby States reciprocally recognize territory and other aspects of sovereignty according to shared norms. In Haddad's words, 'sovereignty is never absolute and international society could not exist without an element of concession on the part of individual states'.[39] Because territorial sovereignty emerges endogenously to international legal-political norms and processes, it cannot ground an ethical or political limitation to international legal duties towards refugees in the way suggested by liberal nationalists.

To be clear, liberal internationalists do not claim that territorial sovereignty is meaningless, but rather that the Westphalian model of the absolute jurisdiction of a central authority over all persons within a State's territory is a myth of the past. Liberal international sovereignty is structured by the principles and commitments outlined in international law, including the UN Charter (1945), the UDHR (1948), and the regimes of human rights created in the aftermath of the Second World War, including the ICCPR (1966) and the ICESCR (1966). In the protection of their borders, States must not derogate from these international commitments.

Immigration policies that privilege 'meritocratic' assessments, or that prioritize immigrants with family affiliations, may be acceptable from a liberal international perspective if they are adopted by national legislatures in compliance with international human rights norms. But the rights of the strangers amongst us are not at the discretion of States alone; they must be in conformity with national, regional, as well as international norms. Prominent liberal internationalists include, amongst others, Henkin, Doyle, Koh, Hathaway, and Slaughter.[40]

Some liberal nationalists argue that obligations towards refugees stem only from States' voluntary accession to the Refugee Convention and the 1967 Protocol. However, there is a crucial normative link between State sovereignty and the protection of human rights, including refugee rights, that is not exhausted by States' commitment (or lack thereof) to the primary instruments of refugee law. As Hathaway argues, international human rights are essential to State sovereignty insofar as they 'establish a benchmark of a government's

[39] Emma Haddad, 'Refugee Protection: A Clash of Values' (2003) 7(3) The International Journal of Human Rights 1, 10.

[40] Louis Henkin, 'That S Word: Sovereignty, and Globalization, and Human Rights, et cetera' (1999) 68 Fordham Law Review 1; Michael Doyle, 'The Model International Mobility Convention' (2018) 56 Columbia Journal of Transnational Law 219; Harold H Koh, 'Why Do Nations Obey International Law? (Review Essay)' (1997) 106 Yale Law Journal 2599; Anne-Marie Slaughter, *A New World Order* (Princeton University Press 2005); James C Hathaway, 'Reconceiving Refugee Law as Human Rights Protection' (1991) 4 JRS 113.

right to claim sovereign authority over a people'.[41] States that violate international human rights norms fail to achieve the minimum standard for international legitimacy and delegitimize their claim to 'autonomous authority'.[42] Henkin elaborates that although the Refugee Convention and its Protocol were largely distinct from international human rights law in their inception, serving as 'a small concession by compassionate states addicted to and fearful for their "sovereignty"',[43] the situation over the past six decades has changed this relationship substantially. International human rights law has since grown from a series of non-binding declarations to 'binding covenants and conventions'; and accordingly, international refugee law has become inextricably enmeshed with international human rights law insofar as 'massive flows of refugees result from massive human rights violations'.[44]

According to Costello and Foster, this entanglement is reflected in part through the fact that the norm of *non-refoulement* is gradually attaining the status of a *jus cogens* norm.[45] This places *non-refoulement* alongside other universal, non-derogable norms in international law, such as the prohibitions on genocide and torture. For Henkin, an updated reading of international refugee law must thus recognize 'not only the Refugee Convention but the International Covenants and the UN Charter; not only UNHCR, but the Human Rights Committee and, if necessary, the UN Security Council'.[46]

For Hathaway, the increasing entanglement of refugee and human rights law means reorienting the concept of 'persecution' at the centre of the Refugee Convention. Since international human rights serve principally to define the basic duties that States owe to their citizens and those within their jurisdiction, understanding persecution specifically as a failure of State protection resituates refugee protection within the purview of human rights law.[47] In particular, Hathaway claims that a human rights-focused conception of persecution re-centres the fact that the distinctive feature of persecution is a form of harm that entails a coercive separation between the refugee and his or her home, and thereby a rupture in the State–citizen relationship.[48] Thus understood, refugee law *qua* human rights law becomes a means to enable 'persons to disengage from states which have forfeited their claim to international legitimacy by failure to adhere to basic standards of human rights law'.[49]

Hathaway recognizes that the Refugee Convention's requirement to demonstrate a nexus between serious harm feared and one of five enumerated grounds—race, religion, nationality, membership of a particular social group, or political opinion—precludes

[41] Hathaway (n 40) 113. [42] ibid.

[43] Louis Henkin, 'Refugees and Their Human Rights' (1994) 18 Fordham International Law Journal 1079, 1080.

[44] ibid.

[45] Cathryn Costello and Michelle Foster, 'Non-Refoulement as Custom and Jus Cogens? Putting the Prohibition to the Test' (2015) 46 Netherlands Yearbook of International Law 273.

[46] Henkin (n 43) 1081. [47] Hathaway (n 40) 122.

[48] See also Andrew E Shacknove, 'Who Is a Refugee?' (1985) 95 Ethics 274.

[49] Hathaway (n 40) 120.

other categories of persons fleeing human rights violations from accessing international protection; the Convention could even be accused of elitism for privileging dissidents and government opponents. Still, he defends the Refugee Convention's nexus requirement in part as a mechanism to identify 'the most deserving as among the deserving'[50] in a world with insufficient capacity to accommodate all those with legitimate claims to fearing serious harm.[51]

Souter adds that within this prioritized group are those who are '*doubly* deserving' of asylum because they also have claims to 'reparative asylum specifically from a *particular* state'.[52] In reconceiving of asylum as reparation for historical harm, Souter offers an ethic of refugee protection based on diachronic, rather than only synchronic, notions of justice. Souter contends that under certain conditions, asylum can serve as an appropriate remedy by States that are causally responsible for harm leading to displacement. He admits that discerning causation and assigning State responsibility require a scalar approach, in which, for instance, 'an Iraqi refugee claiming asylum in the United States since its invasion appears to have a stronger reparative claim than a Rwandan seeking asylum in Belgium on account of its past colonial rule'.[53] But he posits nonetheless that reparative justice should be one amongst several considerations in prioritizing claims for refugee status.[54]

Despite their divergences in emphasis, these various accounts encapsulate the broader liberal internationalist view that claims to State sovereignty cannot pre-empt obligations deriving from ratified treaties, *jus cogens* norms, or international human rights law. But as Parekh highlights, discussion about the legal and ethical obligations of receiving States at their borders should not occlude an equally important aspect of refugee protection: upholding their dignity and autonomy.[55] In this vein, we turn to other perspectives that situate ethical obligations towards refugees as matters of respect for their human dignity and agency, and not only as forms of beneficence, remedial duty, or legal obligation on the part of States. We call these views the 'cosmopolitan ethics of refugee protection'.

[50] James C Hathaway, 'Is Refugee Status Really Elitist? An Answer to the Ethical Challenge' in Jean-Yves Carlier and Dirk Vanheule (eds), *Europe and Refugees: A Challenge* (Kluwer Law International 1997) 86.

[51] ibid 85.

[52] James Souter, 'Towards a Theory of Asylum as Reparation for Past Injustice' (2014) 62 Political Studies 326, 340.

[53] ibid 339.

[54] See Section 3.c of this chapter for further discussion. Note that postcolonial approaches to the ethics of refugee protection are not uniformly liberal internationalist. While Souter treats reparative justice as a mechanism to prioritize amongst those who meet the Refugee Convention's eligibility criteria for refugee status, other postcolonially oriented scholars deploy reparative justice to reject the legal distinction between refugees and other migrants entirely. See eg Tendayi E Achiume, 'Migration as Decolonization' (2019) 71 Stanford Law Review 1509.

[55] Serena Parekh, *Refugees and the Ethics of Forced Displacement* (Routledge 2017) 52.

3. Cosmopolitan Ethics of Refugee Protection

The cosmopolitan position pushes liberal internationalists beyond the perspective of the State, which, whether liberal or not, privileges an 'ontology of containment' that occludes the radical fluidity, historical variability, and interdependence of peoples, histories, cultures, and territories across borders. Cosmopolitanism proceeds from the premise that mobility is an anthropologically deep-seated drive of the human species, and that the regulation of human mobility through national borders is relatively recent in human history.[56]

The cosmopolitan view is not, however, a plea for a world without borders. To the contrary, cosmopolitans generally recognize that republics and democracies require jurisdictional boundaries.[57] In this aspect, cosmopolitanism in fact converges with liberal nationalists' emphasis on democratic self-determination, that is, to know in whose name the law is enacted and who is accountable for its enactment. But for cosmopolitans, these jurisdictional boundaries need not be coterminous with violently guarded territorial border regimes. If we shift our gaze below and above the level of the State, we begin to recognize various forms of interdependence amongst citizens and strangers at the level of municipalities, regions, borderlands, and transnational alliances.

While both liberal nationalists and internationalists treat migratory movements as matters to be regulated and governed, cosmopolitans seek to identify how, at the causal level, such movements express forms of structural dependence and interdependence amongst peoples. Cosmopolitans situate the roots of the ethical responsibilities we bear towards each other in the economic and political systems in which we are mutually implicated. Three versions of the cosmopolitan position have achieved prominence in the political–theoretic literature on refugee protection—what we call the 'agency-centric view', the 'power-centric view', and the 'postcolonial view'.

a. Agency-centric Views

Drawing on Arendt's insights, the 'agency-centric views' can be attributed to the work of several scholars, including Benhabib,[58] Gündoğdu, and Mann, amongst others. These views are grounded upon two interrelated claims. First, agency-oriented theorists argue

[56] For a political-theoretical discussion on the long-range history of migration, see eg Thomas Nail, *The Figure of the Migrant* (Stanford University Press 2015); Thomas Nail, *Theory of the Border* (OUP 2016).

[57] See Immanuel Kant, 'Perpetual Peace' in Hans Reiss (ed), Lewis White Beck (tr), *On History* (Library of Liberal Arts 1957). Kant criticizes the idea of a 'world State' and unbounded political communities.

[58] See Section 4 for a discussion of Benhabib's views on agency-centric cosmopolitanism.

that the tribulations suffered by refugees are irreducible to the specific harms that determine eligibility for refugee status. Rather, at the core of refugeehood is the loss of a 'world'—that is, following Arendt, the loss of membership in a political community where one is 'judged by one's actions and one's opinions'.[59] In deploying a conception of human personhood and dignity that is explicitly political, rather than legal–formal, agency-centric theorists emphasize the importance of restoring some form of political membership through the realization of the 'right to have rights'. Ethical obligations towards refugees are not exhausted by temporary protection but extend towards their integration into civil and political society.

Secondly, the agency-centric account holds that ethical responsibilities towards refugees are reducible neither to the legal obligations between States generated by international law, as asserted by legal positivists, nor to any obligations towards 'humanity as such', implied by an ontological account of human rights as pre-political and inalienable, as understood in natural rights theory.[60] While States and international institutions might be the formal adjudicators of rights claims, such claims are justified with reference to moral and political obligations amongst human beings that are irreducible to statist terms. The encounter between those who have rights and those who lack them is thus at the core of the ethics of refugee protection.

The agency-centric account is oriented around Arendt's insight that the legal-political institutionalization of international human rights has failed to meaningfully challenge the equation of the 'rights-bearer' with the citizen. As Gündoğdu elaborates, it is precisely when certain categories of migrants become *de facto* stateless—that is, when they can no longer fully avail themselves of the benefits of citizenship—that we can yet discern the degree to which the guarantee of human rights remains contingent upon citizenship. For Gündoğdu, however, this continued disjunction between 'man' and 'citizen'—traceable to the 1789 Declaration of the Rights of Man and Citizen—does not lead to the cynical view that human rights ought simply to be dismissed as 'logical inconsistencies, hypocritical gestures, or deceptive ploys'.[61] Rather, the political core of human rights becomes apparent and actionable only when we realize that specific human rights presuppose the more foundational 'right to have rights'—that is, the right to membership in a polity in which one's deeds and actions have significance. Because the predicament of the rightlessness of refugees reveals that human rights are not entailed in 'bare life', that is, in the *factum brutum* of human living, we begin to understand that rights must be enacted and demanded; and thus they must be understood as intrinsically political.

Gündoğdu characterizes politics as encompassing 'practices of enacting freedom understood as the capacity to begin something new and interrupt processes that were

[59] Hannah Arendt, *The Origins of Totalitarianism* (New edn, Harcourt Brace & Company 1973) 296–7.

[60] For a detailed critique of natural rights theory, see ibid 297–9.

[61] Ayten Gündoğdu, *Rightlessness in an Age of Rights: Hannah Arendt and the Contemporary Struggles of Migrants* (OUP 2015) 13.

taken to be automatic'.[62] Such practices build a shared world of understanding and establish a community of equals amongst 'human beings who are otherwise "different and unequal" '.[63] These politicizing practices that endow subjects with the 'right to have rights' lie in tension with anti-political impulses within the domain of what Arendt calls the 'social' and which 'reduce politics to an administration of life's necessities'.[64] Such anti-political impulses predominate in certain humanitarian approaches that treat refugees as speechless subjects[65] or destitute victims[66] and limit remedies to the temporary provision of their basic needs for survival.

At the same time, the language of human rights is deployed by migrants and refugees who paradoxically 'claim and exercise the rights that they are not fully authorized to claim and exercise'.[67] Through her account of the *sans-papiers* movement of undocumented migrants in France, Gündoğdu argues that migrants and refugees do not passively receive juridical determinations of the scope of their rights, but rather participate in 'political practices of founding human rights' through which they 'render their speech audible and intelligible, position themselves as political subjects capable of making rights claims, and establish the validity of these claims by wooing the consent of their interlocutors'.[68]

While Mann shares Gündoğdu's broadly Arendtian goal to recover refugee agency in the shaping of international law, he argues that the ethical core of human rights stems 'not from inclusion in particular communities but from the bare life of humans as such, as experienced by those of us who are bound by human rights law'.[69] The action of 'demanding consideration'[70] for oneself by 'putting oneself in the hands of'[71] an authority—of thrusting oneself upon sovereignty[72]—constitutes what Mann calls the fundamental 'right of encounter'.

Mann symbolizes the right of encounter through the figure of the 'universal boatperson'—that is, the refugee in distress who seeks assistance from a coastguard or navy agent at high seas outside of sovereign jurisdiction.[73] Mann treats the boatperson's encounter with the State as a 'litmus test for law' in determining whether any rights stem from bare life as such, beyond State authority, contractual obligation, and sovereign consent.[74] His answer is clear: even where sovereignty has no dominion, this encounter generates an obligation experienced existentially by both the boatperson and the State agent as an ethical imperative to protect. He argues that this imperative is the ontogenesis of international human rights law insofar as it generates rights and duties that cannot be derived from a positivist account that treats sovereignty as the cornerstone of

[62] ibid 56. [63] ibid. [64] ibid 58. [65] ibid 116.
[66] ibid 143. [67] ibid 168. [68] ibid.
[69] Itamar Mann, *Humanity at Sea: Maritime Migration and the Foundations of International Law* (CUP 2016) 13.
[70] ibid 145. [71] ibid 54. [72] ibid 145.
[73] ibid 42. For Mann, the high seas serve as a 'global, ever-present state of nature' insofar as they are 'outside of all sovereign territories and free for the navigation of all'. The figure of the 'universal boatperson' is analogously tied to the image of the 'flagless vessel', which lies beyond the customary legal obligation of rescue.
[74] ibid 71–2.

international law.[75] Because refugees impose duties on States and citizens in exercising the right of encounter, 'making human rights claims remains a political action even if not engaged from a position of reason but responds to need, necessity, and fear'.[76]

For agency-centric theorists, the tension between the political and the anti-political potentialities of human rights law remains the site of hope: for Gündoğdu, because refugees do not take the denial of their rights as a limit on possibilities for political action, and for Mann, because refugees deploy novel means, including emerging technologies, to facilitate face-to-face encounters with 'rights-bearing' others despite deterrence efforts. Most importantly, for agency-centric theorists, the meaning of the law is always predicated on the broader political world. In this insight, there is both fragility and possibility.

b. Power-centric Views

The 'power-centric views' focus on a critique of governmentality[77] in the ethics of protection. While accepting the critique of legal-formalistic interpretations of human rights advanced by agency-centric theorists, the power-centric position assumes a much more cynical view of the insight that the meaning of human rights is fundamentally political. In this account, human rights become an instrument to further occlude the voices and actions of the vulnerable, rather than to engender new possibilities for the exercise of their agency. In refiguring refugees as mere victims, humanitarian programmes, drawing on the language of human rights, produce docile subjects whose inclusion is predicated on their depoliticization.

Power-oriented critics of human rights and humanitarian protection include, to name a few, Agamben, Moyn, Fassin, Rancière, and Ticktin. We briefly reconstruct the positions of Rancière and Fassin as representative of the broader power-centric view.

For Rancière, the discourse of human rights took a contradictory turn at the end of the twentieth century. While announcing themselves as the universal premise of global democracy following the collapse of the Soviet Union, human rights are increasingly revealed as the rights of victims, of 'those who were unable to enact any rights or even any claim in their name, so that eventually their rights had to be upheld by others'.[78] The universal rights of the human are transformed into the particular rights of the 'humanitarian' to intercede on behalf of the dispossessed. For Rancière,

[75] ibid 44–5. [76] ibid 101.

[77] See Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France, 1977–1978* (Michel Senellart, François Ewald, and Alessandro Fontana eds, Graham Burchell tr, Picador 2009) 108. Foucault defines 'governmentality' in part as the 'ensemble formed by the institutions, procedures, analyses and reflections, calculations, and tactics that allow the exercise of this very specific, albeit very complex, power that has the population as its target, political economy as its major form of knowledge, and apparatuses of security as its essential technical instrument'.

[78] Jacques Rancière, 'Who Is the Subject of the Rights of Man?' (2004) 103 *South Atlantic Quarterly* 297, 298.

international human rights thus ushered in a new right of invasion through 'humanitarian interference'.[79]

While certain elements of Rancière's critique resemble the more political aspects of the agency-centric position, he departs from them in his account of what human rights have become in practice. For Rancière, instead of following a path of dissensus,[80] the institutionalization of human rights seeks *consensus*—that is, 'closing the spaces of dissensus by plugging the intervals and patching over the possible gaps between appearance and reality or law and fact'.[81] He claims that the turn towards 'consensus' in human rights law seeks to reify rights as attributes of 'real groups, attached to their identity and to the recognition of their place in the global population'.[82] In the guise of universalizing rights, consensus aims to legally formalize human rights, or to achieve the semblance of the 'identity of law and fact'.[83] For Rancière, refugees and others without effective State protection possess human rights only to the degree that they use them to resist their reduction to 'bare life'. There is no fundamental 'right to have rights' other than the one erected in oppositional struggle.

Fassin offers a related but more ethnographically rooted account of the perils of what he calls 'humanitarian reason', or the logic of power that 'governs precarious lives . . . that humanitarian government brings into existence by protecting and revealing them'.[84] At the broadest level, he claims that there has been a shift in State discourses from the political rights of precarious populations to their pain and misfortune, resulting in new requirements to expose 'suffering' to gain access to recognition and services.

Applying his critique to the asylum regime in France, Fassin argues that asylum authorities have progressively altered the 'site of veracity' of asylum adjudication since the 1970s. Although asylum seekers' narrative accounts of their flight were 'long the only evidence testifying to their story and justifying their request', the new regime casts suspicion on the evidentiary value of narrative testimony, instead focusing on claimants' bodies as the vehicles on which the veracity of their narratives is inscribed.[85] This change in the asylum system's 'truth regime' creates a new purview for medical-technocratic expert authority in the adjudication process to ascertain 'the scars left by the violence suffered'.[86] The truth of the expert supplants the truth of the claimant.

For Fassin, this increasing focus on the corporeality of asylum seekers both betrays the possibility anchored in the Refugee Convention of securing refugee status on the

[79] ibid. For an extended discussion, see also Seyla Benhabib, *Exile, Statelessness, and Migration: Playing Chess with History from Hannah Arendt to Isaiah Berlin* (Princeton University Press 2018) 115–18.

[80] Rancière (n 78) 304. By 'dissensus', Rancière means action by the 'rightless' to contest their exclusion from political life. Dissensus is 'a dispute about what is given, about the frame within which we see something as given'.

[81] ibid 306. [82] ibid.

[83] ibid. For a similar discussion, see also Nanda Oudejans, 'The Right Not to Have Rights: A New Perspective on Irregular Immigration' (2019) 47 Political Theory 447.

[84] Didier Fassin, *Humanitarian Reason: A Moral History of the Present* (University of California Press 2011) 4.

[85] ibid 110. [86] ibid.

basis of a well-founded *fear* of persecution (even where actual persecution has not occurred) and neglects the formal characteristics of many instances of modern State-sponsored violence. '[B]y an ironic turn', he notes, 'it is at a moment when the practice of torture is developing toward increasingly invisible forms that a visibility of marks on the body is demanded to confirm that persecution did indeed take place'.[87] But the body often has little to say because expert 'torturers silence it'.[88]

Fassin's argument parallels Rancière's in suggesting that the recent technocratization of adjudicating refugees' claims masks new modalities of State power that aim to depoliticize the experiences of 'precarious subjects' (borrowing from Butler)[89] as a precondition for recognition. If Rancière highlights that the body is already political, and never simply 'bare life', then Fassin elaborates the tactics deployed by States to *actually* depoliticize the bodies of precarious subjects by refiguring them as independent sites of truth to be decoded by experts. While remaining deeply sceptical of institutional remedies and other programmatic solutions, adherents of the power-centric position hint at an oppositional potential for human rights as a language of political mobilization and resistance.

c. Postcolonial Views

Drawing on the experiences of formerly colonized nations in the Global South, postcolonial theorists rewrite the history of international humanitarian and human rights law to expose how these ostensibly universalistic frameworks reflect the partial interests of former colonial powers in Europe and North America.[90] Some postcolonial theorists argue that key concepts underlying international law, including the notion of 'humanity', as formulated by European Enlightenment thinkers such as Immanuel Kant, cannot be detached from the history of Western imperial expansion in Asia, Africa, and Latin America.[91]

In bringing these theoretical claims to bear on international refugee law, postcolonial theorists argue that the 1967 Protocol's universalization of refugee status beyond Europe, and more importantly, the removal of its temporal limitation, was insufficient to mitigate the deep Eurocentrism in the nexus requirements attached to the concept of persecution in the original Refugee Convention.[92] Even proponents of the universal relevance of the Refugee Convention, such as Hathaway, often concede that defending the treaty requires assuming States' willingness to continually stretch the scope of the five

[87] ibid 128. [88] ibid.

[89] See Judith Butler, *Precarious Life: The Powers of Mourning and Violence* (Verso 2006).

[90] See eg Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2005).

[91] See Sankar Muthu, *Enlightenment against Empire* (Princeton University Press 2003); David Harvey, *Cosmopolitanism and the Geographies of Freedom* (Columbia University Press 2009).

[92] See Sara E Davies, *Legitimising Rejection: International Refugee Law in Southeast Asia* (Brill 2008) 23–56.

enumerated forms of civil–political status to match 'contemporary realities' beyond Europe, such as the prevalance of generalized conflict without specific targets of individualized harm.[93] It is clear, however, that States of asylum in the Global North do not universally accept such interpretive flexibility.

In recognition of the limited scope of the Refugee Convention, several States have adopted supplementary legal instruments to broaden the scope of the refugee definition, such as the OAU Convention in Africa and the Cartagena Declaration covering Central America, Mexico, and Panama. Despite these legal advances, the fact that 84 per cent of refugees are hosted in developing countries[94] reveals that the globalization of refugee law has not been accompanied by a corresponding globalization of responsibilities for the fate of the world's refugees. While neighbouring countries in the Global South bear a disproportionate responsibility for accommodating the vast majority of refugees,[95] the territorial lines between these countries were in many cases drawn by former colonial powers with little regard for the daily existence and well-being of the populations concerned.[96] In these regions, it is frequently difficult to distinguish State failure, official corruption, and grinding poverty, from a well-founded fear of persecution.

In view of these ironies, some postcolonial scholars engage in a more radical critique, interrogating the distinction between refugees and migrants altogether. Achiume, for instance, argues that the treatment of refugees as an exceptional group worthy of admission in an otherwise closed-border State system is undergirded by a 'neocolonial' conception of State sovereignty as the 'right to exclude foreigners and nonnationals'.[97]

For Achiume, the notion of sovereignty as the 'right to exclude' occludes the fact that the forms of globalization structuring the contemporary world stem from nineteenth-century colonial institutions designed to afford political and economic advantages, such as freedom of movement, to colonizing nations, while systematically denying such advantages to colonized populations.[98] These asymmetrical global associations were not only 'in significant part condoned by the European international law in force at the time', but were further ossified by international law at the end of empire through the pairing of 'formal political independence with structural political and economic subordination to First World nation-states'.[99]

Against this regime of 'quasi-sovereignty', Achiume contends that '[p]olitical self-determination requires economic agency',[100] and that such agency is predicated on

[93] Hathaway (n 50) 87. Hathaway also acknowledges that his defence of the Refugee Convention assumes the malleability of the membership of a particular social group category to track non-enumerated forms of disenfranchisement 'on such bases as sex, sexual orientation, age, and disability'.

[94] UNHCR, 'Global Trends: Forced Displacement in 2018' (2019) 2.

[95] ibid.

[96] See Lisa Anderson, 'Creative Destruction: States, Identities and Legitimacy in the Arab World' in Seyla Benhabib and Volker Kaul (eds), *Toward New Democratic Imaginaries: Istanbul Seminars on Islam, Culture and Politics* (Springer 2016) 21.

[97] Achiume (n 54) 1517–21.

[98] ibid 1535–6.

[99] ibid 1544.

[100] ibid 1544–5.

having an equal say in the 'effective collective vehicles of self-determination presiding over the field of neocolonial empire'.[101] According to Achiume, because neocolonial dynamics ensure that these 'vehicles' of self-determination remain 'First World' nation-States, she claims that States in the Global North have 'no right to exclude Third World persons',[102] including migrants of all forms, insofar as they are committed to universal political equality.

Echoing other postcolonial critics, Achiume's call for 'migration as decolonization' advocates a radical departure from theories of sovereignty that authorize migration only as occasional deviations from a territorial conception of sovereign self-determination premised on the 'right to exclude'.

4. Towards an Ethical Reorientation

Counterposing the positions discussed in this chapter—liberal nationalism, liberal internationalism, and the three varieties of cosmopolitanism—reveals divergences along several key axes, such as territorial sovereignty versus international obligation, legal formalism versus political action, and victimhood versus agency. These various commitments compete for preponderance in defining the source and scope of our obligations towards those displaced across international borders. One overarching tension, however, encapsulates the rest: *the legal versus the political*.

Liberal nationalists argue that positive domestic law represents the political will of a bounded *demos*, and that international law lacks legitimacy when it is unchained from mechanisms of democratic accountability. We must therefore look first and foremost to our legislatures to define our responsibilities towards non-citizen 'others'. Liberal internationalists, in contrast, contend that respect for the territoriality underlying democratic self-determination has always been premised on mutual recognition of sovereignty in an international system. As such, international positive law is equally a precondition for democratic politics. Our obligations towards refugees must thus be situated in the context of international treaties.

Agency-oriented cosmopolitans shift the register of discussion, arguing that law at all levels—local, national, and international—is always supervenient on a broader political world that provides the hermeneutic horizon for legal interpretation. In this view, we must turn towards refugees themselves to enact the obligations that we owe them, and not to the law alone, although we are jointly responsible for their institutionalization. While power-centric cosmopolitans loosely share the premise that duties stem from political encounters, they add the major caveat that the law mirrors and further entrenches the power structures that configure the larger political world,

[101] ibid 1548. [102] ibid 1549.

despite its purported neutrality and universalism. They join postcolonial theorists in arguing that the obligation to protect the 'other' cannot be cleanly separated from the impulse to dominate that 'other'. Protection must be wrested through political struggle.

Above all, what is at stake in this debate is whether the source of our responsibilities towards 'strangers among us' ought to be derived from *positive law*, as defined either by a State or by international declarations and treaties, or from *political praxis*—that is, from the declarations, actions, and demands of refugees themselves. Of course, these are not mutually exclusive possibilities. Indeed, our main contention is that the duality between the legal and the political is much more porous than each of these positions, taken in isolation, presupposes. Drawing on Benhabib's concept of 'jurisgenerative politics', we argue that a responsible ethics of refugee protection must look both to the law and to political praxis to elaborate our obligations towards those forcibly displaced across borders without effective State protection.

As Cover contends, there is a fundamental disjunction between law as *power* and law as *meaning*. While law as power flattens competing normativities into a singular authoritative interpretation backed by coercive force, the 'uncontrolled character' of law as meaning 'exercises a destabilizing influence upon power. Precepts must "have meaning", but they necessarily borrow it from materials created by social activity that is not subject to the strictures of provenance that characterize what we call formal law-making'.[103] Benhabib elaborates that the:

> [l]aw's normativity does not consist in the grounds of its formal validity, i.e. legality, alone. Law can also structure an extra-legal normative universe by developing new vocabularies for public claim-making, by encouraging new forms of subjectivity to engage with the public sphere, and by interjecting existing relations of power with forms of justice to come—*à venir*, in Derrida's terms.[104]

The *validity* of the law is not limited to its *facticity* alone as determined in juridical interpretation and enforced by coercive agencies. Just as the law is amenable to the tactics of humanitarian reason that depoliticize the asylum claim-making process, it can equally serve as a modality of 'dissensus' for the mobilization of the *sans papiers* in France, as Gündoğdu demonstrates.[105] Formal legal institutions alone provide no ' "originary" source of meaning, or an "original" to which all subsequent forms must conform'.[106] Legal norms transcend their own formalism as they are adopted in political struggles.

We can conceptualize this bivalence of the law through the notion of *democratic iterations*. If we accept the premise that the law has no monopoly on the spectrum of its

[103] Robert Cover, 'Forward: *Nomos* and Narrative' (1983) 97 Harvard Law Review 4, 18.

[104] Seyla Benhabib, 'Critique of Humanitarian Reason' *Eurozine* (18 July 2014).

[105] Gündoğdu (n 61).

[106] Seyla Benhabib, 'Democratic Iterations: The Local, the National, and the Global' in Seyla Benhabib and Robert Post (eds), *Another Cosmopolitanism* (OUP 2006) 48.

own possible meanings in the social world, then we begin to discern that every invocation of a legal norm in a political struggle is a modification of that norm in view of its contextual function. In other words, each iteration serves to resignify the norm in light of the situation in which it is deployed.[107] Such iterations are not mere deviations from an originary meaning, but rather enhance and transform the content of the norm to the point that 'when the creative appropriation of that authoritative original ceases or stops making sense, then the original loses its authority on us as well'.[108] Each iteration is thus at the 'same time its dissolution as the original and its preservation through its continuous deployment'.[109]

As Gündoğdu and Mann warn as well, because the law's meaning is contingent and ever-shifting, it is also fragile. If we can envision a politics of meaning-making that seizes the language of the law to expand protection and political agency to the rightless amongst us—that is, a *jurisgenerative politics*—then we can equally discern, with Rancière and Fassin, how democratic iterations can also be used to yield 'sterile, legalistic, or populistic'[110] readings of the law that curtail these emancipatory possibilities. Following Cover, we refer to these possibilities as *jurispathic*. There are no guarantees in the iterative process; the possibility of jurisgenerativity offers no sure trajectory towards a human rights utopia.

If power-centric cosmopolitans neglect to conceptualize fully the mediated relationship between law and politics, then liberal nationalists fail to acknowledge that a similar mediation can take place between international law and conceptions of territorial sovereignty. To the extent that States convert their commitments in ratified treaties into domestic law, they undertake an iterative process that interprets and contextualizes these commitments. In such democratic iterations, cosmopolitan norms are reconfigured through the pre-existing body of law, modifying the content of the norms themselves. This recursivity forces cosmopolitan imperatives into mediation with the will of democratic majorities in a mutually reconstitutive process.

Of course, the possibility of jurispathic outcomes looms ever large in this process. As the recent populist turn towards a 'new sovereigntism' in the Global North makes clear, there are many possibilities for States to exploit the gaps between national and international law to justify refugee containment, deportation, and non-entrée policies that fall only trivially short of *refoulement*—as we have witnessed with the recent EU deals with Turkey and Libya.[111] In recent years, the United States has even directly abrogated the norm of *non-refoulement* by criminalizing the entry of refugees through 'non-designated ports', by pushing them back into Mexican territory, and by asserting

[107] ibid. [108] ibid. [109] ibid. [110] ibid 50.

[111] See eg Liz Fekete, 'Migrants, Borders and the Criminalisation of Solidarity in the EU' (2018) 59 Race & Class 65. See also the texts of the EU agreement with Turkey and the EU-endorsed bilateral agreement between Italy and Libya: 'EU–Turkey Statement' (*European Council*, 18 March 2016); 'Memorandum of Understanding on Cooperation in the Fields of Development, the Fight against Illegal Immigration, Human Trafficking and Fuel Smuggling and on Reinforcing the Security of Borders between the State of Libya and the Italian Republic' (2 February 2017).

that refugees passing through 'safe third countries' have no right to seek asylum in the US—a claim contradicted by the Refugee Convention.[112]

Locating our obligations towards refugees in a jurisgenerative politics—between the legal and political—is also important for another reason. As Benhabib argues, a purely political conception of human rights 'runs the risk of burdening the most vulnerable with their own defense as well as being voluntaristic in making the entitlement to rights dependent upon the capacity to assert them as well as to have them recognized'.[113] The claim to rights, in other words, 'cannot rest on the *ability* to make others recognize them who may or may not be inclined to do so'.[114] This critique applies equally to strong versions of the agency-centric position and the power-centric cosmopolitan position.

At the same time, a purely juridical conception of rights, as reflected in highly formalistic versions of both the liberal nationalist and internationalist positions, neglects that:

> legal regimes create further differentiations and distinctions that trap individuals in conditions of *administrative dependency*. This aspect of *legal governmentality*, which generates such distinctions as among displaced persons, refugees in protracted situations, and stateless persons, is a double-edged sword, often robbing individuals of the autonomy, dignity, and initiative that their protection of human rights was intended to guarantee in the first place.[115]

In defining our duty to offer protection to refugees and others without effective State protection, we must therefore balance the *specificity* of the law with the *generality* of political praxis. We must recognize that international refugee and human rights law alone provide no remedy for the victims of global neoliberalism, including those fleeing abject poverty and natural disasters. Likewise, we must remain attentive to the perverse incentives that refugee law generates for States to keep refugees in protracted or permanent precarity, to disincentivize flight on the part of others, and to prevent extending citizenship to those on their territory.

We must also acknowledge that in broadening the scope of what might be a legitimate claim for protection, certain cosmopolitan views, including those rooted in postcolonial theory, risk creating a framework in which normative questions about immigration policy writ large are elided with questions about the treatment of displaced persons more specifically. In doing so, these positions risk inadvertently producing an ethic of responsibility towards a unitary migrant 'other' that might ultimately erode, rather than expand, States' obligations towards refugees. We must be equally wary of the dangers of

[112] See eg Andrea Silva and Maura I Toro-Morn, 'The Paradox of State Control in the Global Age of Migrations: The 2018 Central American Immigrant Caravan' in Cara E Rabe-Hemp and Nancy S Lind (eds), *Political Authority, Social Control and Public Policy* (Emerald Publishing Limited 2019). For an extended discussion, see Seyla Benhabib, 'The End of the 1951 Convention? Dilemmas of Sovereignty, Territoriality and Human Rights' (2020) 2 Jus Cogens: A Critical Journal of Philosophy of Law and Politics 75 (forthcoming).

[113] Benhabib (n 79) 120. [114] ibid. [115] ibid 114.

making our duties towards refugees contingent on their ability to compel us to uphold their rights.

Our contention, at its core, is that we must resist dichotomous approaches to the ethics of refugee protection. The notion of jurisgenerativity offers one strategy to negotiate the line between the critique of humanitarian reason and the institutionalization of rights, between the refugee as an 'abject subject of compassion and administrative logic'[116] and as a subject capable of agentic action, between international law and political mobilization in solidarity with refugees. There are, no doubt, other such possibilities. Above all, we must give up neither on law nor on politics in defining the scope of refugee protection.

[116] ibid 121.

CHAPTER 7

REFUGEES AS MIGRANTS

IDIL ATAK AND FRANÇOIS CRÉPEAU*

There is no universally agreed definition of an 'international migrant'. According to the UN's Recommendations on Statistics of International Migration of 1998, a 'long-term migrant'[1] is a person who is outside the territory of the State of which they are nationals or citizens and who has resided in a foreign country for more than one year, irrespective of the causes, voluntary or involuntary, and the means, regular or irregular, used to migrate.[2] Similarly, Eurostat's definition emphasizes the length of at least 12 months' residence in Europe.[3]

The International Organization for Migration suggests a more open working definition, which seems nowadays more appropriate:

> An umbrella term, not defined under international law, reflecting the common lay understanding of a person who moves away from his or her place of usual residence, whether within a country or across an international border, temporarily or permanently, and for a variety of reasons. The term includes a number of well-defined legal categories of people, such as migrant workers; persons whose particular types of movements are legally defined, such as smuggled migrants; as well as those whose status or means of movement are not specifically defined under international law, such as international students.[4]

* The authors thank Lorielle Giffin for her research assistance.

1 This article deals with international migrants who have crossed an international border, as opposed to domestic migrants or internally displaced persons. However, for practical reasons, the article uses the generic term 'migrant'. UN Department of Economic and Social Affairs, *Recommendations on Statistics of International Migration*, UN doc ST/ESA/STAT/SER.M/58/Rev.1 (1998) 10.

2 UN Department of Economic and Social Affairs, 'Definitions: Refugee, Migrant' (*UN Refugees and Migrants*) <https://refugeesmigrants.un.org/definitions> accessed 29 October 2019.

3 Council Regulation (EC) No 862/2007 of 11 July 2007 on Community Statistics on Migration and International Protection and Repealing Council Regulation (EEC) No 311/76 on the Compilation of Statistics on Foreign Workers [2007] OJ L199/23, art 2.1(b).

4 International Organization for Migration, 'Glossary on Migration', IML Series No 34 (2019) 130.

Many other organizations accept a similarly broad definition. According to the International Labour Office's Department of Statistics, international migrants are 'persons who are usual residents of that country and who are citizens of another country (foreign population) or whose place of birth is located in another country (foreign born population)'.[5] The International Federation of Red Cross and Red Crescent Societies underlines that migration can be forced or voluntary, but most of the time a combination of choices and constraints is involved.[6] Interestingly, it notes an intent to live abroad for an extended period of time, whereas the motivation or length of stay are not considered defining elements of migration in most other contexts. For instance, in the International Convention on the Protection of All Migrant Workers and Members of their Families, 'the term "migrant worker" refers to a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national'.[7]

Indeed, the term 'migrant' covers a broad spectrum of people, from the tourist to the survivor of human trafficking. On this spectrum, a refugee is a migrant. However, there has been a long-standing debate as to whether refugees should be portrayed as migrants.[8] Several organizations, refugee advocates, and scholars argue for a clear line between 'migrants' and 'refugees', as a means of protecting the refugee regime.[9] They point to the inherently distinct motivations driving refugee movements compared to other types of migration, as well as to the specific normative and institutional framework for refugee protection.[10] Thus, former Assistant High Commissioner for Refugees (Protection), Erika Feller, argued that it was dangerous, and detrimental to refugee protection, to confuse the two groups, and that as the line between 'migrant' and 'refugee' blurs, so does the distinction between migration *control* and refugee *protection*.[11]

[5] International Labour Office, 'Guidelines concerning Statistics of International Labour Migration' ICLS/20/2018/Guidelines (October 2018) para 13.

[6] Canadian Red Cross, 'What is the Difference between a Refugee and a Migrant?' <https://www.redcross.ca/how-we-help/current-emergency-responses/syria-crisis-and-refugee-crisis/what-is-the-difference-between-a-refugee-and-a-migrant> accessed 29 October 2019.

[7] International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3, art 2(1).

[8] BS Chimni, 'The Birth of a "Discipline": From Refugee to Forced Migration Studies' (2009) 22 JRS 11; Roger Zetter, 'More Labels, Fewer Refugees: Remaking the Refugee Label in an Era of Globalisation' (2007) 20 JRS 172.

[9] Amnesty International, 'Refugees, Asylum Seekers and Migrants' <https://www.amnesty.org/en/what-we-do/refugees-asylum-seekers-and-migrants/> accessed 29 October 2019; Somini Sengupta, 'Migrant or Refugee? There is a Difference, with Legal Implications' *The New York Times* (27 August 2015) <https://www.nytimes.com/2015/08/28/world/migrants-refugees-europe-syria.html> accessed 12 November 2019; Adrien Edwards (Global Spokesperson UNHCR), '"Refugee" or "Migrant": Which is Right?' (*UNHCR Canada*, 27 July 2016) <https://www.unhcr.ca/news/unhcr-viewpoint-refugee-migrant/> accessed 29 October 2019. See also David S FitzGerald and Rawan Arar, 'The Sociology of Refugee Migration' (2018) 44 Annual Review of Sociology 387.

[10] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/1P/4/ENG/REV.4 (1979, reissued 2019) para 62–4.

[11] Erika Feller, 'Refugees Are Not Migrants' (2005) 24(4) RSQ 27, 28.

More recently, the topic sparked a public controversy at the peak of the so-called European 'migration crisis' in 2015, when more than a million asylum seekers, mostly from war-torn Syria, reached Europe. It began with the announcement by the news website *Al Jazeera* that it would no longer refer to 'migrants' in the Mediterranean, but to 'refugees', where appropriate.[12] It was contended that 'migrant' is a term that strips suffering people of their voice and undermines the rights of those fleeing violence and conflict.[13] This was followed by a heated media discussion about the use of appropriate terminology and the potential impact on public responses to refugees.[14] UNHCR warned against 'conflating refugees and migrants', noting that this could 'have serious consequences for the lives and safety of refugees . . . [by] politiciz[ing] the debate and undermin[ing] public support for refugees and the institution of asylum'.[15] Efforts to keep refugees distinct from migrants were also prominent in the discussions leading to the adoption in 2018 of the Global Compact on Refugees and the Global Compact for Migration.

We argue that refugees are indeed migrants. We underscore the overlap between these two categories in a global context that is characterized by restricted avenues for legal migration, limited durable solutions for refugees, and punitive policies towards asylum seekers. In so doing, we do not deny that refugees are special, nor do we question the international refugee protection regime. On the contrary, the current institutional and normative refugee protection framework should be supported and the specific rights and entitlements for refugees set forth in the Refugee Convention and Protocol should be implemented and reinforced.

Our aim is to show why the forced/voluntary and political/economic binaries that underlie the refugee/migrant distinction are questionable. We contend that conceptualizing refugees as migrants does not undermine the specific normative and institutional framework for refugee protection. Rather, it further promotes refugees' access to asylum and safety.

Refugees, like all migrants, are already protected by international human rights law, which has proven effective in addressing many intersecting factors (such as age, gender, religion, ethnicity, and nationality) that exacerbate refugees' vulnerability. As well, insisting on a migrant/refugee dichotomy leads many to believe that refugees need protection while migrants do not, a belief that is false: refugees may singularly need 'international protection' as conceptualized in the Refugee Convention, but all migrants—indeed all human beings—need the protection of States against violations of their human rights.

[12] Barry Malone, 'Why Al Jazeera Will Not Say Mediterranean "Migrants"' (*Al Jazeera*, 20 August 2015) <https://www.aljazeera.com/blogs/editors-blog/2015/08/al-jazeera-mediterranean-migrants-150820082226309.html> accessed 29 October 2019.

[13] ibid.

[14] Jørgen Carling, 'Refugees Are Also Migrants. All Migrants Matter' (*Border Criminologies*, 3 September 2015) <www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2015/09/refugees-are-also> accessed 29 October 2019.

[15] Edwards (n 9).

Our goal is to plead for a global mobility regime that would ultimately lead to the better protection of rights for all those on the move, including refugees. International migration law is still nascent and fragmented, but the Global Compact for Migration constitutes a major political step towards structuring States' responses more coherently. One could cautiously suggest that, just as the UDHR created the post-1948 momentum for numerous subsequent human rights instruments and institutions, so might the Global Compact have a similarly catalytic role over the coming decades.

The first section of this chapter examines the literature on the refugee/migrant distinction, and whether upholding it is accurate and justifiable. It highlights the increasingly overlapping and interconnected motivations and contexts driving forced migration. Section 2 focuses on the mounting barriers refugees face to reach safety, noting that difficulties in finding durable solutions may result in secondary movements, in turn further blurring the distinction between migrants and refugees in political and media discourse. Section 3 explores the avenues to safeguarding and promoting access to asylum and refugee rights. It explains why the special status of refugees in international law does not guarantee their effective protection (given the absence of durable solutions for so many). Section 4 contends that migrants (including refugees) benefit from the international human rights regime, which sometimes offers a more robust protection to refugees than the international refugee regime. Section 5 articulates the role that freedom of movement should play in protecting the rights of all migrants (including refugees). The chapter concludes with a plea for increased facilitated mobility for all, as championed by the Global Compact for Migration.

1. The Problematic Refugee/ Migrant Binary

There are several reasons why refugees are special compared to other categories of migrants. First, the refugee protection regime is premised on forced,[16] rather than voluntary,[17] movement: a refugee is someone with a well-founded fear of being persecuted for at least one of five enumerated grounds. Secondly, as Carens argues,—from an ethical perspective, democratic States should admit refugees on the basis of 'causal connection, humanitarian concerns and the normative supposition of the state system', in the sense that 'because the state system assigns people to states, states collectively have a responsibility to help those for whom this assignment is disastrous'.[18]

[16] Susan F Martin, 'Global Migration Trends and Asylum', UNHCR New Issues in Refugee Research, Working Paper No 41 (2001) 1.

[17] Etienne Piguet, 'Theories of Voluntary and Forced Migration' in Robert McLeman and François Gemenne (eds), *Handbook on Environmental Displacement and Migration* (Routledge 2018) 18 (the decision to migrate is made after weighing options and choices, and involves a process of 'utility maximization').

[18] Joseph H Carens, *The Ethics of Immigration* (OUP 2013) 195–6.

Gibney suggests that refugees have a stronger moral claim than economic migrants because '[i]f economic migrants are refused entry, they are forced to remain in a situation of poverty; if refugees are turned away, their very lives may well be on the line'.[19] Moore agrees that concern for basic rights justifies the obligations that different political communities have to refugees. If people's lives and liberties are threatened, they should be entitled to a safe haven.[20]

The distinctive conceptual features of the refugee have been debated and sometimes revised and contested. An example is the additional grounds for protection in certain regional refugee protection instruments, such as the OAU Convention and the Cartagena Declaration.[21] The former was adopted during a period of violent struggle for self-determination and national development in Africa,[22] and as a result, its refugee definition includes people fleeing 'external aggression, occupation, foreign domination or events seriously disturbing public order'.[23] In a similar vein, the Central American political situation in the 1980s informed the extension of the refugee definition in the Cartagena Declaration to people 'fleeing generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order'.[24] Shacknove notes that the OAU definition of refugee '[r]ecognizes, as the UN [Refugee Convention] definition does not, that the normal bond between the citizen and the state can be severed in diverse ways, persecution being but one'.[25]

Similarly, the categorical distinction between forced and voluntary migration has been widely contested. De Genova, Mezzadra, and Pickles hold that this clear-cut distinction is empirically untenable, as the motivations for movement are always mixed and cannot be encapsulated in such simple dichotomies.[26] In particular, it has been argued that all migration involves both choices and constraints. Even refugees may have a degree of control over their destination and the means they choose to reach it.[27] As well, it may at times be very difficult to distinguish between voluntary and forced migrants:

> voluntary migrants may feel compelled to seek new homes because of pressing problems at home; forced migrants may choose a particular refuge because of family and community ties or economic opportunities. Moreover, one form of migration often leads to another. Forced migrants who settle in a new country may then bring family members to join them.[28]

[19] Matthew J Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees* (CUP 2004) 12.

[20] Margaret Moore, *A Political Theory of Territory* (OUP 2015) 209.

[21] See Chapters 15, 17, and 34 in this volume.

[22] Eduardo Arboleda, 'Refugee Definition in Africa and Latin America: The Lessons of Pragmatism' (1991) 3 *IJRL* 185; Marina Sharpe, *The Regional Law of Refugee Protection in Africa* (OUP 2018).

[23] OAU Convention, art 1(2).

[24] Cartagena Declaration, conclusion III.

[25] Andrew E Shacknove, 'Who is a Refugee?' (1985) 95 Ethics 274, 275–6.

[26] Nicholas De Genova, Sandro Mezzadra, and John Pickles, 'New Keywords: Migration and Borders' (2015) 29 Cultural Studies 55, 72.

[27] Stephen Castles, Heaven Crawley, and Sean Loughna, *States of Conflict: Causes and Patterns of Forced Migration to the EU and Policy Responses* (Institute of Public Policy Research 2003) 29.

[28] Martin (n 16) 1; UNHCR (n 10) para 63.

This difficulty was acknowledged in the 2016 New York Declaration for Refugees and Migrants[29]—a not insignificant point given that the Declaration was, in part, spurred on by the dramatic movement of refugees across Europe in 2015–16, which encouraged States to seek greater coordination on migration and asylum.[30]

It is noteworthy that the current global context differs greatly from that which gave rise to the contemporary refugee regime and the Refugee Convention, in particular, which arguably conceived of refugees as 'products of oppressive, totalitarian regimes in which the normal responsibilities of a State to its citizens were deliberately and directly violated'.[31] Today, often interrelated factors compound the blurring of the line between the economic and political motivations to leave one's country. Forced migration linked to armed conflicts, political unrest, and undemocratic societies has increased considerably in the past few decades, further exacerbated by climate change and struggles for scarce resources.[32] According to UNHCR, 70.8 million people were forcibly displaced in 2018 compared to 42 million a decade ago.[33] While persecution, conflict, violence, and human rights violations continue to uproot people from their homes, conflicts (such as those in Syria and Afghanistan), which have caused large refugee outflows, are lasting longer, pushing the number of refugees in the world steadily upward.

Castles underlines that forced migration is linked to the globalization that created 'a system of selective inclusion and exclusion of specific areas and groups'.[34] Bivand and Oeppen likewise stress the interconnectedness of factors such as poverty, corruption, and political violence.[35] Betts suggests that 'so-called slow-onset environmental displacement is generally based on the complex interaction of the environment with other factors notably, livelihoods and state fragility',[36] and McAdam remarks that although international refugee law may apply to people displaced by the impacts of climate change, it is generally an inappropriate normative framework for responding to the needs of such people.[37]

[29] New York Declaration for Refugees and Migrants, para 6.

[30] Elspeth Guild, 'The Global Compact as a Milestone in Global Governance of Migration' (2018) 18 Global Social Policy 325, 325.

[31] Gibney (n 19) 6.

[32] Tazreena Sajjad, 'What's in a Name? "Refugees", "Migrants" and the Politics of Labelling' (2018) 60 Race & Class 40.

[33] UNHCR, 'Global Trends: Forced Displacement in 2018' (2019) <https://www.unhcr.org/uk/statistics/unhcrstats/5d08d7ee7/unhcr-global-trends-2018.html> accessed 29 October 2019.

[34] Stephen Castles, 'Towards a Sociology of Forced Migration and Social Transformation' (2003) 37 Sociology 13, 16.

[35] Marta Bivand and Ceri Oeppen, 'Forced to Leave? The Discursive and Analytical Significance of Describing Migration as Forced and Voluntary' (2018) 44 Journal of Ethnic and Forced Migration Studies 981.

[36] Alexander Betts, 'Survival Migration: A New Protection Framework' (2010) 16 Global Governance 361, 362.

[37] Jane McAdam, *Climate Change, Forced Migration, and International Law* (OUP 2012) 40; see also Chapter 46 in this volume.

Thus, voluntary/forced and economic/political binaries that underlie the Refugee Convention do not offer adequate explanatory frameworks for those who leave their homes on account of extreme poverty created by protracted conflict or oppressive governments or because of environmental or climate-related factors—and nor do they reflect migrants' personal experiences of constraints and choices.[38] Against this background, some scholars question the ethical permissibility of treating refugees as a distinct category from migrants. Kukathas, for instance, contends that 'making refugees special neither makes sense conceptually, nor looks possible practically on the evidence we have to date'.[39]

The controversy about voluntary/forced migration shows how these categories are malleable. Some States' refugee jurisprudence has been liberal. As noted by Hathaway, decision-makers in some Global North countries have increasingly recognized that threats to core social and economic rights constitute persecution, in the sense that they amount to 'sustained or systemic violation of basic human rights demonstrative of a failure of state protection'.[40] Despite UNHCR's objection to conflating migrants with refugees, its own mandate has shown remarkable adaptability in the face of this reality. As the number of forced migrants has steadily increased globally, so have the persons of concern to UNHCR whose mandate now comprises, in addition to refugees, groups such as returnees, stateless persons, internally displaced persons, and people displaced by disasters. These changes have also impacted the terminology employed by UNHCR. Crisp noted in 2009 that, from the mid-1990s to the mid-2000s, the refugee concept was progressively replaced by the notion of 'persons of concern to UNHCR'. UNHCR's website now refers to 'refugees, stateless persons, IDPs and other persons of concern'.[41]

States have instrumentalized the refugee/migrant dichotomy to stem unwanted migration. Many have rhetorically recognized their obligations towards refugees, while denying any rights to 'illegal aliens', a category in which asylum seekers are too often included. Moreover, refugees in comparable situations may receive radically different treatment in different contexts. For example, hundreds of thousands of North Korean asylum seekers who fled into China since 1995 have been labelled 'illegal economic migrants' by the Chinese government, which has refused to assess their refugee claims and forcibly repatriated many to North Korea.[42] By contrast, millions of Venezuelans

[38] Fazila Bhimji, 'The Nexus of Political Violence and Economic Deprivation: Pakistani Migrants Disrupt the Refugee/Migrant Dichotomy' (2018) 16 Journal of Immigrant and Refugee Studies 470; Christopher Kyriakides, 'Words Don't Come Easy: Al Jazeera's Migrant–Refugee Distinction and the European Culture of (Mis)trust' (2017) 65 Current Sociology 933.

[39] Chandran Kukathas, 'Are Refugees Special?' in Sarah Fine and Lea Ypi (eds), *Migration in Political Theory: The Ethics of Movement and Membership* (Oxford Scholarship 2016) 266.

[40] James C Hathaway, 'Refugees and Asylum' in Brian Opeskin, Richard Perruchoud, and Jillyanne Redpath-Cross (eds), *Foundations of International Migration Law* (CUP 2012) 185.

[41] Jeff Crisp, 'Refugees, Persons of Concern, and People on the Move: The Broadening Boundaries of UNHCR' (2009) 26(1) Refuge 73, 75. See also UNHCR, 'Research and Evaluation' <https://www.unhcr.org/evaluation-and-research.html> accessed 31 October 2019.

[42] Russell Aldrich, 'An Examination of China's Treatment of North Korean Asylum Seekers' (2011) 7 North Korean Review 36.

who have fled their country for similar reasons have been welcomed in neighbouring Latin American countries, with Colombia accounting for some 1.3 million, followed by Peru with 768,000 in 2019.[43] Interestingly, Latin American countries welcomed all persons fleeing Venezuela, irrespective of their eventual status as refugee or migrant. The so-called Quito Process includes mechanisms for coordinating their response and facilitating the legal, social, and economic inclusion of these Venezuelan citizens, refugees and migrants alike.[44] This exemplifies how in some cases States may overlook the refugee/migrant binary. After all, they have a sovereign right to decide who can enter and reside on their territory.

In other cases, States simply choose to ignore the special treatment owed to refugees. The travel bans issued by US President Donald Trump is an example of an arbitrary political decision that indiscriminately targets all migrants (including refugees).[45] Overall, then, the binary distinguishing voluntary/economic migration from forced/political displacement is very unsatisfactory at a conceptual level, and probably not an effective practical tool to best advance refugee rights.

2. The Voluntary/Forced Migration Binary and the Mounting Barriers Refugees Face to Reach Safety

Since the 1980s, a defining feature of the global migration context has been States' efforts to stem unwanted migration. Not only has legal immigration become more difficult and increasingly limited to the privileged few,[46] but States have also implemented a containment strategy through a range of preventative and deterrent policies.[47]

Facilitated mobility was the trend until the oil crises of the late 1970s, when many States in the Global North attempted to close their borders to labour migration, thus spurring a considerable increase in asylum applications and the appearance of the

[43] UNHCR and IOM, 'Refugees and Migrants from Venezuela Top 4 Million' (*UNHCR UK*, 7 June 2019) <https://www.unhcr.org/uk/news/press/2019/7/5d230a254/latin-american-countries-agree-road-map-integration-venezuelans.html> accessed 29 October 2019.

[44] ibid.

[45] The executive order of 6 March 2017 notably suspended for 90 days the entry to the US of refugees and migrants from Iran, Libya, Somalia, Sudan, Syria, and Yemen; Exec Order No. 13780, 82 CFR 13,209, 13,213 (2017); see also Elspeth Guild, 'Crime, Migration and Data Extraction: The Trump Travel Bans' (2018) 44 International Journal of Migration and Border Studies 366.

[46] Alice Bloch and Milena Chimienti, 'Irregular Migration in a Globalizing World' (2011) 34 Ethnic and Racial Studies 1271.

[47] See Chapter 27 in this volume; Elspeth Guild and Vladislava Stoyanova, 'The Human Right to Leave Any Country: A Right to be Delivered' (2018) European Yearbook on Human Rights 373, 375; Violeta Moreno-Lax, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law* (OUP 2018).

expression 'asylum seeker'.[48] Until then, many of those who would have qualified as refugees instead came as workers and settled in their host country with their family, thanks to a residence visa and a work permit.[49]

States often consider undocumented people on the move to be 'irregular economic migrants' and a threat to their sovereignty and security.[50] This approach has been used to justify the tightening of the criteria for granting refugee status in many destination countries with the pretext of deterring 'abuse' and reducing the 'burden' of 'manifestly unfounded' asylum claims.[51] For instance, under the Dublin regime, asylum seekers must have their application for refugee status processed by the State that is responsible for their entry into the European Union (EU). In most cases, this is the country responsible for the external European border crossed by the asylum seeker. During the 'migration crisis' of 2015–16, the Dublin system was completely overwhelmed, and, given the reticence of EU States to accept refugees for resettlement from the main EU entry points (Italy and Greece), neither of these two countries had any incentive to ensure the efficient operation of the Dublin system.[52]

Considering the administrative difficulties, financial cost, and political repercussions of detecting, detaining, and deporting undocumented migrants (including asylum seekers), the phenomenon of externalization of migration control has become widespread.[53] What's more, destination countries increasingly cooperate with source and transit countries to enable the latter to efficiently control their borders and contain asylum seekers. As Hathaway has noted, 'if there has been a single overarching trend in refugee protection over the last decade or so, it has been the official drive to rein-in, to control, to constrain, to render orderly and hence manageable the arrival of refugees. The goal has been to render the refugee as much a migrant as possible.'[54]

The concept of 'precarious migrants', developed by Goldring and Landolt in the Canadian context,[55] refers to authorized and unauthorized forms of migration that are

[48] Christof Van Mol and Helga de Valk, 'Migration and Immigrants in Europe: A Historical and Demographic Perspective' in Blanca Garcés-Mascareñas and Rinus Penninx (eds), *Integration Processes and Policies in Europe: Contexts, Levels and Actors* (Springer Open 2016).

[49] Catherine Wihtol de Wenden, *La question migratoire au XXIe siècle. Migrants, réfugiés et relations internationales* (Les Presses de Sciences Po 2013) 26–7.

[50] UNHCR, 'Refugee Protection and Mixed Migration: The 10-Point Plan in Action' (February 2011) <https://www.refworld.org/docid/4d9430ea2.html> accessed 30 October 2019; 2016 New York Declaration, para 9.

[51] Idil Atak and François Crépeau, 'The Securitization of Asylum and Human Rights in Canada and the European Union' in Satvinder Juss and Colin Harvey (eds), *Contemporary Issues in Refugee Law* (Edward Elgar 2013) 227.

[52] UN Human Rights Committee, *Report by the Special Rapporteur on the Human Rights of Migrants (SRHRM), François Crépeau: Mission to Greece*, UN doc A/HRC/35/25/Add.2 (24 April 2017).

[53] See Chapter 27 in this volume.

[54] James C Hathaway, 'Forced Migration Studies: Could We Agree Just to "Date"?' (2007) 20 JRS 349, 354; Harald Bauder, 'Why Should We Use the Term "Illegalized" Refugee or Immigrant: A Commentary' (2014) 26 IJRL 327.

[55] Luin Goldring and Patricia Landolt (eds), *Producing and Negotiating Non-Citizenship: Precarious Legal Status in Canada* (Toronto University Press 2013).

legally produced. Precarious migrants, including asylum seekers, share a precarity[56] rooted in conditionality of presence in the host country and access to entitlements. The concept underscores the non-linear and unpredictable migration trajectory experienced by some migrants, such as asylum seekers, making their vulnerability to rights violations and exploitation pervasive. De Genova, Mezzadra, and Pickles suggest that the present refugee protection regime produces more rejected refugees than ones with 'status', and effectively intensifies the precarious existence for many, while offering protection to only a few.[57]

As stated above, some of these policies have proven to be counterproductive. It should not come as a surprise that the number of asylum seekers has increased steadily in the past decades: worldwide, there were 827,000 people awaiting a decision on their application for asylum in 2008, and this number reached 3.5 million in 2018.[58] There is evidence that many refugees choose to remain in an undocumented status rather than risk applying for asylum in those countries where recognition rates are particularly low.[59] Similarly, obstacles like truncated timelines to lodge and/or examine refugee claims may create a disincentive for asylum seekers to make their claim upon arrival in the country of asylum: this can result in individuals preferring to remain undocumented until they compile evidence needed to support their claim, although, in some States, this may mean that they are precluded from applying for asylum at a later stage.[60]

3. The Limits of Durable Solutions for Refugees and their Consequences

Another defining feature of the global migration regime has been the limited nature of durable solutions for refugees. Voluntary repatriation to the country of origin has been constrained considerably by the lack of safety and ongoing political instability in major refugee-producing countries like Afghanistan, Syria, and South Sudan.[61] Similarly,

[56] Contemporary scholarship has developed a distinction between precarity and precariousness, see eg Sharryn Kasmir, 'Precarity', *The Cambridge Encyclopedia of Anthropology* <https://www.anthroencyclopedia.com/entry/precarity> accessed 30 October 2019.

[57] De Genova, Mezzadra, and Pickles (n 26) 71; See also Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (CUP 2008).

[58] UNHCR (n 33).

[59] Mathias Czaika and Mogens Hobolth, 'Do Restrictive Asylum and Visa Policies Increase Irregular Migration into Europe?' (2016) 17 European Union Politics 345, 348; Frank Düvell, 'Paths into Irregularity: The Legal and Political Construction of Irregular Migration' (2011) 13 EJML 275.

[60] See Emily Bates, Jennifer Bond, and David Wiseman, 'Troubling Signs: Mapping Access to Justice in Canada's Refugee System Reform' (2016) 47 Ottawa Law Review 1.

[61] See Chapter 59 in this volume.

resettlement places for refugees remain few compared to need.[62] Acts of leadership, such as Germany taking in more than a million refugees during the 2015–16 'migration crisis', and Canada's special intake of more than 45,000 (mostly Syrian) refugees in 2015–17, have been the exception rather than the rule.

Against this backdrop, there has been mounting pressure on so-called first countries of asylum and transit countries to redouble efforts to locally integrate the refugees they are already hosting. Today, developing regions host 85 per cent of the refugees under UNHCR's mandate.[63]

Unsurprisingly, many refugees do not see a future for themselves in first countries of asylum or transit countries, given scarce livelihood opportunities, political and economic pressures, discrimination, and a lack of access to rights or to citizenship. This is why some move onwards in search of protection.[64] Whether such secondary movement should be seen as a continuation of the original journey or a separate migration experience is debatable. Crawley and Skleparis see it as 'a separate process driven by its own motivations, decision-making, planning and aspirations'.[65] In contrast, UNHCR emphasizes 'the wider factors at play' that push refugees to move onward, such as lack of comprehensive solutions, and barriers to access to asylum procedures in host countries.[66] Interviews with refugees in Greece and Turkey led Crawley and Skleparis to note that 'at times in their lives, some of our Afghan respondents were 'refugees' fleeing conflict, at others they were 'migrants' looking to improve their economic situation, albeit in the context of discrimination'.[67] This provides a perfect illustration of how individuals can move between various legal and administrative categories of migrants (including refugees) over space and time, in particular due to complex and conflicting State policies.

Secondary movements have become a major concern for policymakers in the Global North. The Comprehensive Refugee Response Framework (CRRF), annexed to the 2016 New York Declaration and reiterated in the Global Compact on Refugees, encourages States to regulate refugees' onward movement and explore complementary pathways to protection. These include humanitarian visas or corridors, and other humanitarian

[62] UNHCR, 'Global Trends. Forced Displacement in 2017' (2018) <https://www.unhcr.org/globaltrends2017/> accessed 1 November 2019. As the level of refugees hit a record high of 25.4 million in 2017, UNHCR submitted 75,200 refugees for resettlement to various States, a 54 per cent drop from 2016. See Priscilla Alvarez, 'US Sets a Refugee Cap of 18,000 for Next Year, A New Historic Low', *CNN* (26 September 2019) <https://edition.cnn.com/2019/09/26/politics/refugee-cap-historic-low/index.html> accessed 12 November 2019.

[63] UNHCR (n 33).

[64] See Chapter 61 in this volume.

[65] Heaven Crawley and Dimitris Skleparis, 'Refugees, Migrants, Neither, Both: Categorical Fetishism and the Politics of Bounding in Europe's "Migration Crisis" ' (2018) 44 Journal of Ethnic and Migration Studies 48, 56.

[66] UNHCR, 'Onward Movement of Asylum-Seekers and Refugees: Discussion paper prepared for the Expert Roundtable on Onward Movement' (25 September 2015) para 4.

[67] Crawley and Skleparis (n 65) 57. See also Katie Kuschminder and Khalid Koser, 'The Role of Migration-Specific and Migration-Relevant Policies in Migrant Decision-Making in Transit' (2017) Maastricht Economic and Social Research Institute on Innovation and Technology Working Papers 022/2017.

admission programmes, such as labour mobility opportunities for refugees.[68] As scholars have noted, (temporary) labour migration is a possible fourth 'durable solution', which can enable refugees to lead more dignified and self-sustained lives, particularly in situations of protracted forced displacement.[69]

The CRRF emphasizes the importance of refugees' economic and social inclusion in their host countries as an essential step towards long-term solutions. The focus is on empowering refugees through building human capital and transferable skills, with the involvement of the private sector and the World Bank, as well as new innovative financial mechanisms.[70] This echoes calls by researchers and international organizations in favour of a 'bottom-up' approach whereby refugees, as social innovators, engage in problem-solving and create opportunities for themselves and their communities. Key elements of a positive enabling environment include the right to work, freedom of movement, access to education, good infrastructure, banking and credit facilities, and transnational networks.[71]

Historical precedents inform these discussions and illuminate how mobility is central to durable solutions. When the international refugee protection regime was first established in the 1920s, refugees were considered migrants. The Nansen Passport, a refugee travel document first introduced in 1922, was intended to facilitate refugees' onward movement and through this, their access to labour markets. Long contends that the approach to refugee protection in the 1920s was centred on facilitating individual freedom of movement as a form of burden-sharing.[72] Bivand and Oeppen remark that some Pakistani participants in their research refused to be classified as either refugees or economic migrants.[73] Likewise, McAdam's empirical research reveals that those who may be displaced due to environmental or climate-related factors in Tuvalu and Kiribati do not want to be categorized as 'refugees fleeing from their own government, perceiving them as passive victims, waiting helplessly in camps and relying on handouts, with no prospects for the future'.[74] In this sense, conceptualizing refugees as migrants may acknowledge the desire of most refugees to establish themselves in a country where they can create a future for themselves and their family, and where they may thrive thanks to their economic and other skills—a desire which they share with all migrants.

[68] New York Declaration, para 95; Swiss Refugee Council, 'Humanitarian Visas' <https://www.refugeecouncil.ch/asylum-law/asylum-procedure/humanitarian-visas.html> accessed 30 October 2019.

[69] Ryszard Cholewinski and Patrick Taran, 'Migration, Governance and Human Rights: Contemporary Dilemmas in the Era of Globalization' (2009) 28(4) RSQ 1; Katy Long, 'When Refugees Stopped Being Migrants: Movement, Labour and Humanitarian Protection' (2013) 1 Migration Studies 4; see also Chapter 61 in this volume.

[70] New York Declaration, para 13(c).

[71] Alexander Betts and others, 'Refugee Economics: Rethinking Popular Assumptions' (Refugee Studies Centre, University of Oxford, 2015) 3 <https://www.rsc.ox.ac.uk/files/files-1/refugee-economies-2014.pdf> accessed 30 October 2019.

[72] Long (n 69) 8.

[73] Marta Bivand and Ceri Oeppen, 'Forced to Leave? The Discursive and Analytical Significance of Describing Migration as Forced and Voluntary' (2018) 44 Journal of Ethnic and Forced Migration Studies 981.

[74] McAdam (n 37) 41 (fn omitted).

The downside of treating refugees as migrants is that it may lead State authorities and opinion makers to downplay the distinctive tenets of the Refugee Convention, and thus the States' specific obligations to refugees. A focus on refugees as agents of economic development, rather than as individuals in need of international protection, may also push States to curtail their responsibilities to address the specific needs of vulnerable groups. In the past, some States have screened out 'non-preferred' classes of refugees or refrained from resettling those who are sick, old, or impaired.[75] Unless accompanied by the effective enforcement of civil, social, and economic rights, there is also a risk that refugees could be turned into a cheap workforce. International human rights law, more than the Refugee Convention, plays an important role in this respect.

4. International Human Rights Law and the Protection of all Migrants (including Refugees)

The Refugee Convention sets out a range of fundamental rights and freedoms in articles 2 to 34, and 'refugees become entitled to an expanding array of rights as their relationship with the asylum State deepens'.[76] However, it has been criticized for being State-centric in the sense that it represents undertakings and obligations, accepted between the Contracting States, to respect, protect, or accord certain rights and benefits,[77] and it does not impose requirements to establish refugee status determination procedures or minimum procedural standards.[78] Consequently, the criteria for refugee status determination vary considerably between countries and are inconsistently applied, as do procedural rights, such as access to legal aid and the right to appeal.[79]

The Refugee Convention also lacks an oversight or treaty-monitoring body.[80] While article 38 enables disputes pertaining to interpretation to be referred to the International Court of Justice, this inter-State procedure has never been activated. Under article 35,

[75] Long (n 69) 9. [76] Hathaway (n 40) 191.

[77] Guy S Goodwin-Gill, 'The International Law of Refugee Protection' in Elena Fiddian-Qasmiyeh and others (eds), *The Oxford Handbook of Refugee and Forced Migration Studies* (OUP 2014) 44.

[78] Guy S Goodwin-Gill, 'International Law and Human Rights: Trends concerning International Migrants and Refugees' (1989) 23 International Migration Review 526, 536.

[79] Jaya Ramji-Nogales, Andrew I Schoenholtz, and Philip G Schrag, 'Refugee Roulette: Disparities in Asylum Adjudication' (2007) 60 Stanford Law Review 295.

[80] Hugo Storey, 'Consistency in Refugee Decision-Making: A Judicial Perspective' (2013) 32(4) RSQ 112. See also 'Summary Conclusions' (Roundtable on the Future of Refugee Convention Supervision, Cambridge, 28–29 September 2012) <http://opiniojuris.org/wp-content/uploads/130325-cambridge-roundtable-summary-conclusions-final.pdf> accessed 30 October 2019; Anthony North and Joyce Chia, 'Towards Convergence in the Interpretation of the Refugee Convention: A Proposal for the Establishment of an International Judicial Commission for Refugees' (2006) 25 Australian Yearbook of International Law 105.

UNHCR has supervisory responsibilities, including taking steps to ensure the consistent and correct interpretation of the Convention. However, this has been criticized for providing no legal 'teeth'.[81] In addition, States have consistently sought to undermine the two major entitlements of refugees in articles 31 and 33 of the Refugee Convention by criminalizing undocumented arrivals, arbitrarily detaining asylum seekers, and deporting people to life-threatening situations.

As noted by Chetail, 'human rights law provides a universal and uniform set of standards which represents a particularly persuasive device for harmonizing the unilateral and frequently diverging interpretations of states parties'.[82] The ICCPR and the ICESCR set out fundamental rights available to 'all' persons, regardless of their legal status. Both instruments are the base line common to all, including all migrants (including refugees). The Refugee Convention provides refugees with specific, supplementary rights. Additional human rights treaties on racial discrimination, torture, children, women, persons with disabilities, and so on, are all core universal human rights instruments, which again apply to all migrants (including refugees). All States have ratified at least one of these treaties and, owing to the non-discrimination principle, are thus obliged to respect the human rights of all.

Unlike the Refugee Convention, universal (and regional) human rights treaties are supported by their own treaty bodies specifically mandated to monitor State compliance with their treaty obligations. Although the UN treaty bodies' recommendations are not legally binding as such, they point to protection gaps and exert pressure for action. Moreover, a number of the universal treaties have optional communications mechanisms that allow anyone, including migrants, to make individual complaints to the relevant UN treaty body.[83] At the regional level, the European Court of Human Rights, the Inter-American Commission on Human Rights, and the Inter-American Court of Human Rights have played important roles in the protection of migrants' (including refugees') human rights, through a reinforcement of the principle of *non-refoulement*, the prohibition of inhuman and degrading treatment and arbitrary detention, and the right to an effective remedy.[84]

In some cases, international human rights law offers a stronger protection to refugees than the Refugee Convention. The principle of *non-refoulement* contains an exception in article 33(2) of the Convention (on security grounds), whereas it is absolute under the ICCPR and CAT.[85] As noted above, it also enlarges the scope of rights available to refugees: for instance, refugee children have better access to education under the CRC

[81] Storey (n 80).

[82] Vincent Chetail, 'Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law' in Ruth Rubio-Marin (ed), *Human Rights and Immigration* (OUP 2014) 26.

[83] Fernando M Mariño Menéndez, 'Recent Jurisprudence of the United Nations Committee against Torture and the International Protection of Refugees' (2015) 34(1) RSQ 61.

[84] See eg *John Doe et al v Canada*, Inter-American Commission on Human Rights Report No 78/11, Case No 12.586 (21 July 2011); *Hirsi Jamaa and Others v Italy* (2012) 55 EHRR 21.

[85] See further Chapter 36 in this volume.

than under the Refugee Convention. As Goodwin-Gill rightly notes, the Refugee Convention's approach differs markedly from that of the human rights instruments, where the individual is identified 'as the point of departure—whether simply by virtue of being human, or a child, a woman, a worker, or someone with a disability'.[86] As a woman, a child, a person with disability, the refugee benefits *cumulatively* from all the international human rights instruments protecting those particular groups, as well from all other generally applicable human rights instruments benefiting all human beings. As do all migrants.

5. Freedom of Movement as a Fundamental Right

This section highlights the key role of freedom of movement as a fundamental right, arguing that, in a context characterized by repetitive 'migration crises' and limited durable solutions for refugees, enhancing migrants' (including refugees') mobility would also ensure more effective protection of their human rights.

The right to freedom of movement set out in article 13 of the UDHR and article 12 of the ICCPR, includes an individual's right to leave any country, including their own, and to return to their country. Juss describes it as 'half' a right because migrants generally do not have the right to enter another country without that country's permission.[87] By contrast, for Guild and Stoyanova, the absence of a right to enter another country may be one of the most important strengths of article 12 in the sense that the right to leave is a right in and of itself; it is not dependent on any right to enter a specific country of destination (or, indeed, any country at all).[88]

For refugees, freedom of movement is a vital part of securing protection.[89] Yet, it has been dramatically curtailed by a range of measures, including restrictions on the right to leave by some countries of origin, border controls by transit countries, and deterrence policies by destination States, such as interception measures beyond their borders.[90] Zieck argues that restricting the right to leave in order to assist other States in controlling undocumented movement, even if carried out pursuant to relevant international

[86] Goodwin-Gill (n 78) 545.

[87] Satvinder Juss, 'Free Movement and the World Order' (2004) 16 IJRL 289, 293.

[88] Guild and Stoyanova (n 47) 381.

[89] Marjoleine Zieck, 'Refugees and the Right to Freedom of Movement: From Flight to Return' (2018) 39 Michigan Journal of International Law 19, 21.

[90] Note, for example, cooperation between European and Libyan authorities in order to intercept migrants: European Commission, 'European Agenda on Migration: Continuous Efforts Needed to Sustain Progress' (Press Release, 14 March 2018) <https://europa.eu/rapid/press-release_IP-18-1763_en.htm> accessed 12 November 2019; Andrea Segre, Riccardo Biadene, and Dagmawi Yimer (eds), *Come un uomo sulla terra* (Pal Color Broadcast System 2008).

obligations, cannot be justified on the basis of public order.[91] Indeed, as stated by Goodwin-Gill and McAdam, '[T]he right to seek asylum, when read in conjunction with the right to freedom of movement and the totality of rights protected by the UDHR and ICCPR, implies an obligation on States to respect the individual's right to leave his or her country in search of protection'.[92] Likewise, drawing on the international and European human rights case law, Guild and Stoyanova contend that 'demonstrating that an individual has the possibility or right to enter another country is not a ground on the basis of which States are permitted to interfere with the free-standing right of that person to leave their territory'.[93]

International refugee law does not address mobility for refugees. Article 26 of the Refugee Convention relates only to the right of refugees who are lawfully present in the host country to choose their place of residence and to move freely within that country. For instance, the Refugee Convention does not determine where a refugee's international mobility must end, and refugees are under no obligation to apply for asylum in any particular State. By contrast, facilitating human mobility for all is an integrated policy objective of the 2015 Sustainable Development Goals[94] and has been included in the Global Compact for Migration,[95] which provides a list of the changes in both policy and practice that need to occur for international mobility to be liberalized.

As the first global (albeit soft-law) instrument on migration to synthesize negotiated norms and mesh them with State obligations under international human rights law, the Global Compact for Migration details the many human rights, including labour rights, guarantees that generally apply to all people—regardless of status.[96] There is a clear rule-based governance approach, which brings the treatment of migrants closer to that of citizens and reduces the administrative discretion of government authorities towards foreigners. The Global Compact draws on various principles and standards deriving from State sovereignty, international human rights law, and international refugee law, and it sets forth rules and principles for cooperation amongst States to govern the international movement of people. As such, it has strong potential to contribute to the consolidation of a still fragmented and nascent 'international migration law'.[97] This could, in turn, facilitate constructive responses to 'migration crises', such as financial and technical support for transit countries and an increase in resettlement options. If most migrants were offered legal pathways for easier mobility, undocumented migration would considerably decrease (and with it, a number of people requesting asylum who

91 Zieck (n 89) 31, 54–5.

92 Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, OUP 2007) 370.

93 Guild and Stoyanova (n 47) 394.

94 UNGA, *Transforming Our World: The 2030 Agenda for Sustainable Development*, UN doc A/RES/70/1 (21 October 2015).

95 Global Compact for Migration, paras 21, 22, 34.

96 See Elspeth Guild, 'The UN Global Compact for Safe, Orderly and Regular Migration: What Place for Human Rights?' (2019) 30 IJRL 661.

97 See generally Richard Perruchoud, and Katarina Tömölová (eds), *Compendium of International Migration Law Instruments* (TMC Asser Press 2007); Opeskin, Perruchoud, and Redpath-Cross (n 40).

do not, in fact, need international protection, but whose claims choke refugee determination mechanisms). Greater mobility for all would mean enhanced protection for refugees.

6. Conclusion

This chapter contended that refugees are, indeed, one category of migrants. This does not negate the fact that refugees are special. The normative and institutional framework for the recognition and protection of refugees must be safeguarded and supported. However, the voluntary (economic) versus forced (political) binary that underlies many of the concerns about conceptualizing refugees as migrants is not an effective approach to advance refugee rights, especially in the current context of forced migration.

Some of the basic premises of the Refugee Convention have the effect of excluding large numbers of forced migrants from its protection. To some extent, international and regional human rights law has helped to fill the gap. Human rights law takes better account of the intersecting elements of vulnerability that may precipitate flight (such as gender, age, religion, and so on) and has been instrumental in shaping and expanding refugee rights.

Unsurprisingly, deterrence strategies by States have fuelled illicit activities. Underground labour markets in transit or destination countries allow undocumented migrants, including refugees, to survive in the margins. Smuggling rings provide migrants with mobility options, at a cost. Unscrupulous recruiters, landlords, employers, and others take advantage of this precarity to exploit migrants under the threat of denouncing them to the authorities. This threat silences most undocumented migrants, who do not dare denounce the exploitation. Restricting mobility thus pushes many migrants (including refugees), underground and ultimately subsidizes criminal rings.

This chapter argued that, by contrast, States need to govern mobility, that is, to legalize, regulate, and tax mobility. This will avoid creating an increasingly unmanageable and costly 'fortress', and will progressively allow more people to come and go in the pursuit of their own goals, and to make their own choices about their lives—one of the core elements of human dignity.

The final part of the chapter pleaded for the effective facilitation of international mobility for all, as a solution to 'migration crises'. This does not mean diminishing border controls. On the contrary, it would make them more effective by offering foreigners easier access to appropriate travel documents which can be checked by border guards, and allowing security agencies to screen them openly and target their efforts on the dangerous few.

Thriving economies have the capacity to integrate millions of migrants (including refugees). Business communities are constantly calling for more workers. Cities around the world have absorbed millions of migrants from the countryside or from abroad, mostly without erecting barriers. Migrants themselves, including refugees, have shown agency, resilience, courage, and creativity, and have positively influenced their host communities.

However, there remains a collective crisis of moral and political leadership. The present 'migration crisis' cannot be tackled until politicians adhere to a long-term, sustainable vision in which human rights-based strategic mobility and diversity policies and practices are championed. Despite contemporary nationalist, populist narratives, one can envision a different, peaceful, more productive approach whereby migrants are empowered to defend their rights, just like anyone else.

CHAPTER 8

THE INTERSECTION OF INTERNATIONAL REFUGEE LAW AND INTERNATIONAL STATELESSNESS LAW

LAURA VAN WAAS

We recognize that statelessness can be a root cause of forced displacement and that forced displacement, in turn, can lead to statelessness.

New York Declaration for Refugees and Migrants[1]

1. Introduction

International refugee law and international statelessness law share common roots. To determine how to deal with the situation of the millions of people who were left displaced and denationalized in the wake of the Second World War, the Economic and Social Council of the newly formed United Nations ordered a study to be undertaken to inform 'interim measures to afford protection to stateless persons [and] action by Member nations in co-operation with the United Nations to ensure that everyone shall have an effective right to a nationality'.[2] The resulting *Study of Statelessness*[3] provided the foundation for the development of the Refugee Convention and the 1954 Convention

[1] UNGA res 71/1 (19 September 2016) para 72.

[2] Economic and Social Council, 'Resolution 116 (V) D: Stateless Persons' preamble in 'Resolutions adopted by the Economic and Social Council during its sixth session from 2 February to 11 March 1948', UN doc E/77 (12 March 1948) 16.

[3] UN Economic and Social Council, 'A Study of Statelessness', UN doc E/1112 (August 1949).

relating to the Status of Stateless Persons (followed later by the 1961 Convention on the Reduction of Statelessness).[4] Born of the same process, yet distinct in their scope and aims, these UN treaties went on to take very different paths in the half-century that followed. While refugee law, policy, doctrine, and research evolved, 'in a litter of two offspring, statelessness was the metaphorical runt'.[5] It was not until after the turn of the twenty-first century that international statelessness law started to draw much attention and to begin to emerge as a field of its own.

As global interest in (tackling) statelessness grows, the interaction between statelessness and forced displacement has also come back under the spotlight. Today, for those working in either field, it is not only important to have knowledge of the scope and application of that area of the law, but also to understand the relationship between these two sub-domains of international law. This entails, in particular, the ability to critically reflect on the challenges that arise out of the separation, yet interaction, between refugee law and statelessness law. Indeed, at the nexus of these two sub-fields, a number of important conceptual questions arise as well as some very practical difficulties in ensuring an appropriate and effective response to situations in which statelessness and displacement occur together.

This chapter provides an insight into the relationship between statelessness and forced displacement, and between statelessness law and refugee law. It starts by unpacking how statelessness can manifest itself as a cause or consequence of displacement, as well as how statelessness can be a complicating factor for refugee protection and durable solutions. The chapter then offers a brief overview of key norms relating to the protection of stateless persons and the prevention and resolution of statelessness, setting out the contours of international statelessness law for readers who are less familiar with this area. Thereafter, the chapter looks at the implications of the statelessness–displacement nexus by exploring the conceptual and practical questions that arise when a refugee is also stateless, and when a stateless person is also a refugee. It draws to a close with some reflections on the importance of forging a stronger dialogue between international refugee and statelessness law scholars and practitioners.

2. The Interaction between Statelessness and Forced Displacement

A stateless person is defined under international law as someone 'who is not considered as a national by any state under the operation of its law'.[6] Whether a person is stateless or

[4] Convention relating to the Status of Stateless Persons (adopted 28 September 1954, entered into force 6 June 1960) 360 UNTS 117 (1954 Statelessness Convention); Convention on the reduction of Statelessness (adopted 30 August 1961, entered into force 13 December 1975) 989 UNTS 175 (1961 Statelessness Convention).

[5] Mark Manly, 'UNHCR's Mandate and Activities' in Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* (CUP 2014) 92.

[6] 1954 Statelessness Convention (n 4) art 1.

not therefore hinges solely on whether the person enjoys a nationality or not[7]—a 'mixed question of law and fact' which turns on an assessment of 'how a State applies its nationality laws in an individual's case in practice'.[8] For the purposes of the application of this definition, it is irrelevant whether they have ever crossed an international border, whether they once did have a nationality (that is now lost) or might again in the future. The definition of a refugee encompasses an element of cross-border movement (ie departure from the country of nationality or habitual residence) against a context of persecution, conflict, or violence. The possession or absence of a nationality is not the defining factor—a refugee can be,[9] but does not need to be, stateless—although this can and sometimes should weigh into the assessment.[10] The upshot is that it is possible to meet both the definition of a *refugee* under the 1951 Refugee Convention and be a *stateless person* according to the 1954 Convention relating to the Status of Stateless Persons (1954 Statelessness Convention).

As illustrated by the quote from the New York Declaration for Refugees and Migrants at the opening of this chapter, statelessness is in fact recognized to be both a root cause and a potential consequence of forced displacement.[11] A stateless person may also be(come) a refugee and a refugee may also be(come) stateless. To explain why statelessness is so often accompanied by displacement requires looking more closely at the function and regulation of nationality, as well as the impact of statelessness.

Statelessness is a *root cause* of forced displacement because the removal of, or refusal to grant, citizenship may be one element of—and an indicator to identify—the severe marginalization of an individual or community: so severe that it encompasses the wholesale denial of their place in society. Indeed, historically and today, the production of statelessness and the production of refugeehood can be intrinsically connected to one and the same underlying project of statecraft. The universalization of the nation-State model combined with the arbitrary drawing of borders resulted in the mass generation of refugees—but also of statelessness, where the belonging of communities perceived as being in the 'wrong' place is contested.[12]

[7] Nationality here referring to a particular type of legal bond between a person and a State, commonly also referred to as citizenship. See further Alice Edwards, 'The Meaning of Nationality' in Edwards and van Waas (n 5) 12–14.

[8] UNHCR, 'Handbook on Protection of Stateless Persons: Under the 1954 Convention relating to the Status of Stateless Persons' (2014) 12 <https://www.unhcr.org/dach/wp-content/uploads/sites/27/2017/04/CH-UNHCR_Handbook-on-Protection-of-Stateless-Persons.pdf> accessed 23 May 2019.

[9] This is also explicit in art 1A(2) of the Refugee Convention.

[10] See Chapter 44 in this volume. See also Eric Fripp, *Nationality and Statelessness in the International Law of Refugee Status* (Bloomsbury 2016); Michelle Foster and Hélène Lambert, *International Refugee Law and the Protection of Stateless Persons* (OUP 2019).

[11] For a discussion of the wider interaction between statelessness and migration, see eg Sophie Nonnenmacher and Ryszard Cholewinski, 'The Nexus between Statelessness and Migration' in Edwards and van Waas (n 5) 247–63; Jyothi Kanics, 'Migration, Forced Displacement, and Childhood Statelessness' in *The World's Stateless: Children* (Institute on Statelessness and Inclusion 2017) 209–22.

[12] Consider, for instance, the examples of statelessness produced following decolonization in East Africa as discussed in Bronwen Manby, 'Statelessness and Citizenship in the East African Community' (UNHCR 2018) <https://www.refworld.org/docid/5bee966d4.html> accessed 30 September 2019.

Moreover, as Achiume observes, nationality has been used as a tool to facilitate racial exclusion[13] and so where racial discrimination operates as a root cause for refugee movements, the denial or deprivation of citizenship may be one of the ways in which this discrimination also manifests. 'Nation-building and nationalist ideology privileging certain racial, ethnic or religious groups' as well as 'unresolved historical ethno-nationalist legacies' have led to the construction of national identities to the exclusion of minorities and indigenous peoples,[14] taking its toll in terms of access to citizenship and in some cases precipitating forced displacement.[15] Statelessness has even been described as 'a form of forced displacement in situ',[16] further reinforcing the potentially close relationship between the production processes of statelessness and refugeehood.

The lack of the legal bond of membership to a State also entails the absence, or more often the deliberate denial, of government protection. Although States are today required to respect the human rights of everyone under their jurisdiction, in most cases regardless of nationality or statelessness, some rights can still be granted exclusively to nationals or more easily limited in the case of non-nationals.[17] In reality, stateless persons are commonly exposed to much wider, structural discrimination and their basic human rights are violated in many States with worrying impunity. Many studies document the detrimental impact of statelessness on the enjoyment of the right to education, health, work, an adequate standard of living, free movement, legal personhood, property, a family, access to justice, and other rights.[18] The insecurity and vulnerability that statelessness perpetuates can trigger forced displacement. In some cases, the denial or deprivation of nationality has been accompanied with, or followed by, widespread violence, persecution, or enforced deportation, precipitating mass refugee movements. The decades-long oppression of the stateless Rohingya in Myanmar,

[13] See Chapter 2 in this volume.

[14] UN Human Rights Council, *Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and related Intolerance* UN doc A/HRC/38/52 (25 April 2018) 14–15. See also Lindsey Kingston, *Fully Human: Personhood, Citizenship, and Rights* (OUP 2019).

[15] Consider the examples of the Lhotshampas of Bhutan following 1985 changes to the citizenship law, as discussed in Michael Hutt, *Unbecoming Citizens: Culture, Nationhood, and the Flight of Refugees from Bhutan* (OUP 2005); and Black Mauritanians who were forcibly deported and stripped of their citizenship in 1989, as discussed in Bronwen Manby, *Citizenship in Africa: The Law of Belonging* (Hart 2018) ch 7.6.

[16] Kristy A Belton, *Statelessness in the Caribbean: The Paradox of Belonging in a Postnational World* (Penn Press 2017) 14.

[17] The right to participate in government, protected under art 25 of the ICCPR is affirmed for *citizens*. For further details of permissible distinctions between nationals and non-nationals under human rights law, Office of the High Commissioner for Human Rights, *The Rights of Non-Citizens* (2006) <https://www.ohchr.org/Documents/Publications/noncitizensen.pdf> accessed 23 May 2019.

[18] One example is the 2014 UNHCR report released to coincide with the launch of its Global Action Plan to End Statelessness, UNHCR, 'A Special Report: Ending Statelessness Within 10 years' (2014) <https://www.unhcr.org/protection/statelessness/546217229/special-report-ending-statelessness-10-years.html> accessed 23 May 2019.

which has forced as much as three-quarters of the population to flee, is one of the most heinous examples of this,[19] but there are others.[20]

Statelessness can also be a *result* of forced displacement because the way that nationality is regulated does not always accommodate the situation of people who have had to flee their country, especially if their exile is protracted and extends across multiple generations. One of the challenges is that, because nationality is understood to be the legal expression of a 'genuine link', when a person or group is forced into exile, then over time the link may be seen as growing more tenuous and this can lead to situations in which the bond of nationality is no longer recognized.[21] The legislation of some States allows for the loss or withdrawal of nationality if a person resides outside the country for an extended period—even if they have not naturalized in the country of refuge.[22] Other laws place conditions on or limit the conferral of nationality to children via *jus sanguinis* (through descent from a parent who is a national) if the child is born abroad or if they are the second generation to be born outside the country. Yet birth on the territory is not sufficient in most countries to secure that State's nationality.[23] This negative conflict of nationality laws can lead to statelessness if neither of the States concerned provides safeguards to ensure the child's right to nationality.[24] The context of forced displacement can also hamper the full application of safeguards where they do exist.[25]

Refugee families can also struggle to access birth registration, which makes it difficult to establish the link that a child born in exile has to the country of birth and the country of his or her parents, generating a risk that neither State will recognize the child as a

[19] Data is incomplete, but the Rohingya community is estimated to number between 2 and 2.5 million people in total, of whom in early 2019 only in the region of 600,000 remain in Myanmar, the rest having been forcibly displaced from the country. See statistics collated in European Network on Statelessness and Institute on Statelessness and Inclusion, 'Country Position Paper: Myanmar' (2019) <https://statelessjourneys.org/wp-content/uploads/StatelessJourneys-Myanmar-final.pdf> accessed 28 May 2019. See on the treatment of the Rohingya, among others, UN Human Rights Council, 'Report of the Independent International Fact-Finding Mission on Myanmar,' UN doc A/HRC/39/64 (12 September 2018) <https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=23575&LangID=E> accessed 28 May 2019.

[20] Including the Kurds in Al-Hasakeh in Syria and the Faili Kurds in Iraq, deprived of nationality *en masse* in 1962 and 1980 respectively, as discussed in Zahra Al Barazi and Jason Tucker, 'Challenging the Disunity of Statelessness in the Middle East and North Africa' in Tendayi Bloom, Katherine Tonkiss, and Philip Cole (eds), *Understanding Statelessness* (Routledge 2017) 91–3.

[21] Lucy Hovil, 'Ensuring that Today's Refugees are not Tomorrow's Stateless: Solutions in a Refugee Context' in Laura van Waas and Melanie Khanna (eds), *Solving Statelessness* (Wolf Legal Publishers 2017) 71–98.

[22] See 'Mode L02—Loss of Citizenship: Residence Abroad' in 'GLOBALCIT, Global Database on Modes of Loss of Citizenship, version 1.0' (*Global Citizenship Observatory*, 2017) <http://globalcit.eu/loss-of-citizenship> accessed 29 May 2019.

[23] The latter system of citizenship by birthplace, known as *jus soli*, is common in the Americas but the rest of the world adheres predominantly to *jus sanguinis*.

[24] Laura van Waas, 'International and Regional Safeguards to Protect Children from Statelessness' in *The World's Stateless: Children* (n 11) 342–55.

[25] ibid. See also Chapter 58 in this volume.

national.[26] Where there is an intergenerational problem of lack of documents, this can heighten the risk of statelessness because it becomes ever more difficult to establish the facts that are determinative of nationality (place and date of birth, identity and nationality of the parents).[27] If displacement was precipitated by conflict that ultimately leads to the fracturing of States, then people may find themselves living on the other side of a new border from where they or their ancestors originated, which may cause them not to be recognized as nationals of either state.[28]

Finally, it is important to note that statelessness can also be a complicating factor in a situation of displacement and may give rise to additional obstacles in the pursuit of durable solutions.[29] Research into the experience of *stateless* refugees from Syria has demonstrated this, showing that their lack of nationality in some cases made it harder to flee and to cross international borders in search of protection, that it affected some refugees' access to international protection and assistance, and that being stateless could obstruct access to naturalization or resettlement and raise questions about prospects of future voluntary return.[30]

The manifold ways in which situations of statelessness and forced displacement can intersect raise a number of challenges when it comes to ensuring that the response to such cases is adequately tailored to give effect to the protection offered by refugee law and statelessness law—respectively, but also collectively. This means building a stronger understanding of how the two sub-domains interact.

3. International Statelessness Law

When it comes to addressing statelessness, the international community has long pursued two broad goals. The first is to offer international protection to stateless persons who have been left 'unprotected' as a result of their lack of any nationality.

[26] This issue has been flagged as a major concern in the Syria displacement context, including in Norwegian Refugee Council (NRC) and Institute on Statelessness and Inclusion (ISI), 'Understanding Statelessness in the Syria Refugee context' (2016) <http://www.syrianationality.org/pdf/report.pdf> accessed 29 May 2019.

[27] UNICEF, *Uprooted. The Growing Crisis for Refugee and Migrant Children* (2016) <https://www.unicef.org/publications/files/Uprooted_growing_crisis_for_refugee_and_migrant_children.pdf> accessed 29 May 2019.

[28] Situations include the former Yugoslavia where displacement, loss or lack of documentation and discrimination combined to exclude many Roma from citizenship of any of the successor States. See, among others, Julija Sardelić, 'Romani Minorities and Uneven Citizenship Access in the Post-Yugoslav Space' (2015) 14(2) Ethnopolitics 159.

[29] UNHCR, 'Statelessness and Citizenship' in *The State of the World's Refugees: A Humanitarian Agenda* (OUP 1997) 227.

[30] NRC and ISI (n 26); European Network on Statelessness and Institute on Statelessness and Inclusion, 'From Syria to Europe: Experiences of Stateless Kurds and Palestinian Refugees from Syria Seeking Protection in Europe' (2019) <https://statelessjourneys.org/wp-content/uploads/2019/01/ENS-ISI-From_Syria_to_Europe_Jan-2019.pdf> accessed 29 May 2019.

This is an objective that is familiar to refugee lawyers because it also underpins the Refugee Convention; indeed the 1954 Statelessness Convention shares a common drafting history that has left the two instruments almost identical in approach and substance.[31] As is the case with refugee law, the protection framework offered by the 1954 Statelessness Convention is also reinforced and complemented by the body of human rights law that applies to all people, regardless of nationality or statelessness.[32]

The second—and ultimate[33]—goal is the avoidance and reduction of the occurrence of statelessness, for which the fundamental right to a nationality has become a central norm. This focus on *preventative* action sets international statelessness law apart from international refugee law, which does not, strictly speaking, concern itself with stemming the *production* of refugeehood.[34] The goal of avoiding and reducing statelessness achieved its first significant milestone in 1930 with the adoption of the League of Nations' Hague Convention on Certain Questions relating to the Conflict of Nationality Laws, along with a Protocol Relating to a Certain Case of Statelessness. These instruments reflected a shared understanding among States that it was in their own interests to ensure that everyone has a nationality, prompting the elaboration of some common standards for regulating acquisition or loss of nationality in situations where statelessness might otherwise arise.[35] In the 1950s, following affirmation of the right to a nationality as a human right in the UDHR (article 15), the International Law Commission began work on a draft convention to codify standards for the avoidance of statelessness. After a difficult series of negotiations and compromises, States agreed to proceed with the less ambitious of the two alternative texts that had been prepared, namely on the *reduction*—rather than *elimination*—of statelessness.[36] The adoption of the 1961 Convention on the Reduction of Statelessness (1961 Statelessness Convention) marked the completion of UN efforts to put in place a dedicated international law regime to tackle the problem of statelessness.[37]

[31] Where art 1 of the 1951 Refugee Convention contains the definition of a *refugee*, art 1 of the 1954 convention defines a *stateless person* and thereafter there are no more than a handful of differences. See Chapter 44 in this volume. See further on the shared drafting history Guy Goodwin-Gill, '1954 Convention relating to the Status of Stateless Persons' (*UN Audiovisual Library of International Law* 2010) 1 <http://legal.un.org/avl/pdf/ha/cssp/cssp_e.pdf> accessed 23 May 2019; Foster and Lambert (n 10) ch 2.

[32] See Chapter 11 in this volume.

[33] Carol Batchelor, 'The International Legal Framework Concerning Statelessness and Access for Stateless Persons' (European Union Seminar on the Content and Scope of International Protection, Madrid, 2002) 6.

[34] UNHCR's statelessness mandate is similarly distinct from the refugee mandate due to the responsibility to take preventative action: Manly (n 5) 103.

[35] Carol Batchelor, 'Stateless Persons: Some Gaps in International Protection' (1995) 7 IJRL 232, 249.

[36] Guy Goodwin-Gill, 'Convention on the Reduction of Statelessness' (*UN Audiovisual Library of International Law* 2011) 4 <http://legal.un.org/avl/pdf/ha/crs/crs_e.pdf> accessed 23 May 2019.

[37] See further Paul Weis, *Nationality and Statelessness in International Law* (Kluwer Academic Publishers Group 1979).

The main contours of international statelessness law are thus established by the 1954 and 1961 Statelessness Conventions. The first of these defines statelessness and establishes a protection regime for (non-refugee) stateless persons, as well as urging naturalization to be facilitated so that a person's statelessness can be resolved through the acquisition of nationality. The second concentrates on prescribing safeguards to avoid situations of statelessness from arising, focusing on three different contexts: acquisition of a nationality at birth; renunciation, loss, or deprivation of nationality in later life; and change of nationality upon State succession.[38]

Over time, international norms relating to statelessness continued to evolve—as refugee law did in parallel—through the progressive development of human rights law in particular. This included the articulation of such norms as the right of every child to a nationality in the CRC[39] and the emergence of jurisprudence affirming the justiciability of the right to a nationality within the UN, African, European, and Inter-American human rights systems.[40] The 1997 European Convention on Nationality and 2006 Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession[41] complement the 1961 Statelessness Convention with a more elaborate regional framework for Europe; and a Protocol to the African Charter on Human and Peoples Rights on the Specific Aspects of the Right to a Nationality and the Eradication of Statelessness in Africa had reached advanced stages of negotiations at the time of writing.[42] The issue of statelessness has been receiving significant attention within the

[38] For a further description of the content and approach of the two Statelessness Conventions, see Laura van Waas, 'The UN Statelessness Conventions' in Edwards and van Waas (n 5) 71–7. For a full analysis of these instruments, set out against contemporary human rights law, see Laura van Waas, *Nationality Matters. Statelessness under International Law* (Intersentia 2014).

[39] CRC art 7.

[40] Including African Commission on Human and People's Rights, *Modise v Botswana*, African Commission on Human and Peoples' Rights, Communication No 97/93 (6 November 2000); Inter-American Court of Human Rights, *Case of the Girls Yean and Bosico v Dominican Republic*, Inter-American Court of Human Rights Series C No 130 (8 September 2005); African Committee of Experts on the Rights and Welfare of the Child, *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on behalf of Children of Nubian Descent in Kenya v the government of Kenya*, No 002/com/002.2009 (2011); European Court of Human Rights, *Genovese v Malta* (2014) 58 EHHR 25; UN Human Rights Committee, *Q v Denmark*, Un doc CCPR/C/113/D/2001/2010 (1 April 2015); and African Court on Human and Peoples' Rights, *Anudo v United Republic of Tanzania*, African Court of Human and Peoples' Rights, Ap No 012/2015 (22 March 2018).

[41] European Convention on Nationality (adopted 6 November 1997, entered into force 1 March 2000) ETS 166; Council of Europe Convention on the avoidance of Statelessness in relation to State Succession (adopted 19 May 2006, entered into force 1 May 2009) CETS 200.

[42] See African Commission of Human and Peoples' Rights, 'Press Release on the Brainstorming and Awareness Meeting on the "Draft Protocol to the African Charter on Human and Peoples' Rights on the Specific Aspects of the Right to Nationality and the Eradication of Statelessness in Africa" with a Focus on the Fight against Statelessness for the North Africa Region' (December 2019) <https://www.achpr.org/fr_pressrelease/detail?id=464> accessed 23 March 2020; African Commission of Human and Peoples' Rights, 'Draft Protocol to the African Charter on Human and Peoples' Rights on the Specific Aspects of the Right to Nationality and the Eradication of Statelessness in Africa' (September 2015) <https://www.achpr.org/public/Document/file/English/draft_citizenship_protocol_en_sept2015_achpr.pdf> accessed 23 March 2020.

UN Human Rights Council's Universal Periodic Review process,[43] and has been flagged as an issue of concern in relation to the UN's Sustainable Development Agenda 2015–2030.[44] In 2014, the profile of international statelessness law also received a significant boost with the launch of the UNHCR-led #IBelong campaign to end statelessness by 2024.[45]

Today, international statelessness law is a rich field composed of a multitude of treaties, jurisprudence, and soft law instruments, complemented by other international frameworks and initiatives that are helping to place the issue higher on the agenda of States and the international community. As this occurs, a question that is increasingly being asked is how the strong relationship between statelessness and forced displacement should shape the application of international statelessness—and refugee—law.

4. When a Refugee is also Stateless, or a Stateless Person is also a Refugee

In situations where a refugee is also stateless, the traditional understanding has been that he or she be treated first and foremost as a *refugee*—with statelessness generally seen as a secondary consideration that only really becomes relevant when refugee status ceases. In its *Handbook on Protection of Stateless Persons*, UNHCR explains:

> When an applicant raises both a refugee and a statelessness claim, it is important that each claim is assessed and that both types of status are explicitly recognised. This is because protection under the 1951 Convention generally gives rise to a greater set of rights at the national level than that under the 1954 Convention. Nevertheless, there may be instances where refugee status ceases without the person having acquired a nationality, necessitating then international protection as a stateless person.[46]

UNHCR's guidance goes on to elaborate that 'although an individual can be both stateless as per the 1954 Convention and a refugee as per the Refugee Convention, at a minimum, a stateless refugee must benefit from the protection of the Refugee Convention and international refugee law'.[47]

[43] Melanie Khanna and Peggy Brett, 'Making Effective Use of UN Human Rights Mechanisms to Solve Statelessness' in van Waas and Khanna (n 21) 13–46; Institute on Statelessness and Inclusion, *Statelessness & Human Rights: The Universal Periodic Review* (2017) <http://www.institutesi.org/Statelessness-and-UPR.pdf> accessed 23 May 2019.

[44] Radha Govil, 'The Sustainable Development Goals and Solutions to Statelessness' in van Waas and Khanna (n 21) 47–70.

[45] For example, 15 States acceded to one or both of these instruments in the first five years of the #IBelong campaign.

[46] UNHCR (n 8) 31.

[47] UNHCR (n 8) 7.

This means that statelessness has received relatively little attention in situations of forced displacement.[48] Stateless refugees are dealt with as refugees and included as such in the data published by UNHCR, without differentiation. When it began to report statistics on the number of *stateless persons* under its mandate, from 2004 onwards, UNHCR included only non-refugee stateless persons in this dataset, to avoid double counting.[49] One implication of this is that it is difficult to quantify the number of stateless refugees globally and, by extension, accrue a comprehensive picture of the number of people living without a nationality in the world (refugee and non-refugee stateless combined).[50] This is notwithstanding the already distinctly challenging task of measuring the magnitude of statelessness in any context, due to the complexities of data gathering and reporting on this issue.[51] In a survey of publicly available statistics carried out in 2014, the Institute on Statelessness and Inclusion estimated that at least 1.5 million people included in UNHCR's refugee statistics, as well as some 3.5 million Palestinian refugees who are reported in separate data compiled by UNRWA and not (also) included in UNHCR's datasets, are likely also to be stateless—suggesting that approximately one in three stateless persons is a refugee.[52] Yet this is obscured by the emphasis on the separation of these issues and the manner in which global data reporting is organized.

Meanwhile, as international attention on statelessness grew, it was at first deliberately presented as an issue distinct from refugeehood, in order to raise awareness and build up knowledge and capacity to more effectively implement international statelessness law. When UNHCR published expert guidance under its statelessness mandate, it spelled out explicitly that:

> Most stateless persons [. . .] have never crossed borders and find themselves in their 'own country'. Their predicament exists in situ, that is in the country of their long-term residence, in many cases the country of their birth.[53]

[48] Indeed, statelessness has received relatively little attention *per se*, as 'a prioritized focus on refugees has dominated, or even eclipsed, the plight and protection needs of refugees' Michelle Foster and Hélène Lambert, 'Statelessness as a Human Rights Issue: A Concept Whose Time Has Come' (2016) 28 IJRL 564, 564.

[49] UNHCR's data can be explored in its Population Statistics database online, UNHCR, 'Population Statistics' <http://popstats.unhcr.org/en/overview> accessed 23 May 2019. For a summary of the statistical reporting methodology and this policy of avoiding 'double counting', see UNHCR, 'Global Trends: Forced Displacement in 2017' (2018) 53 <https://www.unhcr.org/globaltrends2017/> accessed 29 May 2019.

[50] Institute on Statelessness and Inclusion (ISI), *The World's Stateless* (Wolf Legal Publishers 2014) 49–50.

[51] UNHCR, 'Stateless Persons' in 'UNHCR Statistical Yearbook 2013' (2014) 39–47 <https://www.unhcr.org/54cf99f29.pdf> accessed 23 May 2019.

[52] ISI (n 50) ch VII, VIII. Note that this study was conducted prior to the new wave of displacement of Rohingya from Myanmar that occurred from August 2017 onwards. See also Chapter 35 in this volume on UNRWA's mandate and the position of Palestine refugees under international refugee law.

[53] UNHCR (n 8) 3.

The UNHCR *Global Action Plan to End Statelessness 2014–2024*, similarly reminds readers that 'while some stateless people are also refugees, most are not' and explains that this Action Plan 'focuses primarily on *non-refugee* stateless populations'.[54] Likewise, as statelessness started to evolve as its own field of scholarship, interest has also been predominantly in statelessness as a phenomenon that may be related to, but is to be distinguished from, refugee situations.[55] When civil society organizations and networks dedicated to statelessness first started to emerge, it was in part a response to the fact that the distinct problem of statelessness had been overshadowed (and left behind) as the refugee field developed. This meant that their work also initially concentrated on understanding the challenges in the implementation of international statelessness law in non-refugee settings and promoting better adherence to this overlooked set of norms.

However, this two-way effort to keep separate questions of refugee law and statelessness law has started to change, for broadly two reasons. First, scholars and organizations engaged in statelessness started to question the validity and wisdom of (over)emphasizing the separation from refugee law and refugee contexts, because the commonplace interaction between them in practice was so evident.[56] Secondly, those in the refugee field started to take notice of the work being done on statelessness, because this was a problem they regularly encountered in their work, even if it was not one to which they had devoted much attention. In fact, to progress the understanding on both sides and benefit optimally from the respective knowledge and tools produced, the nexus between statelessness and forced displacement needed to be acknowledged and explored. A greater urgency was also felt in this regard as the interaction between statelessness and displacement became hard to ignore in the context of Syria's humanitarian crisis and the plight of the Rohingya from Myanmar.

One of the specific questions that demanded a response following the 2017 wave of displacement of Rohingya from Myanmar was how to account for this in global statistical reporting. The exodus of more than 650,000 Rohingya to Bangladesh in late 2017, swelling the numbers there to close to a million stateless refugees, prompted UNHCR to reflect on whether it could continue to report on stateless persons and refugees separately, with stateless *refugees* only counted in the refugee numbers. This would have meant a drastic reduction in the number of stateless persons reported in Myanmar and, by extension, globally—a change in data that may inadvertently and incorrectly

[54] Emphasis added. UNHCR, 'Global Action Plan to End Statelessness 2014–2024' (2014) 6 <https://www.unhcr.org/protection/statelessness/54621bf49/global-action-plan-end-statelessness-2014-2024.html> accessed 29 May 2019.

[55] A brief overview of the developing research agenda on statelessness, from the early 2000s to 2014 is given in Mark Manly and Laura van Waas, 'The State of Statelessness Research: A Human Rights Imperative' (2014) 19 Tilburg Law Review 3.

[56] See for instance Jason Tucker, 'Recognising the Importance of the Statelessness of Refugees: Are we Witnessing a Shift to Evidence Based Policies?' in Lindsey Kingston and Tendayi Bloom (eds), *Statelessness and Governance* (Manchester University Press, forthcoming) See further Foster and Lambert (n 10).

have been interpreted as a success in efforts to reduce statelessness, while in fact their statelessness remained unresolved and their situation deteriorated.[57] Against this backdrop, UNHCR approached Myanmar as a special case in the updated Global Trends data released mid-2018. Acknowledging that 'reporting on stateless populations is a particular challenge for UNHCR as many displaced people are also stateless', UNHCR explains that 'in 2017, it was decided to report the displaced Rohingya population as stateless' and thereby break with its previous policy of avoiding double counting.[58] The report goes on to recognize that 'this approach is inconsistent with the methodology applied for other displaced stateless populations' and indicate that UNHCR is 'currently reviewing its statistical reporting for stateless populations'.[59] How to reconcile, within global datasets, the overlap between the categories of *stateless* and *refugee*—as well as potentially with other groups which are reported separately by UNHCR in IDP data or as Palestine Refugees by UNRWA under its mandate—is one of the unsettled questions at the nexus of statelessness and forced displacement.

In situations where a refugee is also stateless, there are also fundamental conceptual and practical challenges to be considered. As discussed in Chapter 44 in this volume, a person's statelessness and the circumstances surrounding this may be relevant to whether they meet the definition of a refugee and qualify for protection as such. Even if their statelessness is not a constitutive element of the refugee claim, identifying a refugee to *also* be stateless can be critical. On the one hand, this is needed to avoid inadvertently discriminating against stateless refugees in relevant procedures because due consideration is not given to their lack of nationality—that is, in order to ensure *the full operation of international refugee law in a statelessness context*. On the other hand, identification of statelessness is necessary to ensure *the full operation of international statelessness law in a refugee context*—for instance to apply the safeguards prescribed by the 1961 Statelessness Convention, as relevant, to avoid new cases of statelessness from emerging. As mentioned above, the experience of some stateless refugees has been that their lack of nationality impedes their ability to access international protection or durable solutions and that not enough is done to address the risk of statelessness among refugees with possible nationality problems.[60]

A study of the relationship between statelessness and forced displacement in Europe, published in 2019, found that the failure to identify and suitably account for statelessness in asylum procedures was indeed the cause of an array of problems encountered by

[57] A similar dilemma also arose in relation to statistical reporting on IDPs, with many Rohingya who remained in Myanmar displaced internally and as such potentially also being removed from the statelessness statistics (while added to the IDP numbers).

[58] UNHCR 2018 (n 49) 51.

[59] ibid 53. See further for an analysis of the statistical update issued on statelessness by UNHCR within their Global Trends report, ISI, 'Statelessness in Numbers: 2018. An Overview and Analysis of Global Statistics' (2018) <https://www.institutesi.org/ISI_statistics_analysis_2018.pdf> accessed 29 May 2019.

[60] ibid 30.

stateless refugees—in registration, refugee status determination, family reunification, naturalization, and other procedures.[61] An underlying issue, according to this research is the 'fundamental lack of knowledge and limited interaction between stakeholder groups' on how statelessness interacts with forced displacement.[62] The report makes a number of practical recommendations to address this, but even if the knowledge and capacity gaps were to be overcome, the modalities for the establishment of refugee status and of statelessness are different, and combining the two will not always be straightforward or even feasible. As Gyulai explains:

> Given that the most common procedural act in statelessness determination (contact with and information gathering from foreign authorities) is strictly prohibited in asylum procedures, the regulatory framework ought to clarify the relationship between these two.[63]

If contacting foreign authorities to seek clarity on the interpretation and application of their nationality rules in the case at hand would 'compromise the confidentiality to which refugees and asylum seekers are entitled' and without this there 'is insufficient information to conclude that an individual is stateless', then the determination of statelessness will have to be suspended.[64] In such instances, the necessary prioritization of refugee protection may therefore impact on the recognition of statelessness and application of international statelessness law standards.

A concrete scenario that arises is as follows: due to the failure—or inability—to determine a refugee to be stateless, a child born to that refugee is not identified as a beneficiary of the safeguard prescribed in article 1 of the 1961 Statelessness Convention to confer nationality *jus soli* where the child would otherwise be stateless.[65] International refugee law does not contain an equivalent obligation with regards to children of refugees born on the territory of the host State more generally, but if the child of a refugee *would otherwise be stateless*, then the statelessness-related safeguard applies—regardless of the refugee context. States that 'have deliberate policies not to confer nationality to children born to refugees, especially when a parent is unable to confirm their identity',[66] would be in breach of international statelessness law if no special accommodation is made where the child would be left stateless. Guidelines

[61] European Network on Statelessness and Institute on Statelessness and Inclusion, 'Addressing Statelessness in Europe's Refugee Response: Gaps and Opportunities' (2019) <https://statelessjourneys.org/wp-content/uploads/StatelessJourneys-Addressing_statelessness_in_Europ_refugee_response-FINAL.pdf> accessed 29 May 2019.

[62] ibid 17ff.

[63] Gábor Gyulai, 'The Determination of Statelessness' in Edwards and van Waas (n 5) 136–7.

[64] UNHCR (n 8) 31.

[65] The same safeguard is recommended by the UN Committee on the Rights of the Child to ensure the right to a nationality under CRC art 7. Laura van Waas, 'Stateless Children' in Jacqueline Bhabha, Jyothi Kanics, and Daniel Senovilla Hernández (eds), *Research Handbook on Child Migration* (Edward Elgar 2018) 217.

[66] Kanics (n 11) 215.

issued by UNHCR under its statelessness mandate on how to apply this safeguard against childhood statelessness recognize the challenge and ask States to adopt a child-rights-based approach. In making the 'determination of the non-possession of any foreign nationality' the guidelines indicate that States are required to 'take into account Articles 3 [*best interests of the child*] and 7 [*right to nationality*] of the CRC and adopt an appropriate standard of proof' and not to leave a child in a prolonged situation of undetermined nationality.[67] It is therefore not necessary to make a (formal) determination that the child's parent is stateless, but rather the focus should be on assessing all relevant evidence of the nationality status of the child. This means that it should be possible to secure the operation of this safeguard in a refugee context. The same UNHCR guidelines also address the situation of refugee children who would be entitled to the nationality of their parent(s) but are precluded from completing the necessary procedures to effect this claim, owing to their status as refugees, making clear that the same safeguard against statelessness should apply.[68] In short, States must protect the child's right to a nationality and ensure the operation of safeguards to prevent children from being left stateless, whether this is in a refugee context or not. The application of international statelessness law is not limited by the presence of a claim under international refugee law (and vice versa), demonstrating how important it is for those working in either field to have at least a baseline understanding of both areas of law.

This example also hints at a deeper dilemma at the nexus of these two fields—that of the (relative) attribution of State responsibility. If the above approach to the fulfilment of the child's right to a nationality were to be scrupulously applied in situations of large-scale displacement of a stateless community across an international border—such as the case of the Rohingya—this would lead stateless refugee children born in exile to receive the nationality of the host State. Childhood statelessness would thereby be avoided and through securing the child's right to a nationality, access to and enjoyment of other (child) rights would be strengthened.[69] Moreover, this approach would disrupt an existing problem of statelessness, breaking what has likely been an intergenerational cycle of denial of nationality. However, such a solution

[67] UNHCR, 'Guidelines on Statelessness No. 4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1–4 of the 1961 Convention on the Reduction of Statelessness', HCR/GS/12/04 (21 December 2012) 5–6 <https://www.refworld.org/docid/50d460c72.html> accessed 29 May 2019.

[68] ibid 7. This specific guidance relates to situations of non-automatic conferral of nationality at birth, that is, where a registration procedure must be completed to activate the entitlement to nationality. Less conceptually and normatively clear-cut is the position of children of refugees who automatically acquire nationality *jus sanguinis* under the law of their parents' country of nationality but whose existence is not known or legally established—for instance due to lack of access to birth registration procedures. See Gábor Gyulai, 'The Long-Overlooked Mystery of Refugee Children's Nationality' in *The World's Stateless: Children* (n 11) 242–7.

[69] The right to a nationality operates as an 'enabling right' for children with respect to the other rights contained in the CRC. See Maria Jose Recalde Vela, 'An Interview with Benyam Dawit Mezmur, Chairperson of the United Nations Committee on the Rights of the Child' in *The World's Stateless: Children* (n 11) 131.

would be effected in a way that neglects the genuine link of the stateless refugee population to their 'own country'[70]—the State that has denied or stripped them of nationality in violation of international law and from which they have been forcibly displaced.[71] The international statelessness law-compliant, and child rights-sensitive, action of the host State could have the inadvertent impact of absolving the home State of responsibility and, where deprivation of nationality has been utilized to purge a community from its own country, may contribute to effectuating ethnic cleansing. Moreover, the expectation that any stateless child of a refugee must be able to access the nationality of the State in which they are born would likely lead to a further shrinking of international protection space, with States being reluctant to provide safe haven specifically to *stateless* refugees. Yet, in situations of protracted displacement, determining which State is the stateless refugee's 'own country' becomes more complex. The Human Rights Committee has indicated that the language of article 12, paragraph 4 [of the ICCPR] 'permits a broader interpretation that might embrace other categories of long-term residents, including but not limited to stateless persons arbitrarily deprived of the right to acquire the nationality of the country of such residence'.[72] In this light, it would seem very difficult for a host State to justify allowing statelessness to persist across several generations of refugees born in exile—which is in practice the case for Rohingya refugees in many countries and other stateless refugee groups as well.

As this chapter has discussed, the definition of a stateless person under international law 'applies in both migration and non-migration contexts'.[73] This definition is widely understood, including on the basis of commentary by the International Law Commission, to have attained the status of customary international law.[74] As such, international norms directed at the avoidance of statelessness and the realization of the right to a nationality employ a similarly unqualified understanding of statelessness as a phenomenon that may be either migratory or *in situ*. Yet, this dichotomy is widely used, in some contexts specifically to distinguish different courses of action that would be appropriate. As Vlieks explains in her survey of the use of the terms 'migratory' and '*in situ*' statelessness:

[70] The scope of 'his own country', as contained in art 12(4) of the ICCPR (protecting the right to enter one's 'own country') is 'broader than the concept "country of his nationality". It is not limited to nationality in a formal sense, that is, nationality acquired at birth or by conferral; it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien.' Human Rights Committee, 'General Comment No 27: Article 12 (Freedom of Movement)', UN doc CCPR/C/21/Rev.1/Add.9 (2 November 1999) 20–1.

[71] In the specific case of the Rohingya, the race-based denial of nationality to the Rohingya community amounts to discrimination and violates the prohibition of arbitrary deprivation of nationality. See United Nations High Commissioner for Human Rights, 'Situation of Human Rights of Rohingya Muslims and other Minorities in Myanmar,' UN doc A/HRC/32/18 (28 June 2016) 26.

[72] ibid 20. [73] UNHCR (n 8) 10.

[74] International Law Commission, 'Draft Articles on Diplomatic Protection with Commentaries' (2006) II(2) International Law Commission Yearbook 49.

> the main reason for making a distinction […] is the difference in response that the distinct situations represented by these two concepts require. […] there are two ways of responding to statelessness from a legal perspective: (1) statelessness determination and a protection status (as well as access to facilitated naturalization) […] for persons who are stateless in the migratory context—or (2) recognition of statelessness—for persons who are stateless *in situ*.[75]

However, as Vlieks goes on to expose, drawing a line between these two purportedly distinct contexts is extremely challenging. A situation of intergenerational statelessness in a protracted refugee setting would be one example of a very blurred line. There is a tension, in such contexts, between international norms and respective State responsibilities that is difficult to reconcile. International statelessness law prescribes both the (re)acquisition of the nationality of the country of origin that has denied nationality in violation of requisite norms, and a pathway to nationality in the host country to reduce statelessness, especially for children born in exile who thereby enjoy a genuine fact of attachment to that State. Understanding such difficulties helps to contextualize why UNHCR has focused primarily on non-refugee statelessness under its statelessness mandate, including in the *Global Action Plan to End Statelessness 2014–2024*: 'the Global Action Plan focuses primarily on non-refugee stateless populations but also complements UNHCR's efforts to resolve protracted refugee situations'.[76] Given the strong and enduring interaction between statelessness and forced displacement, however, digging deeper into the nexus of statelessness and refugee law to identify, unpack, and perhaps find ways to constructively resolve areas of potential tension is critical.

5. Final Observations: The Need for Stronger Dialogue between Two (Sub-)Fields

As any account of the 'origin story' of international refugee and statelessness law must acknowledge, the two fields sprung from the same roots. As efforts to protect refugees became separated from efforts to protect those without nationality, the journey taken by these two areas of law considerably diverged. The revival of interest in statelessness in the early 2000s initially spurred an array of efforts to generate a better understanding of the content and scope of international statelessness law and to improve its

[75] Caia Vlieks, 'Contexts of Statelessness: The Concepts "Statelessness *in situ*" and "Statelessness in a Migratory context" ' in Bloom, Tonkiss, and Cole (n 20) 36.

[76] UNHCR (n 54) 6. Under this Global Action Plan, for example, in respect of Action 1 to 'Resolve existing major situations of statelessness', the goal by 2024 is 'all major non-refugee statelessness situations resolved'.

implementation—with a particular focus on non-refugee settings. But it was not long before these efforts led scholars and international actors alike back to the relationship between statelessness and forced displacement, and with it the nexus between refugee and statelessness law.

As work continues to bring these two fields (back) together, there are some important questions to be answered. This chapter raises a number of them, from the practicalities of strengthening the mutual understanding of statelessness law among refugee specialists and vice versa so as to ensure the effectiveness of both sets of standards in situations where statelessness and forced displacement intersect, to the normative difficulties inherent in asserting and protecting the right to a nationality in a situation of (protracted) displacement and reconciling respective State responsibilities. Raising, investigating, and debating these questions can also help to tease out areas of international statelessness law that must operate in a *non-refugee* setting, including, for instance: the obligations owed in terms of *international* protection to non-refugee stateless persons inside their own country, especially in intergenerational situations, as well as to stateless persons in a migratory but *non-refugee* context; how to deal with situations of cessation of refugee status where the person concerned remains stateless and voluntary return is impeded by this; and the scope for, and appropriateness of, the use of resettlement as a durable solution for non-refugee stateless persons.[77] Perhaps the study and debate of statelessness law can assist those working in the refugee field to generate new insights of refugee law in the same way. Maintaining a transparent, reflective and critical dialogue between these two fields will ultimately be of great value to both.

[77] UNHCR resettlement guidance includes a section on 'Resettlement of non-refugee stateless persons', acknowledging that resettlement may be considered for non-refugee stateless persons with acute protection needs. However, this area of policy remains underdeveloped. UNHCR, 'Resettlement Handbook' (2011) 306 <https://www.unhcr.org/46f7c0ee2.pdf> accessed 29 May 2019.

PART II

SOURCES

CHAPTER 9

THE ARCHITECTURE OF THE UN REFUGEE CONVENTION AND PROTOCOL

JAMES C HATHAWAY*

The heart of international refugee law is the 1951 Convention relating to the Status of Refugees and the 1967 Protocol relating to the Status of Refugees, with some three-quarters of the world's governments having bound themselves to respect the standards set by these treaties. Contracting States may—and often have—accepted additional refugee protection responsibilities under national or regional law. But, as a matter of international law, these additional duties complement rather than supplant the fundamental commitments made under the Refugee Convention and Protocol.

The architecture of this core normative standard is in many ways unusual. As a formal matter, it derives from two interlocking UN treaties—the Refugee Convention and the Protocol—rather than from a single treaty.[1] Perhaps the regime's best-known feature is a definition of refugee status that must be accepted without any qualification or variation by States, and which embraces persons on the basis of the facts of their situation rather than only as a function of legal adjudication or official declaration. Any persons so qualifying must be granted the benefit of an extraordinary array of refugee rights—rights that must be respected in addition to, not instead of, other entitlements including those that have been codified in international human rights law. The duty to respect refugee rights is not, moreover, conditional on the sufficiency of resources and may be derogated from in only relatively limited circumstances.

* The analysis here draws on the more detailed examination of these issues in *The Rights of Refugees under International Law* (2nd edn, CUP 2021). Jamila Odeh (JD, Michigan, 2019) provided outstanding research assistance for this chapter.

[1] See generally Stefanie Schmahl, 'General Provision' in Andreas Zimmermann (ed), *The 1951 Convention relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (OUP 2011).

However, and in contrast to most other human rights treaties, refugee rights are not all owed immediately to a refugee coming under a Contracting State's jurisdiction, but rather arise on the basis of a sophisticated structure of levels of attachment. Nor is the nature of refugee rights generally defined in absolute terms; the content of most entitlements is instead contingent on what a particular host State provides to a specified group of non-refugees under its jurisdiction. These two features—the incremental acquisition of rights and the definition of many rights on the basis of contingent standards of compliance—are critical means of taking account of legitimate host State concerns that might otherwise arise from the core obligation to protect all persons coming under their jurisdiction who meet the international refugee definition. The continuing viability of this careful compromise embedded in the architecture of the Convention and Protocol is, however, increasingly threatened by the failure to establish an independent mechanism to supervise compliance with obligations or to ensure the fair distribution of protection burdens and responsibilities arising thereunder.

1. The Refugee Convention and Protocol as Interlocking Sources of Obligation

The Refugee Convention was drafted between 1948 and 1951 by a combination of United Nations organs, *ad hoc* committees, and a conference of plenipotentiaries.[2] Its orientation was decidedly Eurocentric: while most Contracting States opted to apply its provisions to non-European refugees, the mandatory scope of protection was limited to refugees whose flight was prompted by a pre-1951 event within Europe. It was not until the adoption in 1967 of the Protocol that the duty to protect refugees was prospectively made both global and temporally inclusive. In the result, Contracting States to the Refugee Convention that have gone on to adopt the Protocol—as nearly all have done[3]—

[2] See Terje Einarsen, 'Drafting History of the 1951 Convention and the 1967 Protocol' in Zimmermann (n 1); James C Hathaway, 'The Evolution of Refugee Status in International Law: 1920–1950' (1984) 33 ICLQ 348.

[3] Two States—Madagascar and Saint Kitts and Nevis—acceded to the Refugee Convention but have not gone on to adopt the Protocol. These two States are therefore not formally bound to protect the rights of modern refugees. While the option under the Convention to protect only European refugees is in most cases denied to States that sign the Protocol, one Contracting State, Madagascar, exercised the 'European refugee only' option when it acceded to the Convention and it has not yet become a party to the Protocol—meaning that it is still formally entitled to refuse to protect non-European refugees. In addition, the Protocol includes a 'grandfathering' provision that allows Contracting States that were parties to the Convention before 1967 to maintain any pre-existing geographical restriction even upon ratifying or acceding to the Protocol. Congo and Turkey fall into this category: having ratified the Convention with a geographical limitation and not having elected to withdraw that limitation (as, for example, Malta did in 2002), these countries are also exempted from obligations towards non-European refugees.

must now grant all Convention rights to all refugees, including those in flight from contemporary phenomena in any part of the world.

Whether the Protocol truly updated and universalized the scope of international refugee protection is, however, debatable. While the explicit temporal and geographical limitations were eliminated, the substantive test for refugee status—a well-founded fear of being persecuted for reason of one of five forms of civil or political status—was not changed by the Protocol.[4] This raises the spectre of persons in flight from natural disasters, war, or broadly based political or economic turmoil—arguably the dominant causes of flight in most of the less-developed world today—being thought to fall outside the scope of internationally protected refugee status.[5] This has led some scholars, including most recently Betts and Collier,[6] to call for a new understanding of refugee status. Yet other voices[7] recognize the continuing value of the definition, in particular as expanded at the regional level[8] and taking into account the adoption of complementary or subsidiary protection regimes.[9] Indeed, even in the absence of such formal initiatives, the creative reinterpretation of the refugee definition by scholars and judges has in many cases succeeded in broadening understandings of a risk of 'being persecuted', so that at-risk minorities in flight from war or other broadly based forms of harm are recognized as refugees entitled to the protection of the Convention and Protocol.[10] As framed by Justice Kirby of the High Court of Australia:

> Because the Convention is universal, it does not speak only of the grounds of persecution that have been most familiar to Western countries . . . [I]n other societies,

[4] James C Hathaway, 'A Reconsideration of the Underlying Premise of International Refugee Law' (1990) Harvard International Law Journal 129; Schmahl (n 1) 612.

[5] See Chapters 45 and 46 in this volume.

[6] Alexander Betts and Paul Collier, *Refuge: Transforming a Broken Refugee System* (Allen Lane 2017); see also Jerzyv Sztucki, 'Who Is a Refugee? The Convention Definition: Universal or Obsolete?' in Frances Nicholson and Patrick Twomey (eds), *Refugee Rights and Realities: Evolving International Concepts and Regimes* (CUP 1999); Jacqueline Bhabha, 'International Gatekeepers?: The Tension between Asylum Advocacy and Human Rights' (2002) 15 Harvard Human Rights Journal 155, 161; Matthew Gibney, 'The Ethics of Refugees' (2018) 13(10) *Philosophy Compass* <https://onlinelibrary.wiley.com/toc/17479991/2018/13/10> accessed 1 October 2019.

[7] This approach is comprehensively developed in James C Hathaway and Michelle Foster, *The Law of Refugee Status* (2nd edn, CUP 2014). See also Jean-Yves Carlier, 'The Geneva Refugee Definition and the "Theory of Three Scales"' in Frances Nicholson and Patrick Twomey (eds), *Refugee Rights and Realities: Evolving International Concepts and Regimes* (CUP 1999); Einarsen (n 2) 37; Kristen Walker, 'Defending the 1951 Convention Definition of Refugee' (2003) 17 Georgetown Immigration Law Journal 583; Max Cherem, 'Refugee Rights: Against Expanding the Definition of a "Refugee" and Unilateral Protection Elsewhere' (2016) 24 Journal of Political Philosophy 183.

[8] See in particular Marina Sharpe, *The Regional Law of Refugee Protection in Africa* (OUP 2018); see generally Andreas Zimmermann and Claudia Mahler, 'Article 1 A, para 2' in Zimmermann (n 1) 464.

[9] See generally Chapter 36 in this volume; Jane McAdam, *Complementary Protection in International Refugee Law* (OUP 2007). A generous and evolving interpretation of refugee status also aligns with Recommendation E of the Conference of Plenipotentiaries that adopted the Refugee Convention: Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, OUP 2007) 36.

[10] See Chapter 45 in this volume; Matthew Scott, *Climate Change, Disasters and the Refugee Convention* (CUP 2020).

> and in modern times, different cultural norms and social imperatives may give rise to different sources of persecution.... The concept is not a static one. Nor is it fixed by historical appreciation.[11]

2. Refugee Status as a Non-reservable International Norm

As in the case of most treaties, States acceding to the Convention and Protocol may generally enter a reservation to avoid particular obligations. The Refugee Convention, however, insulates five core norms from any possibility of reservation or qualification—including the Convention's definition of a refugee entitled to international protection.[12]

Because the refugee definition in article 1A(2) may not be altered by Contracting States, it is, for example, not lawful for a country to protect as refugees only those fleeing risk on account of religion but not for reason of their particular social group; to decide that only persons who have already experienced persecution (rather than all who have a 'well-founded fear' of being persecuted) are to be treated as refugees; nor to exclude stateless persons from refugee status. And because the Convention stipulates in great detail both the circumstances under which refugee status comes to an end and the scope of permissible exclusion from refugee status, Contracting States may not, for example, simply end refugee status because of economic or political pressure or summarily bar persons from protection on the basis of vague allegations that they present a 'terrorist' or other threat.[13]

It is of course true, as both Sztucki[14] and Chetail[15] have insisted, that Contracting States enjoy significant latitude to interpret and apply the common refugee definition. Courts have nonetheless recognized the importance of giving a common meaning to the Convention, including to its definition of who is a refugee. As the Supreme Court of the United Kingdom made clear, the refugee definition 'must be interpreted as an international instrument, not a domestic statute. It should not be given a narrow or restricted interpretation'.[16] Because there is a single refugee definition that binds all

[11] *Applicant A v Minister for Immigration and Multicultural Affairs* [1997] HCA 4, (1997) 190 CLR 225, 293–4.

[12] Refugee Convention, arts 1A(2) and 42(1). The other non-reservable rights are to protection from discrimination, to enjoy freedom of religion, to have access to the courts, and to be protected from *refoulement*.

[13] See Chapters 39 and 57 in this volume.

[14] Sztucki (n 6) 68–75.

[15] Vincent Chetail, 'Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law' in Ruth Rubio-Martin (ed), *Human Rights and Immigration* (OUP 2014) 42.

[16] *R (ST, Eritrea) v Secretary of State for the Home Department* [2012] UKSC 12, [2012] 2 AC 135 para 30.

Contracting States, each State is required to promote the effectiveness of the Convention as a treaty with a common standard of entitlement to protection:

> As in the case of other multilateral treaties, the Refugee Convention must be given an independent meaning . . . without taking colour from distinctive features of the legal system of any individual contracting state. In principle therefore there can only be one true interpretation of a treaty . . . . In practice it is left to national courts, faced with the material disagreement on an issue of interpretation, to resolve it. But in doing so it must search, untrammelled by notions of its national legal culture, for the true autonomous and international meaning of the treaty.[17]

3. Refugee Status as Declaratory

While it is common to speak of Contracting States 'granting' refugee status, this framing is not in fact accurate. As detailed below,[18] rights under the Convention and Protocol actually accrue incrementally over time, with two important 'bundles' of rights explicitly owed to persons who are not yet 'lawfully present' (much less 'lawfully staying' or durably residing) in an asylum country. This innovative approach to the attribution of rights to refugees reflects the sensible concern of the Convention's drafters that some basic entitlements had to be provisionally extended to all persons claiming refugee status, or recognizable as refugees even before status adjudication, in order to safeguard the very purpose of the regime.[19] Put simply, if a Contracting State had no refugee protection obligations unless and until an individual is affirmatively found to satisfy the criteria of the refugee definition, a poorly intentioned State might opt to delay that

[17] *R v Secretary of State for the Home Department, ex parte Adan and Aitseguer* [2000] UKHL 67, [2001] 2 AC 477, 516–17 (Lord Steyn).

[18] See Section 6.

[19] For example, '[g]iven that a person is a refugee within the meaning of the 1951 Convention as soon as he or she fulfills the criteria contained in the refugee definition . . . the principle of *non-refoulement* applies not only to recognized refugees, but also to those who have not had their status formally declared': UNHCR, 'Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol' (26 January 2007) para 6. 'While [the declaratory nature of refugee status] may sound like a technicality, it is the reason why asylum-seekers should not be returned to their countries of origin until their claims have been examined': Frances Nicholson and Judith Kumin, *A Guide to International Refugee Protection and Building State Asylum Systems: Handbook for Parliamentarians No 27, 2017* (Inter-Parliamentary Union and UNHCR 2017) 18. See also Abdul Ghafur Hamid and Shaban Phiri, 'Protecting Asylum-Seekers Prior to Determination of Refugee Status: Reinterpreting the Refugee Convention and Assessing Contemporary State Practice on *Non-Refoulement*' (2017) 25 International Islamic University of Malaysia Law Journal 29, 37–8. Importantly, all rights provisionally respected can be immediately withdrawn in the event an applicant is found not to be a Convention refugee.

inquiry or even to avoid it altogether.[20] If, on the other hand, core rights are provisionally guaranteed to those arriving to seek protection unless and until found *not* to qualify as refugees, the Contracting State has an incentive to inquire into the need for protection even as the basic interests of the person claiming refugee status are safeguarded in the interim.[21] The UNHCR Handbook thus eloquently observes that:

> A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.[22]

This understanding that refugee status recognition is declaratory has been recognized by the Inter-American Court of Human Rights,[23] as well as by several senior national courts.[24] European Union law also expressly provides that '[t]he recognition of refugee status is a declaratory act', as do the laws of a number of countries.[25]

This importance of the declaratory nature of refugee status truly cannot be overstated:[26] perhaps most importantly, this principle provides a critical means to

[20] A critique of the declaratory status doctrine based on speech theory is advanced in Trish Luker, 'Performance Anxieties: Interpellation of the Refugee Subject in Law' (2015) 30 Canadian Journal of Law and Society 91, arguing that, in advance of recognition, refugee status is not stable.

[21] The declaratory nature of refugee status thus sits comfortably with the implied duty to investigate refugee claims. See eg UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/1P/4/ENG/REV.4 (1979, reissued 2019) paras 24, 189, 194; Chetail (n 15) 51. The innovative attachment system of the Convention (see Section 6) nonetheless ensures that, if a State fails or refuses to assess refugee status, the full catalogue of refugee rights will still accrue over time. James C Hathaway, *The Rights of Refugees under International Law* (CUP 2005) 183–4, 189–91. See also Hathaway and Foster (n 7) 25–6.

[22] UNHCR (n 21) para 28.

[23] 'Given the declarative nature of the determination of refugee status … the States parties to the 1951 Convention … must recognize this status, based on the respective fair and competent proceedings': *Pacheco Tineo Family v Bolivia*, Inter-American Court of Human Rights Series C No 272 (25 November 2013) para 147.

[24] 'True it is … as para 28 of the Handbook neatly points out, that someone recognised to be a refugee must by definition have been one before his refugee status has been determined': *R (Hoxha) v Special Adjudicator* [2005] UKHL 19, [2005] 1 WLR 1063 para 60; see also *R (ST, Eritrea)* (n 16) para 21. 'Under the Refugee Convention, refugee status depends on the circumstances at the time the inquiry is made; it is not dependent on formal findings': *Németh v Canada* 2010 SCC 56, [2010] 3 SCR 281 para 50; see also *Kenya National Commission on Human Rights v Attorney General* [2017] eKLR para 17.

[25] See eg Ley No 26.165, Ley General de reconocimiento y protección al refugiado Argentina, Boletín oficial (2006) art 2 (Argentina); Lei No 9.474 (1997) art 26 (Brazil); Decreto No 36831-G, Reglamento de personas refugiadas (2011) arts 14 and 107 (Costa Rica); Ley sobre Refugiados, Protección Complementaria y Asilo Político (2014) arts 12 and 47 (Mexico).

[26] It is nonetheless fair to observe that, under national law, '[f]or the asylum seeker there is little comfort in this otherwise perfect logic, since unless recognized he or she will be treated, rightly or wrongly, as a non-refugee with all the consequences (perhaps sometimes tragic) of non-recognition': Sztucki (n 6) 70–1; see also Goodwin-Gill and McAdam (n 9) 51. This concern, though, derives less from the declaratory nature of refugee status than from the tragic failure to establish an effective system for oversight of duties under the Convention. See Section 8.

contest the legality of *non-entrée* policies under which Contracting States have attempted to avoid even access to their courts or protection from *refoulement* to persons arriving at their jurisdiction to seek protection.[27]

4. Non-exclusive Catalogue of Rights

A critical attribute of the Convention and Protocol is that they contain a continuing affirmation of the propriety of Contracting States legislating domestically beyond the standards of the Refugee Convention and, particularly, of them continuing to accord refugees all advantages that accrue to them by virtue of other agreements, such as bilateral treaties with the refugee's country of origin. Most important, article 5 should be read as establishing how duties under refugee law are to be reconciled with the requirements of the array of important accords negotiated since the advent of the Refugee Convention—including expansions and interpretations of international refugee law itself, the advent of regional refugee regimes, and especially the evolution of a dynamic system of international human rights law.[28] International human rights law generally grants rights to all persons subject to a State's jurisdiction, and is therefore a critical source of enhanced protection for refugees. Article 5 of the Refugee Convention ensures that refugee rights are not seen as limited to those set by the refugee treaty itself,[29] but rather makes clear that refugees are entitled to the benefit of more general human rights principles. As Chetail explains:

> the Geneva Convention itself provides the means for resolving any potential conflicts of norms [between refugee law and human rights law], for its Article 5 preserves the continuing applicability of more favourable standards granted apart from [the Refugee] Convention without regard to the so-called specialty of the norms.[30]

[27] The implications of the duty of *non-refoulement* in the context of extraterritorial deterrence are developed in Thomas Gammeltoft-Hansen and James C Hathaway, '*Non-Refoulement* in a World of Cooperative Deterrence' (2015) 53 Columbia Journal of Transnational Law 235.

[28] Ziegler notes that rights in the Refugee Convention and Protocol were 'carefully framed to define minimum standards': Ruvi Ziegler, *Voting Rights of Refugees* (CUP 2017) 41, citing UNHCR, 'Note on International Protection', UN doc A/AC.96/951 (13 September 2001) paras 4 and 107.

[29] Skordas, in contrast, contends that it is 'more appropriate to examine the relationship between refugee law and human rights law in Art 7, which establishes a clear obligation of the contracting parties to afford refugees the same treatment as that accorded to aliens generally': Achilles Skordas, 'Article 5: Rights Granted Apart from this Convention' in Zimmermann (n 1) 675; see also at 677, 698. Art 7, which establishes the general standard of treatment for refugees, does indeed reinforce the right of refugees to benefit from general norms of human rights law. But it is art 5 that most clearly resolves the potentially thorny question of how the two bodies of law should be reconciled, requiring that refugees receive the benefit of the cognate rights set by international human rights law.

[30] Chetail (n 15) 22 (fn omitted). It does not, however, follow that 'the terms of the debate should be inversed: human rights law is the primary source of refugee protection, while the [Refugee] Convention is bound to play a complementary and secondary role'. Such an assertion of hierarchy is not only at odds with the complementary and mutually reinforcing nature of refugee and general human rights law, but misstates the relative strength of refugee-specific norms in various contexts. See generally Hathaway (n 21).

Edwards takes much the same position, noting that 'Article 5 of the [Refugee] Convention [may be] read as a "successive clause" or "conflict clause" '.[31] Article 5, in other words, ensures that, in the event of any normative dissonance between the Refugee Convention and simultaneously applicable general human rights standards, refugees are entitled to the benefit of the higher standard.

5. Exceptions and Derogation

Another strength of the Refugee Convention and Protocol—in addition to the non-reservable core definitional norm, the declaratory nature of refugee status, and the non-exclusive catalogue of rights—is that refugee rights are less susceptible to exceptions and derogation than are the rights set by some other core human rights treaties, including, in particular, the two international human rights covenants.

While the rights set by the ICESCR explicitly inhere in 'everyone',[32] they are not framed as obligations of result.[33] States parties agree instead 'to take steps, individually and through international assistance and co-operation . . . to the maximum of [their] available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant'.[34] Critically, this formulation 'does not mean that States parties may indefinitely postpone taking action':[35] to the contrary, there is a duty to give priority to the realization of economic, social, and cultural rights, and to ensure that their realization is subject to meaningful legal accountability and respect

[31] Alice Edwards, 'Human Rights, Refugees, and the Right "to Enjoy" Asylum' (2005) 17 IJRL 293, 306. She continues that this understanding leads to a result that is consistent with the more general approach taken under paragraphs 30(3)–(4) of the Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331. Edwards writes that those sub-paragraphs 'provide that where an earlier treaty is not terminated or suspended, the former applies only to the extent that its provisions are compatible with the latter treaty. While there is no refugee-specific replacement for the 1951 Convention, there is an overlap in relation to particular provisions . . . and application of sub-Articles 30(3) and (4) of the Vienna Convention would mean that all the provisions of the 1951 Convention and/or 1967 Protocol remain on foot apart from those which are incompatible with [international human rights law] instruments subsequently ratified'.

[32] See eg Committee on Economic, Social and Cultural Rights, 'General Comment No 4: The Right to Adequate Housing (Art 11(1) of the Covenant)', UN doc E/1992/23 (13 December 1991) para 6; Committee on Economic, Social and Cultural Rights, 'General Comment No 12: The Right to Adequate Food (Art 11)', UN doc E/C.12/1999/5 (12 May 1999) para 1.

[33] As Saul, Kinley, and Mowbray observe, '[t]he tone and nature of the demands made of states are quite different from the equivalent Article 2(1) in the ICCPR, being more exhortatory than mandatory, more progressive than immediate': Ben Saul, David Kinley, and Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials* (OUP 2014) 134.

[34] ICESCR, art 2(1). 'The term "progressive realization" is often used to describe the intent of this phrase. The concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time': Committee on Economic, Social and Cultural Rights, 'General Comment No 3: The Nature of States Parties' Obligations (Art 2, Para 1, of the Covenant)', UN doc E/1991/23 (14 December 1999) para 9.

[35] Committee on Economic, Social and Cultural Rights, 'The Duties of States towards Refugees and Migrants under the International Covenant on Economic, Social and Cultural Rights', UN doc E/C.12/2017/1 (13 March 2017) para 4.

towards other requirements of human rights law, in particular the duty of non-discrimination. But it remains that general economic rights are subject to a more fungible standard of implementation than are cognate rights under the Refugee Convention, which grant Contracting States no discretion whatsoever to delay implementation on the basis of insufficient resources.

Similarly, article 2(3) of the ICESCR authorizes '[d]eveloping countries, with due regard to human rights and their national economy, [to] determine to what extent they [will] guarantee the economic rights recognized in the present Covenant to non-nationals'. As Saul, Kinley, and Mowbray note, this provision contemplates not just the maintenance of existing restrictions, but also 'the introduction of new measures designed to limit the rights which non-nationals had previously enjoyed'[36]—a potentially fatal concern for the overwhelming majority of refugees who live in the less-developed world. The Refugee Convention, in contrast, requires that a wide range of critical economic rights be granted to refugees by all Contracting States.

While general civil and political rights must be immediately implemented, including by less developed countries, most rights under the ICCPR are nonetheless subject to relatively broad derogation authority in the context of a 'public emergency which threatens the life of the nation'.[37] In contrast, article 9 of the Refugee Convention does not allow Contracting States to derogate from their obligations on an ongoing basis, even in time of war or other serious national emergency. As Grahl-Madsen concluded, 'the Convention is to be applied not only in normal time, but also in time of war or national emergency, and ... States may only derogate from the provisions within the limits of [article 9]'.[38]

Specifically, article 9 allows for derogation only as a provisional measure 'pending a determination by the Contracting State that that person is in fact a refugee'.[39] A Contracting State that wishes to avail itself of the provisional measures authority must therefore proceed to verify the claims to refugee status of all persons whose rights are

[36] Saul, Kinley, and Mowbray (n 33) 215. Invoking the drafting history, the authors nonetheless constrain the implications of this understanding somewhat, arguing that 'Article 2(3) was ... intended to allow developing countries to address structural inequalities in their economies *which resulted from colonialism*' and that 'Article 2(3) would therefore seem to refer to countries which are economically weak and which were formerly subject to colonial rule': 215–16 (emphasis added).

[37] ICCPR, art 4(1).

[38] Atle Grahl-Madsen, *Commentary on the Refugee Convention 1951* (UNHCR 1963) 42.

[39] Refugee Convention, art 9. Despite the clear language of this provision, it has been suggested that a 'determination ... that that person is in fact a refugee' does not mean what it says. Rather, '[t]he ultimate aim of the determination under Art 9 is not to clarify refugee status according to the criteria in Art 1, but to find out whether the individuals concerned—bound via their nationality to a country engaged in severe hostilities against their host country—are (still) loyal to their country of nationality and, hence, a security risk for their host country': Ulrike Davy, 'Article 9' in Zimmermann (n 1) 800. This approach is not only contrary to the plain language and drafting history of the article, but would allow a State effectively to suspend its obligations in perpetuity. Yet even the Australian representative—who argued perhaps most strenuously for a wide-ranging power of derogation—made clear 'that it was never his delegation's intention to open the way to an indefinite extension of the circumstances in which states could take exceptional measures': Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Sixth Meeting (4 July 1951), UN doc A/CONF.2/SR.6, 14 (statement by Mr Shaw, Australia).

thereby suspended.[40] If a particular person[41] is found not to be a Convention refugee, including on the basis of criminal or other exclusion provisions, no rights under the Refugee Convention accrue, and removal from the territory or the imposition of other restrictions is allowed.[42] If, on the other hand, an individual is found to satisfy the Convention refugee definition, article 9 establishes a presumption that the provisional measures must come to an end.[43]

6. Rights Acquisition by Attachment

To this point, the architecture of the Refugee Convention and Protocol may seem skewed in a way that is unrelentingly attuned to the needs of the refugee: refugee status (a) must be based on the international definition of a refugee interpreted in a geographically and temporally inclusive way; (b) accrues by virtue of facts on the ground rather than simply as a function of formal status assessment; (c) is non-exclusive; and (d) is less amenable to exceptions or derogation than are cognate norms under general international human rights law. But these pro-refugee attributes are neatly balanced by two important features that safeguard the legitimate concerns of the Contracting States to which the protection request is addressed.

First, and in contrast to the usual approach in international human rights law, it is not the case that all of the rights set out in the Convention are immediately owed to every presumptive refugee arriving at a State's territory. Refugees are instead entitled to an expanding array of rights as their relationship with the asylum State deepens.[44] At the

[40] 'The purpose of Art 9 is to permit the wholesale provisional internment of refugees in time of war, followed by a screening process': Nehemiah Robinson, *Convention relating to the Status of Refugees: Its History, Contents and Interpretation* (Institute of Jewish Affairs 1953) 95.

[41] 'The words "in his case" indicate that such measures may not be taken against all or certain categories of refugees but may only be taken on the merits of the individual case'. Paul Weis, *The Refugee Convention, 1951: The Travaux Préparatoires Analysed with a Commentary by the Late Dr Paul Weis* (CUP 1995) 75.

[42] Countervailing domestic or international legal obligations, for example duties to avoid removal under the CAT, may operate independently to prevent removal from the asylum country.

[43] Contrary to both the express language and drafting history of art 9, Davy argues that provisional measures may be applied not only to refugees who have not yet been recognized, but also to 'individuals who have—on the basis of a formal determination or just informally—been admitted as refugees. They might all be subjected to provisional measures': Davy (n 39) 801.

[44] As observed by the Supreme Court of the United Kingdom, '[t]he rights that attach to the status of refugee under the Convention depend in each case on the possession of some degree of attachment to the contracting State in which asylum is sought.... An examination of the Convention shows that it contemplates five levels of attachment to the contracting states': *R (ST, Eritrea)* (n 16) para 21. The first level of attachment (being simply subject to a State's jurisdiction) is not included in the attachment typology proposed in Goodwin-Gill and McAdam, though the writers acknowledge that '[s]ome benefits extend to refugees by virtue of their status alone as refugees': Goodwin-Gill and McAdam (n 9) 524. Another writer omits the notion of durable residence. See Rosa da Costa, 'Rights of Refugees in the Context of Integration: Legal Standards and Recommendations', UNHCR Legal and Protection Policy Research Series, POLAS/2006/02 (2006) 17–19.

lowest level of attachment, some refugees are simply subject to a State's *jurisdiction*, in the sense of being under its control or authority. A greater attachment is manifest when the refugee is physically present *within a State's territory*. A still more significant attachment is inherent when the refugee is deemed to be *lawfully or habitually present* within the State. The attachment is greater still when the refugee is *lawfully staying* in the country. Finally, a small number of rights are reserved for refugees who can demonstrate *durable residence* in the asylum State.[45] As the refugee's relationship to the asylum State is solidified over the course of this five-part assimilative path,[46] the Convention requires that a more inclusive range of needs and aspirations be met.

The drafters' decision to grant refugee rights on an incremental basis reflected the experience of States confronted with the unplanned arrival of refugees at their frontiers. While States outside Europe continued mainly to receive refugees preselected for resettlement, several European countries were already faced with what has today become the dominant pattern of refugee flows, namely the unplanned and domestically unauthorized arrival of refugees at a State's borders.[47] The drafters of the Convention explicitly considered how best to align the refugee rights regime with this transition from an essentially managed system of refugee migration to a mixed system in which at least some refugees would move independently:

> the initial reception countries were obliged to give shelter to refugees who had not, in fact, been properly admitted but who had, so to speak, imposed themselves upon the hospitality of those countries. As the definition of refugee made no distinction between those who had been properly admitted and the others, however, the question arose whether the initial reception countries would be required under the convention to grant the same protection to refugees who had entered the country legally and those who had done so without prior authorization.[48]

The compromise reached was that any unauthorized refugee, whether already inside or seeking entry into a Contracting State's territory, would benefit from the protections of the Refugee Convention.[49] Such refugees would not, however, immediately acquire all the rights of 'regularly admitted' refugees, that is, those pre-authorized to enter and to

[45] See generally Hathaway (n 21) 156–91.

[46] 'The Convention is characterized by a gradual improvement of standards over time, reflecting the refugee's assimilation into the host State': McAdam 2007 (n 9) 214.

[47] Art 31 of the Refugee Convention prohibits the penalization of most refugees for unlawful entry or presence: see Hathaway (n 21) 370–412.

[48] Ad Hoc Committee on Statelessness and Related Problems, First Session, Summary Record of the Seventh Meeting Held at Lake Success, New York (23 January 1950), UN doc E/AC.32/SR.7, 12 (statement by Mr Cuvelier, Belgium).

[49] 'It did not, however, follow that the convention would not apply to persons fleeing from persecution who asked to enter the territory of the contracting parties ... [W]hether or not the refugee was in a *regular position*, he must not be turned back to a country where his life or freedom could be threatened': Ad Hoc Committee on Statelessness and Related Problems, First Session, Summary Record of the Twentieth Meeting Held at Lake Success, New York (1 February 1950), UN doc E/AC.32/SR.20, 11–12 (emphasis added) (statement by Mr Henkin, United States).

reside in an asylum State. Instead, as under then-prevailing French law, basic rights would be granted to all refugees, with additional rights following as the legal status of the refugee was consolidated.[50]

This staggered approach to the attribution of refugee rights is a critical answer to the concern that it would be unreasonable simply to demand that all of the Convention's rights—which provide an unusually strong arsenal of, in particular, rights of economic participation—be instantly provided to each and every refugee arriving, whatever the numbers concerned or the circumstances of the receiving State. Yes, some critical refugee rights must be guaranteed immediately and to all under a Contracting State's jurisdiction[51]—to do otherwise would be fundamentally unjust to refugees. But the Convention's more sophisticated rights may be lawfully delayed, ideally allowing time for burden- and responsibility-sharing mechanisms to attenuate the hardship for overtaxed receiving countries, even as the refugee's assimilation demands deeper enfranchisement over time.

7. Rights Defined by a Mix of Absolute and Contingent Standards

In addition to the fact that refugee rights are owed only incrementally rather than immediately, the Convention normally calibrates the nature of a Contracting State's duties with what it provides to other persons under its jurisdiction.[52] While a few rights are guaranteed absolutely to refugees, the standard for compliance normally varies as a function of the relevant treatment afforded another group under the laws and practices of the receiving country. The general idea is that most refugee rights are framed as contingent standards, with the exception of a core group of rights that are owed in

[50] '[T]he problem would be seen more clearly if it were divided into three different aspects: the first concerned the treatment of refugees before they had reached an understanding with the authorities of the recipient countries; the second referred to their right to have their situation regularized and the conditions in which that was to be done; the third dealt with their rights after they had been lawfully authorized to reside in the country, which meant, in the case of France, after they were in possession of a residence card and a work card': Ad Hoc Committee on Statelessness and Related Problems, First Session, Summary Record of the Fifteenth Meeting Held at Lake Success, New York (27 January 1950), UN doc E/AC.32/SR.15, 15 (statement by Mr Rain, France).

[51] The relevant substantive rights are arts 3 (non-discrimination), 13 (movable and immovable property), 16(1) (access to the courts), 20 (rationing), 22 (education), 29 (tax liability), 33 (prohibition of *refoulement*), and 34 (good faith consideration for naturalization). In addition, certain contextual rights also apply at this stage, including arts 5 (respect for other rights), 6 (exemption from insurmountable requirements), 7(1) ('aliens generally' default), 8 (exemption from exceptional measures), and 12 (respect for personal status). Additional rights accruing with mere physical presence include arts 4 (religious freedom), 27 (identity documents), 31(1) (non-penalization for illegal entry or presence), and 31(2) (only necessary and justifiable constraints on freedom of movement).

[52] See Goodwin-Gill and McAdam (n 9) 512 for an examination of the historical foundations of the contingent rights structure.

absolute terms because they are either refugee-specific (such as the duty of *non-refoulement* and the right not to be penalized for illegal entry or presence) or deemed of consummate importance (such as the rights to non-discrimination and to freedom of religion). Under these contingent rights standards, refugees are assimilated to citizens of the asylum country, to nationals of a most-favoured State, or non-citizens generally in the asylum State.[53] But, in any case, refugees must be exempted from any criteria which a refugee is inherently unable to fulfil,[54] and may not be subjected to any exceptional measures applied against the citizens of their State of origin.[55]

The frequent reliance of the Convention and Protocol on contingent standards of treatment helps to ensure that asylum countries are not asked to do more than is demonstrably within their capacity. It also guards against the prospect of refugees being said to be 'privileged' vis-à-vis citizens and others living in the asylum State, since normally refugees are entitled to no more than what others already receive. Like the notion of incremental acquisition of rights, the Convention's reliance on a mix of absolute and contingent rights thus attenuates the otherwise seemingly absolute duty of protection arising from the simple fact of a refugee arriving at a Contracting State's jurisdiction.

8. State-by-State Implementation

The Refugee Convention and Protocol can thus be seen to embody a sensible compromise. On the one hand, their architecture is hugely attentive to the needs of refugees—including by the attribution of rights on the basis of a non-reservable and flexible definition, a commitment to declaratory rather than constitutive status assessment, non-exclusivity of rights accrual, and no more than constrained exceptions and derogation authority. On the other hand, the real needs of host countries are catered for by the structure of incremental rights acquisition through attachment and by the conceptualization of most rights on a contingent basis.

Despite the wisdom of this balance, the Refugee Convention and Protocol are today less influential on the ground than they should be, due in no small measure to the fact that they are implemented on an *ad hoc*, State-by-State basis rather than in a coordinated manner.[56] In part, this concern mirrors the critique noted above that both the refugee

[53] Even the baseline standard of compliance must, of course, meet the requirements of international human rights law, in particular the overarching duty of non-discrimination: Marina Sharpe, 'The 1951 Refugee Convention's Contingent Rights Framework and Article 26 of the ICCPR: A Fundamental Incompatibility?' (2014) 30(2) Refuge 5; Skordas (n 29) 719–20.

[54] Refugee Convention, art 6. See generally Hathaway (n 21) 205–8; Reinhard Marx and Felix Machts, 'Article 6' in Zimmermann (n 1).

[55] Refugee Convention, art 8. See generally Hathaway (n 21) 270–7; Davy (n 39).

[56] '[T]he [Refugee] Convention draws a clear cut distinction between the international norms enshrined therein and their national implementation entrusted to each individual state party': Chetail (n 15) 51.

definition and refugee rights are interpreted in varying ways by Contracting States in a manner that erodes the intended commonality of protection standards.[57] With no more than a never-used right of Contracting States to challenge another Contracting State's interpretation before the International Court of Justice,[58] the refugee regime is today the only widely subscribed UN human rights regime that lacks an independent supervisory mechanism capable of defining its terms in an authoritative way.[59] While this is both historically explicable (the Convention came into force before independent supervision was routine[60]) and mitigated both by UNHCR's role under article 35 of the Convention (though the agency cannot enforce compliance,[61] lacks autonomy from the Contracting States that fund it,[62] and takes on roles that arguably suggest that it should itself be supervised[63]) and the existence of a vibrant transnational conversation amongst refugee law judges (who often draw on international and comparative norms when enforcing law at the domestic level[64]), the ability to sustain the Convention's vitality without truly independent and authoritative oversight is increasingly doubtful.[65]

Yet, as real as the threat from interpretive inconsistency is, the most profound challenge to the longevity of the Convention and Protocol comes from the fundamentally uncoordinated way in which they are implemented. Simply put, neither refugee rights

[57] See Section 2.

[58] See Karin Oellers-Frahm, 'Article 38 of the 1951 Convention/Article IV of the 1967 Protocol' in Zimmermann (n 1) 1551, noting that '[i]t has been argued that the mere existence of a compromissory clause can have a positive effect on the attitude of State parties to a particular convention'.

[59] The contemporaneously drafted Convention relating to the Status of Stateless Persons (adopted 28 September 1954, entered into force 6 June 1960) 189 UNTS 117, and the Convention on the Reduction of Statelessness (adopted 4 December 1954, entered into force 30 August 1961) 989 UNTS 175, also lack independent enforcement mechanisms. Neither treaty has, however, thus far been acceded to by the majority of States (94 and 75 ratifications respectively).

[60] See Walter Kälin, 'Supervising the 1951 Convention on the Status of Refugees: Article 35 and Beyond' in Erika Feller, Volker Türk, and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (CUP 2003) 617, explaining the historical basis for the weak supervisory system designed by the drafters of the Convention.

[61] '[T]here is no proper procedure implementing the UNHCR's supervisory responsibility. Nor has an international enforcement mechanism as such been established in this area.' Volker Türk, 'UNHCR's Supervisory Responsibility', UNHCR New Issues in Refugee Research, Working Paper No 67 (2002) 2–3.

[62] Chetail (n 15) 65.

[63] 'Supervision ceases to be the natural and exclusive preserve of the UNHCR when it assumes responsibilities that are properly those of states and require supervision themselves': Marjoleine Zieck, 'Article 35 of the 1951 Convention/Article II of the 1967 Protocol' in Zimmermann (n 1) 1507–8.

[64] James C Hathaway, 'A Forum for the Transnational Development of Refugee Law: The IARLJ's Advanced Refugee Law Workshop' (2003) 15 IJRL 418.

[65] Proposals to remedy the current supervisory gap have been advanced by Kälin (n 60) 657–9; Anthony North and Joyce Chia, 'Towards Convergence in the Interpretation of the Refugee Convention: A Proposal for the Establishment of an International Judicial Commission for Refugees' (2006) 25 Australian Year Book of International Law 105; and James C Hathaway, Anthony M North, and Jason Pobjoy, 'Supervising the Refugee Convention' (2013) 26 JRS 323. The latter proposal was based on three preparatory studies: Katie O'Byrne, 'Is There a Need for Better Supervision of the Refugee Convention?' (2013) 26 JRS 330; Joanna Whiteman and Claire Nielsen, 'Lessons from Supervisory Mechanisms in International and Regional Law' (2013) 26 JRS 360; and Alysia Blackham, 'A Proposal for Enhanced Supervision of the Refugee Convention' (2013) 26 JRS 392.

nor the protection of legitimate host State interests can be guaranteed under the current 'accidents of geography' mechanism for the allocation of protection burdens and responsibilities.

Despite the recognition in the preamble of the Convention that 'the grant of asylum may place heavy burdens on certain countries, and that a satisfactory resolution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation',[66] the Convention and Protocol are today implemented on a State-by-State basis, the default position being that refugees are the sole legal responsibility of whatever country they arrive at. This is not only grotesquely unfair to States—with only 10, mostly poor, countries hosting roughly half of the global refugee population[67]—but at least as important is a huge threat to the vindication of refugee rights, with more than three-quarters of the world's refugees consigned to long-term indeterminate status in protracted refugee situations.[68] The most recent response[69] of the United Nations to this predicament has been to offer only general principles and a multiplicity of fora in which to discuss voluntary coordination of protection efforts, with no hard commitments to share burdens and responsibilities, much less to establish a true oversight mechanism that would ensure a fair and dependable global implementation of the Convention and Protocol.[70]

We thus stand at a precipice. The thoughtful compromises built into the architecture of the Refugee Convention and Protocol are important, but clearly insufficient to withstand the pressures of continuous large-scale refugee flows in the absence of significantly enhanced oversight and coordination. This poses the very real risk that, despite the smart compromises at the heart of this normative regime, the Refugee Convention and Protocol will founder—leaving both refugees, and the poorer countries that receive most of them, in the lurch.

[66] Refugee Convention, preamble, para 4.

[67] UNHCR, 'Global Trends: Forced Displacement in 2018' (2019) 13–23 <https://www.unhcr.org/5d08d7ee7.pdf> accessed 2 October 2019 (noting that the top 10 receiving countries host nearly 13 million refugees out of a total refugee population of just under 26 million).

[68] ibid 22 (noting that 15.9 million refugees, some 78 per cent of the total refugee population, were living in protracted refugee situations).

[69] An earlier initiative, 'Convention Plus', is thoughtfully analysed in Alexander Betts and Jean-François Durieux, 'Convention Plus as a Norm-Setting Exercise' (2007) 20 JRS 509, noting that despite its often creative engagement with the challenges of protection, the initiative 'fell far short of expectation and it has failed to provide a significant normative basis for global burden sharing' (510). Academic proposals to establish a mechanism to share out refugee burdens and responsibilities include T Alexander Aleinikoff and Leah Zamore, *The Arc of Protection: Reforming the International Protection Regime* (Stanford University Press 2019); Joseph Blocher and Mitu Gulati, 'Competing for Refugees: A Market-Based Solution to a Humanitarian Crisis' (2016) 48 Columbia Human Rights Law Review 53; Peter Schuck, 'Refugee Burden-Sharing: A Modest Proposal' (1997) 22 Yale Journal of International Law 243; and James C Hathaway and Alexander Neve, 'Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection' (1997) 10 Harvard Human Rights Journal 115.

[70] See the Global Compact on Refugees, which is analysed in depth in a collection of articles found in (2018) 30 IJRL 571.

CHAPTER 10

THE OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES

JAMES MILNER AND JAY RAMASUBRAMANYAM

1. Introduction

The Office of the United Nations High Commissioner for Refugees (UNHCR) has played an active and discernible role in the making and implementation of international refugee law since its creation in 1950. For seven decades, UNHCR has employed various tools of influence to develop and promote new interpretations and applications of refugee law at the global, regional, and domestic levels. It has also socialized new States to incorporate international refugee protection norms into domestic law, and used its moral and expert authority to expand the interpretation and application of international refugee protection instruments. Conversely, UNHCR's history also includes examples of the organization acting in ways that contradict core principles of international refugee protection, including *non-refoulement* and other core refugee rights, such as freedom of movement and access to employment. How do we make sense of these apparent contradictions when understanding the role of UNHCR in international refugee law?

In examining UNHCR's role in international refugee law, this chapter employs Barnett and Finnemore's understanding of the *power* and *pathologies* of international organizations.[1] In terms of *power*, UNHCR has used its moral and expert authority to influence the actions of States. It has also used forms of *material power* to implement programmes, primarily in the Global South, that have sometimes served to promote

[1] See Michael Barnett and Martha Finnemore, 'The Politics, Power and Pathologies of International Organizations' (1999) 53 International Organization 699.

progressive interpretations of international refugee law, such as the promotion of the protection needs of refugee women.[2] However, this power has also sometimes served to constrain refugee rights, for instance through the establishment of large refugee camps that furthered the interests of States to contain refugees in regions of origin and insulate the host State from the presence of refugees.[3] More generally, UNHCR has employed *productive power*, defined as the 'production of subjects through . . . social relations'.[4] This type of power relates to the production of subjectivities and the relationship between power and knowledge. At the core of this form of power is the ability of actors to create and enforce new realities through the use of knowledge, discourse, and claims to legitimacy.

Simultaneously, UNHCR has demonstrated *pathologies*, especially through instances where it has acted in its perceived best interests as an organization but in ways that contradict the core principles of refugee protection. When States created UNHCR, they intentionally created an organization that had structural limitations that would make it reliant on the cooperation of States, both donor States to provide funding and host States to provide access to its territory.[5] As argued by Loescher, these constraints have meant that UNHCR has had to navigate a 'perilous path' throughout its history to demonstrate its continued relevance and to secure the support of a diverse range of States.[6] These constraints help explain, although arguably do not justify, UNHCR's role in prominent violations of international refugee law, such as the *refoulement* of Rwandan and Rohingya refugees in the 1990s.[7]

In examining UNHCR's role in international refugee law, this chapter begins by considering UNHCR's mandate responsibilities and operational functions to better understand the structures that condition the scope of UNHCR's engagement with the functioning of international law. By examining the details of UNHCR's mandate and its supervisory responsibilities in relation to the Refugee Convention the chapter establishes what expectations can be placed on UNHCR as an actor in the international refugee protection regime. While UNHCR's 1950 Statute and the Refugee Convention both mandate UNHCR to serve particular functions, such as its supervisory responsibility relating to the Refugee Convention, its Statute also places particular constraints on UNHCR, especially in terms of the scope of its activities and its reliance on voluntary contributions from States to perform its mandated functions. The chapter

[2] See Alice Edwards, 'Transitioning Gender: Feminist Engagement with International Refugee Law and Policy 1950–2010' (2010) 29(2) RSQ 21.

[3] See Amy Slaughter and Jeff Crisp, 'A Surrogate State? The Role of UNHCR in Protracted Refugee Situations' in Gil Loescher, James Milner, Edward Newman, and Gary Troeller (eds), *Protracted Refugee Situations: Political, Human Rights and Security Implications* (United Nations University Press 2008) 123–40.

[4] Michael Barnett and Raymond Duvall (eds), *Power in Global Governance* (CUP 2005) 20.

[5] See Alexander Betts, Gil Loescher, and James Milner, *UNHCR: The Politics and Practice of Refugee Protection* (Routledge 2012).

[6] Gil Loescher, *The UNHCR and World Politics: A Perilous Path* (OUP 2001).

[7] See Tor Krever, '"Mopping-Up": UNHCR, Neutrality, and *Non-Refoulement* since the Cold War' (2011) 10 Chinese Journal of International Law 587.

then considers how the parameters of its mandate responsibilities affect UNHCR's operational functions. On the basis of this understanding, the chapter then considers the roles UNHCR has played in the making and implementation of refugee law at the global, regional, and national levels, through its operations, and how these functions have evolved over time. By illustrating the various instances where UNHCR has demonstrated power, along with those instances where the organization has exhibited pathologies and has been constrained by the interests of States, the chapter points to the importance of understanding international refugee law within the political environment in which it functions.

2. UNHCR's Mandate Responsibilities

The introductory note of the Statute of the United Nations High Commissioner for Refugees outlines that as per 'Resolution 319 (IV), of 3 December 1949, the United Nations General Assembly decided to establish a High Commissioner's Office for Refugees as of 1 January 1951'.[8] As per the General Provisions of the Statute

> [t]he United Nations High Commissioner for Refugees, acting under the authority of the General Assembly, shall assume the function of providing international protection, under the auspices of the United Nations, to refugees . . . and of seeking permanent solutions for the problem of refugees by assisting Governments . . . to facilitate the voluntary repatriation of such refugees, or their assimilation within new national communities.[9]

It is from this section of UNHCR's Statute that we derive the organization's core mandate functions: refugee protection and the pursuit of solutions. But its Statute also makes clear that UNHCR was not intended to be able to fulfil this mandate on its own. Instead, from its origins, UNHCR has needed to rely on the cooperation of States and the continued support of the United Nations General Assembly to undertake its work.

The reliance of UNHCR on States is further reinforced by the organization's reliance on voluntary contributions to undertake its work. Paragraph 20 of UNHCR's Statute specifies that 'no expenditures other than the administrative expenditures relating to the functioning of the Office of the High Commissioner shall be borne on the budget of the United Nations and all other expenditures relating to the activities of the High Commissioner shall be financed by voluntary contributions'. Today, this means that roughly 97 per cent of UNHCR's funding comes from voluntary contributions, primarily from a limited number of States in the Global North. Many of these States 'earmark' their contributions, thereby limiting where and how those funds may be used. For example,

[8] 'Statute of the Office of the United Nations High Commissioner for Refugees,' UNGA Res 428(V) (14 December 1950) (UNHCR Statute).

[9] ibid ch 1.

the United States has consistently remained the largest donor to UNHCR, typically accounting for a third of all State contributions to UNHCR, 100 per cent of which are earmarked. This provision has been used by States to exercise considerable influence over UNHCR's activities since its inception.[10]

The General Provisions further stipulate that '[t]he work of the High Commissioner shall be of an entirely non-political character'.[11] As noted by Goodwin-Gill and McAdam, questions have been raised about the significance of UNHCR's 'non-political' mandate and the scope of its work since its creation.[12] They highlight how the organization's original mandate has evolved significantly, and that UNHCR's independent roles and responsibilities have been reinforced by a series of UN General Assembly (UNGA) resolutions.[13] These resolutions indicate that States have authorized an evolution in UNHCR's role in the functioning of the international refugee protection regime over time.

Juxtaposed against UNHCR's reliance on States to fulfil its mandate is the organization's supervisory responsibilities in relation to the application of the Refugee Convention.[14] Specifically, article 35 of the Refugee Convention outlines that 'Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees . . . in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention'. As Kälin discusses, UNHCR's supervisory role under article 35 ranges from its field operations and related protection work, to scrutinizing State practice in implementing the provisions of the Convention. UNHCR's interventions in domestic jurisdictions with the help of *amicus curiae* briefs can be viewed as a part of the organization's supervisory responsibilities.[15]

As Kälin notes, the primary purpose of the provisions in article 35 is 'to link the duty of States Parties to apply the Convention and the Protocol with UNHCR's task of supervising their application' and by extension imposing an obligation on Contracting States to respect this supervisory power and actively cooperate in such activities.[16] As we note throughout this chapter, the role of UNHCR within the domain of international refugee law is not static and has shown a great deal of dynamism. This evolutive character is noticeable in the States parties' willingness to cooperate with UNHCR 'in the exercise of its functions'.[17]

UNHCR's ability to exercise its supervisory function can be constrained by the provisions of its mandate that make it reliant on the very States it may need to supervise, especially in the context of exercising its supervisory responsibilities in response to the actions of its largest donors. For example, this constraint has been clear from UNHCR's

[10] See Loescher (n 6); Betts, Loescher, and Milner (n 5). [11] UNHCR Statute (n 8) ch 1 para 2.

[12] Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (OUP 2007) 426.

[13] ibid 430.

[14] Walter Kälin, 'Supervising the 1951 Convention relating to the Status of Refugees: Article 35 and Beyond' in Erika Feller, Volker Türk, and Frances Nicholson (eds), *Refugee Protection in International Law* (CUP 2003)[TS: authors to provide pincite].

[15] Ibid 668. [16] Ibid 617. [17] ibid.

intervention on the applicability and effectiveness of the Safe Third Country Agreement between the United States and Canada in light of growing concerns of the treatment of asylum seekers by the US. With the flight of thousands of asylum seekers from Central America, Canada's response to this crisis and adherence to the Safe Third Country Agreement has been questioned by UNHCR, albeit in an insufficiently robust manner. The Safe Third Country Agreement mandates that asylum seekers' claims must be assessed in their first point of entry. However derogatory statements made by the US President in 2017–18 negatively characterizing Central American asylum seekers, coupled with Executive Orders that barred their entry, have raised concerns about the suitability of this Agreement for asylum seekers who wish to enter Canada from the US. Further, with the establishment of detention centres on the US–Mexico border, it can be questioned to what extent the US is considered to be 'safe', yet UNHCR has been reluctant to make public statements to this effect.[18]

In this case, UNHCR's reliance on US funding appears to have constrained the organization's ability to fully exercise its responsibility to supervise the implementation of the Refugee Convention. This raises a critical question about the organization, namely: To what extent is UNHCR non-political? Forsythe argues that although UNHCR has positioned itself in the international protection regime as a non-political agency, it has not stood by the initial precepts of the mandate of being non-political in nature.[19] The overall mandate requires UNHCR to be political by attempting to influence States to protect refugees and implement international protection principles. However, despite clearly laid out responsibilities on paper, UNHCR is hampered in its ability to carry out its responsibilities due to its reliance on States.[20] UNHCR's behaviour stems from the pathologies of international organizations, namely from the reliance of international organizations on States for access to territory and funding. The lack of autonomous power has meant that the interests of States have frequently conditioned UNHCR's ability to fulfil its responsibilities, detailed in the Refugee Convention and its Statute.

Loescher has argued that UNHCR's reliance on voluntary contributions from the affluent States of the Global North has historically contributed to constraints on UNHCR's willingness or ability to fully exercise its mandate. For example, Loescher outlines how UNHCR's reliance on voluntary contributions affected its response to the actions of European States in the 1980s following the arrival of 1.3 million asylum seekers fleeing political crises and armed conflicts in Africa, Asia, and the Middle East.[21] Although many were unable to return to their countries of origin due to fears for their safety, many did not meet the criteria of the Refugee Convention's refugee definition. Loescher argues that this growing number of arrivals into Europe 'severely jolted

[18] See 'CARL Calls for Suspension of Safe Third Country Agreement, Increased Refugee Re-Settlement, in Wake of Trump Executive Orders' (*Canadian Association of Refugee Lawyers (CARL)*, 30 January 2017) <http://www.carl-acaadr.ca/articles/139> accessed 5 October 2019.

[19] David Forsythe, 'UNHCR's Mandate: The Politics of Being Non-Political', UNHCR New Issues in Refugee Research, Working Paper No 33 (2001).

[20] ibid. [21] Loescher (n 6) 235.

existing practices and overtaxed the procedural systems for handling refugee determinations'.[22] Amid such crises, UNHCR urged European States to broaden the protection mandate with a more flexible interpretation of the Refugee Convention. But, as Loescher notes, 'with the upsurge in asylum claims, European governments were not as willing to submit to the UNHCR's authority and leadership as they had been previously' and 'governments began to build barriers' and adopted restrictive policies to deter more people from arriving in Europe and toughened access to asylum procedures.[23]

One of the more noteworthy moves by European governments came when States refused to improve protection for Tamil asylum seekers.[24] Despite UNHCR claiming that the Tamils' predicament was of legitimate concern, governments 'accused the UNHCR of "taking over the sovereign state's function of deciding whether or not asylum outside the Convention should be granted" '.[25] Loescher argues that by the mid-1980s, the relationship between European governments and UNHCR had reached an impasse attributed to the lack of 'converging interests'. Several States in the region were concerned that UNHCR's articulation of such issues reduced the autonomy and power of States over immigration policy. This resulted in UNHCR not being 'perceived by governments to be the sole authority and source of legitimacy on refugee and asylum matters'.[26]

The practice of States, especially in the Global North, since the mid-1980s, has created new challenges for UNHCR and increased the organization's engagement in domestic courts. Given the absence of an international body that oversees and adjudicates asylum cases, domestic courts have become an important forum within which a State's asylum policies have been challenged. These proceedings have increased UNHCR's engagement in national and regional courts through *amicus curiae* briefs.[27] This is quite significant in UNHCR's role in the application and advancement of international refugee law. For instance, apart from UNHCR's direct involvement in carrying out refugee status determination (RSD) in some non-signatory States (as discussed below), the organization might engage with domestic cases by submitting an *amicus curiae* brief in cases where the State has refused asylum to individuals or if inadmissibility clauses are triggered due to individual circumstances. This form of engagement is very different from the appeals structure built into the mandate RSD system, wherein UNHCR engages directly with an individual case. This engagement with courts involves States and UNHCR's 'deliberative function vis à vis the interpretation of the 1951 Convention'.[28] As Gilbert argues, despite UNHCR's *amicus curiae* interventions, States have the leeway to disregard such interventions, which 'reflects the very nature of judicial interpretation within any legal system'.[29]

In response, UNHCR has been contributing to the advancement and interpretation of international protection norms, albeit with limited applicability due in part to States'

[22] ibid. [23] ibid 236. [24] ibid. [25] ibid 238. [26] ibid.

[27] Geoff Gilbert, 'UNHCR and Courts: *Amicus Curiae*... *Sed Curia Amica Est*?' (2016) 28 IJRL 623.

[28] ibid 627. [29] ibid 628.

discretion. For instance, most recently UNHCR submitted a brief in the aftermath of the US rule 'Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations' (Interim Asylum Rule),[30] which UNHCR characterized as a significant change in US asylum policy.[31] UNHCR's brief was presented in an attempt to ensure that US asylum policy remained consistent with US obligations as a Contracting State to the 1967 Protocol. UNHCR's brief provided guidance to the court on those obligations, and ensured that concerns were raised when the Interim Asylum Rule was considered and implemented alongside the 'Presidential Proclamation Addressing Mass Migration Through the Southern Border of the United States' (Proclamation).[32] This revised policy, in addition to running contrary to international legal obligations, also 'effectively denies the right to seek asylum to any refugee who crosses into the United States from Mexico outside of a designated port of entry'.[33] This blanket denial of asylum goes further than denying those crossing the border with a right to due process; it also contradicts the well-established customary international law obligation of *non-refoulement*.[34]

While it would be premature to draw conclusions from this example, it is important to note that this submission from UNHCR represents a very public critique of the domestic policies of the organization's single largest donor. Likewise, UNHCR's decision to critique US asylum policy in 2018 was in contrast to its reluctance to join opposition to the Canada–US Safe Third Country Agreement in 2017. To this end, it will be important to see if this results in changes in the relationship between UNHCR and the US, and if this represents a point at which UNHCR is able to assert its legal responsibilities as guardian of the legal foundations of the global refugee regime, even in the face of opposition by arguably the most powerful State within that regime. This example also illustrates the paradox of UNHCR's mandate responsibilities as being simultaneously expansive in scope and authority, yet constrained by its non-political mandate and the organization's reliance on cooperation from the very States it is mandated to supervise.

3. UNHCR's Operational Functions

The scope of UNHCR's operational functions can be described as equally constrained yet expansive. First, UNHCR's operational functions are *constrained* by its Statute, which makes it reliant on voluntary contributions to function, subject to the permission of States to access their territory, and dependent on cooperation with States to

[30] Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations (Interim Asylum Rule), 83 Fed Reg 55,934 (9 November 2018).

[31] Brief of the Office of the United Nations High Commissioner for Refugees before the United States District Court for the District of Columbia in the case *SMSR v Trump* (10 December 2018) (no 1:18-CV-02838-RDM).

[32] ibid. [33] ibid 3. [34] ibid.

find solutions for refugees. As detailed above, UNHCR's Statute specifies that its funding must come from voluntary contributions. Through this provision, 'UNHCR was made financially dependent on donor governments', which 'continues to be among the most significant means through which states are able to control the scope of UNHCR's work'.[35] Simply put, the major donors to UNHCR hold particular sway over the scope of the organization's work as they can prevent UNHCR from undertaking certain tasks simply by specifying that their funds cannot be used to undertake that task.

Secondly, UNHCR's scope of operations is also constrained by the politics of refugee-hosting States. Given the principle of sovereignty and the lack of mechanisms to enforce international refugee law, States have ultimate control over their borders and the quantity and quality of asylum they afford to refugees.[36] Since the 1980s, the shifting interests of States has contributed to the containment of the majority of the world's refugees in the Global South. In response, many refugee-hosting States in the Global South have responded to this dynamic by either seeking to restrict the number of refugees on their territory or limiting the rights of those refugees who are allowed to remain. Over time, UNHCR has been found to be either unwilling or unable independently to reverse this trend.[37]

Thirdly, as outlined above, UNHCR relies on cooperation with States to find solutions for refugees. UNHCR is consequently unable to realize any of the three durable solutions for refugees—voluntary repatriation, local integration, or third-country resettlement—if opposed by States and without the support of States. For example, States in the Global South have been increasingly resistant to suggestions that they naturalize refugees as a means of providing a solution, while the resettlement of refugees to a third country remains at the discretion of States. While UNHCR has worked to develop guidelines to facilitate refugee resettlement since the late-1990s, and while it provides annual guidance on the number of refugees in need of resettlement, the decision to admit refugees through resettlement is a decision taken by States, not UNHCR. In fact, while UNHCR reported that some 1.4 million refugees were in need of resettlement in 2019, States were only collectively willing to make available some 90,000 resettlement spaces—responding to just 6.4 per cent of the need identified by UNHCR.[38]

These constraints experienced by UNHCR need to be understood in stark contrast to the history of the expanding scope of UNHCR's operational functions. UNHCR's activities have evolved considerably over its history, from its origins as a relatively small and temporary international organization based in Geneva and focusing primarily on

[35] Betts, Loescher, and Milner (n 5) 15.

[36] For a discussion of this dynamic in the African context, see James Milner, *Refugees, the State and the Politics of Asylum in Africa* (Palgrave MacMillan 2009).

[37] For a discussion of UNHCR's complicity in the long-term encampment of refugees, see Slaughter and Crisp (n 3) 123–40.

[38] UNHCR, 'UNHCR Projected Global Resettlement Needs 2019' (June 2018) <https://www.unhcr.org/5b28a7df4.pdf> accessed 24 June 2019.

issues of legal protection, to its current status as a global actor, with a permanent mandate, responsibility for programmes in more than 130 countries, a global staff of more than 16,000 and annual budget of US$7.7 billion in 2017.[39] Through this evolution, the scope of UNHCR's activities has expanded to now include the provision of material assistance and working with a much wider range of 'populations of concern', in addition to their mandated responsibility for refugees and stateless persons. As argued by Loescher, this evolution has been the result of both the interests of States, especially donor States, and the institutional interests of UNHCR itself to demonstrate its continued relevance in changing geopolitical contexts.[40]

From this expanded scope of activity UNHCR derives both moral and expert authority that gives the organization considerable influence in the making and implementation of refugee protection standards. For example, in considering UNHCR's role in refugee repatriation activities, Barnett outlines how UNHCR draws on expert authority—'when an actor's voice is given credibility because of his or her specialized training, knowledge, or experience'—and moral authority—'when an actor is perceived to be speaking and acting on behalf of the community's values and interests and defending the lives of the weak and vulnerable'—to exert dominance over refugees and other actors.[41] In this way, UNHCR is able to employ 'productive power', defined as the 'production of subjects through diffuse social relations',[42] to create realities and categories that serve its interests, even at the expense of the interests of others and the needs of refugees. Recent work on UNHCR's role in the repatriation of Mozambican refugees in the early 1990s illustrates how UNHCR's interests in maintaining its visibility in the aftermath of the Cold War and enhancing its relations with donors significantly influenced its actions in this case, sometimes at the expense of refugee protection.[43]

In other instances, however, UNHCR has employed its moral and expert authority to advance progressive interpretations of international refugee law, especially in relation to the meaning of 'membership in a particular social group' as grounds for persecution, according to the Refugee Convention. This is arguably evident in advancing an understanding of gender-based persecution and persecution on the grounds of gender identity and sexual orientation, although UNHCR's guidelines in these areas are not without critique.[44] In fact, since UNHCR first issued its *Handbook on Refugee Status*

[39] See UNHCR, 'Figures at a Glance' (2019) <https://www.unhcr.org/figures-at-a-glance.html> accessed 7 June 2019.

[40] See Loescher (n 6).

[41] Michael Barnett, 'Humanitarianism, Paternalism, and the UNHCR' in Alexander Betts and Gil Loescher (eds), *Refugees in International Relations* (OUP 2011) 110.

[42] Michael Barnett and Raymond Duvall, 'Power in Global Governance' in Michael Barnett and Raymond Duvall (eds), *Power in Global Governance* (CUP 2005) 20.

[43] See James Milner, 'Refugees, Peacebuilding, and Paternalism: Lessons from Mozambique' in Megan Bradley, James Milner, and Blair Peruniak (eds), *Refugees' Roles in Resolving Displacement and Building Peace: Beyond Beneficiaries* (Georgetown University Press 2019).

[44] See Edwards (n 2); Nicole LaViolette, '"UNHCR Guidance Note on Refugee Claims relating to Sexual Orientation and Gender Identity": A Critical Commentary' (2010) 22 IJRL 173.

Determination in 1979, one of UNHCR's most prominent roles in international refugee law has been in issuing guidelines on the interpretation of provisions of the Refugee Convention, including how the refugee definition should be applied in particular circumstances.[45]

4. UNHCR and the Making and Implementation of International Refugee Law

The scope of UNHCR's mandate responsibilities, combined with its operational functions, determine the agency's impact on the making and implementation of international refugee law in global, regional, and national contexts. This is evident both in the making and implementation of hard law, in the form of international treaties, regional conventions and domestic law, and soft law, in the form of guidelines, declarations, compacts, and policies. In many instances, UNHCR has employed productive power and its moral and expert authority to promote progressive understandings of refugee law. In many other instances, however, UNHCR has been unwilling or unable to oppose or reverse more restrictive expressions of refugee law—ranging from its inability to oppose the expansion of laws, policies, and practices by States in the Global North that have sought to contain refugees in their regions of origin, to its complicity in the implementation of restrictive laws, policies, and practices in the Global South that have placed restrictions on the rights afforded to refugees.

How can we understand this contradiction between UNHCR's role as sometimes promoter of progressive refugee protection principles and at other times complicit partner in the denial of refugee rights? Much of this contradiction can be explained by the nature of the organization, the structures within which it functions, the role of individuals within the organization, and UNHCR's own shifting institutional interests. For example, many of UNHCR's limitations have been explained by the asymmetrical relationship between UNHCR and States—both donor and refugee-hosting States where the interests of States prevail over the interests of UNHCR. The importance of these imbalances is amplified, given the structures within which UNHCR functions, especially its reliance on voluntary contributions and UNHCR's need to respond to the shifting contour of world politics. In responding to external factors, individuals within UNHCR—especially individual High Commissioners—play important roles in determining how UNHCR will navigate particular situations. UNHCR's senior leadership will also

[45] For a useful discussion of this role and a critique of how the role has evolved, see Guy S Goodwin-Gill, *UNHCR's Protection Guidelines: What Role for External Voices?* (Refugee Studies Centre seminar, 20 May 2015) <https://www.rsc.ox.ac.uk/news/unhcr2019s-protection-guidelines-what-role-for-external-voices-guy-goodwin-gill> accessed 7 June 2019.

play a central role in promoting UNHCR's own institutional interests—especially the organization's survival—when responding to particular moments of conflict and crisis.[46] These interests and constraints are also influential in explaining UNHCR's role in the making and implementation of refugee law in global, regional, and national contexts.

a. International Contexts

UNHCR has been explicitly assigned to the development of international refugee law. Paragraph 8(a) of UNHCR's Statute stipulates that UNHCR shall provide for the protection of refugees falling under the competence of its office by promoting the conclusion of international conventions relating to protection of refugees, promoting the ratification of such conventions, supervising the application of such conventions, and proposing amendments to such conventions. In the early stages of UNHCR's history, this authority was employed by UNHCR to lead processes that resulted in the 1957 Agreement on Refugee Seamen[47] and the 1967 Protocol. While UNHCR more recently contributed to the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons[48] and the 2000 Protocol against the Smuggling of Migrants by Land, Sea and Air,[49] its more recent emphasis has been the development of international soft law agreements, such as the 2001 Agenda for Protection[50] and the 2018 Global Compact on Refugees, both of which were developed under UNHCR's auspices but later affirmed by the UNGA.

Despite this role, UNHCR has also been criticized for both failing to enforce international refugee agreements and, more recently, for not promoting more binding agreements that respond to gaps in the international refugee protection regime. While international refugee law contains few, if any, enforcement mechanisms beyond the moral authority of the High Commissioner for Refugees condemning the actions of States, and while UNHCR does play an important role in the supervision of international refugee law in permissive contexts,[51] UNHCR has been found to be frequently muted in its condemnation of States that violate the principles of international refugee law. These criticisms are especially significant in cases where States violate the principle of *non-refoulement*. More generally, UNHCR has been critiqued for not being more forceful in seeking to extract binding obligations from States to address perennial gaps in the

[46] For a detailed consideration of how UNHCR navigated these constraints during its first 50 years, see Loescher (n 6).

[47] Agreement relating to Refugee Seamen (adopted 23 November 1957, entered into force 20 August 1964) 506 UNTS 125.

[48] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 25 December 2003) 2237 UNTS 319.

[49] Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 28 January 2004) 2241 UNTS 507.

[50] UNGA, 'Agenda for Protection: Addendum,' UN doc A/AC.96/965/Add.1 (26 June 2002).

[51] See James C Simeon (ed), *The UNHCR and the Supervision of International Refugee Law* (CUP 2013).

refugee protection regime. Most recently, this was notable in UNHCR's approach to consultations with States leading to the Global Compact on Refugees. While the Compact was intended to 'provide a basis for predictable and equitable burden- and responsibility-sharing among all United Nations Member States',[52] many commentators critiqued UNHCR for not encouraging States to work towards an agreement that would secure binding commitments for this kind of international cooperation.[53]

While UNHCR's frequent hesitancy to condemn State practice and to pursue more binding obligations from States may be, at least in part, explained by the structures within which UNHCR functions, these same functions have enabled UNHCR to play a seemingly paradoxical role as the moral 'guardian' of the Refugee Convention, as outlined above, and expert in the interpretation of the spirit of the Convention in light of changing circumstances. This is especially evident in UNHCR's use of doctrine.[54] UNHCR doctrine—the organization's articulation of its position on specific issues of international refugee law—has been an evolving area of practice for UNHCR since its inception. Drawing on its moral and expert authority, UNHCR doctrine is intended to offer general expressions of guidance to States in their implementation of the Refugee Convention. Here, the most notable form of doctrine has been UNHCR's guidelines on the determination of refugee status. More recently, however, UNHCR has employed doctrine as a means of expanding its mandate over a wider range of 'populations of concern', such as stateless persons[55] and those displaced as a result of natural disasters,[56] or in offering interpretations of the conditions under which refugees may be returned to their country of origin in conditions that fall short of voluntary repatriation. Again, while these actions reflect UNHCR's ability to influence the functioning of international refugee law in certain circumstances through its moral and expert authority, the fact that UNHCR sometimes issues doctrine that contradicts refugee protection principles can often be explained by the structures within which the organization functions and the interests of more powerful actors in the international system.

b. Regional Contexts

There are also important differentiations in UNHCR's ability to promote the development and implementation of international refugee law in regional contexts. In the

[52] Global Compact on Refugees, para 3.

[53] Elizabeth Ferris and Katharine Donato, *Refugees, Migration and Global Governance: Negotiating the Global Compacts* (Routledge 2019).

[54] See eg Corinne Lewis, *UNHCR and International Refugee Law: From Treaties to Innovation* (Routledge 2012).

[55] See UNGA, 'Office of the United Nations High Commissioner for Refugees,' UNGA res 50/152 (9 February 1996) para 14–15. See also Michelle Foster and Hélène Lambert, 'Statelessness as a Human Rights Issue: A Concept Whose Time has Come' (2016) 28 IJRL 564.

[56] Bryan Deschamp, Michelle Azorbo, and Sebastian Lohse, *Earth, Wind and Fire: A Review of UNHCR's Role in Recent Natural Disasters*, UNHCR Policy Development and Evaluation Service, PDES/2010/06 (2010).

African context,[57] for example, UNHCR played an important role working with newly independent African States in the 1960s to develop a regional understanding of refugees that remains more expansive than the definition found in the Refugee Convention. Specifically, the 1969 OAU Convention defines a refugee not only as an individual fleeing a well-founded fear of persecution, as defined in article 1A(2) of the Refugee Convention, but also

> every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.[58]

This definition, along with the wider provisions of the OAU Convention, including a binding commitment to inter-African burden-sharing, is the result of UNHCR's ability to respond to the political priorities of newly independent African States and to promote the incorporation of international refugee law as a means of being socialized as a new member of the international community of States.[59]

In stark contrast, UNHCR has been very limited in its ability to convince South Asian States to become parties to the Refugee Convention.[60] Though larger South Asian States such as India and Pakistan were a part of the initial discussions that galvanized the establishment of the Refugee Convention, the drafters' preoccupation with post-war disenfranchisement in Europe, and their failure to view the Partition of India of 1947, which caused widespread involuntary migration as a cause for concern, led the region to distance itself from debates on accession to the Convention. The relegation of South Asia's contextual specificities by a hegemonic refugee framework has resulted in the establishment of *ad hoc* solutions to respond to human mobility in the region.

India has acted as the regional hegemon in South Asia and has often mandated the policies of other States in the region. Some of these *ad hoc* developments, which run parallel to the global refugee regime, are particularly helpful in demonstrating defiance. Despite India's non-accession to international refugee law instruments, the State has continued to provide protection in a way that is different from Western notions. It is also clear that a defiant or alternative voice has existed on the world stage for the last seven decades. Such a defiant voice has emerged in response to the nature of international institutions in charge of refugee protection, which are intrinsically Eurocentric, a quality that is deeply entrenched in mechanisms and procedures adopted in their approach to their mandate. The refugee regime's aspirations of universalism present an illusory picture of accessible protection and humanitarianism in the context of South Asia.

A few examples from the archives on India's place in the rhetoric on forced migration provide a small window into its demonstrable defiance of the global refugee regime. In

[57] See also Chapter 15 in this volume.
[58] OAU Convention, art 1(2).
[59] See Milner (n 36).
[60] See also Chapter 22 in this volume.

the 1960s, when the Tibetan refugee influx in India was at its peak, an Interoffice Memorandum from November 1961, from Gilbert Jaeger, the then Deputy Director of UNHCR in Geneva, referred to the visit of a representative Mr PN Sharma from an India-based NGO Lok Kalyan Samiti. The memorandum indicated that Mr Sharma had asserted that UNHCR 'could not and should not impose its assistance upon the Indian government and could not start collecting aid for Tibetan refugees in India in the present circumstances'.[61]

Given India's non-accession to international refugee instruments, it has been left to the courts to lead the way and consider what, if any, obligations the Constitution of India impose on the State to accord refugee protection.[62] The Supreme Court of India has considered article 14 of the UDHR and article 13 of the ICCPR to uphold the obligation of refugee protection. Though the principle of *non-refoulement* marks the foundation of the Refugee Convention, in *National Human Rights Commission v State of Arunachal Pradesh*[63] the Supreme Court of India relied on the Indian Constitution, rather than international law, to hold that Chakma refugees who had escaped persecution in Bangladesh cannot be forcibly sent back as the conditions they would face upon return could result in the deprivation of their right to life, and thus a violation of article 21 of the Constitution of India.[64] The court stated:

> We are a country governed by the Rule of Law. Our Constitution confers certain rights on every human being and certain other rights on citizens. Every person is entitled to equality before the law and equal protection of the laws. So also, no person can be deprived of his life or personal liberty except according to procedure established by law. Thus the State is bound to protect the life and liberty of every human being, be he a citizen or otherwise, and it cannot permit any body or group of persons … to threaten the Chakmas to leave the State.[65]

This illustrates how South Asian States, like India, have been much more heavily influenced by domestic politics, law, and jurisprudence in pursuing their own approach to refugee protection, independent from UNHCR, and the instruments of the international refugee protection regime.

c. National Contexts

Arguably, the most tangible manifestation of UNHCR's role in international refugee law has been its implementation of international refugee law in national contexts. Given

[61] Interoffice Memorandum from Gilbert Jaeger to the High Commissioner, 'Tibetan Refugees in India—Visit of Shri PN Sharma', 15/72 (6 November 1961) (Official Records).

[62] See Shuvro Prosun Sarker, *Refugee Law in India: The Road from Ambiguity to Protection* (Palgrave Macmillan 2017).

[63] *National Human Rights Commission v State of Arunachal Pradesh*, 1996 SCC (1) 742 (Supreme Court of India).

[64] ibid paras 15–16. [65] ibid para 20.

that more than 80 per cent of the world's refugees are in low- and middle-income countries, and that many of these States are either unable or unwilling to assume full responsibility for responding to the needs of refugees, UNHCR's history since the late 1980s has been marked by its ever-increasing role as an operational organization running refugee protection and assistance programmes in countries around the world. This takes the form of activities ranging from RSD to the management of refugee camps and settlements. UNHCR also frequently plays a prominent operational role in the provision of solutions for refugees, especially through repatriation and resettlement. Given that these activities are undertaken on the territories of States and require financial contributions from States, and given that these States have particular interests, it may not be surprising that it is the interests of States that ultimately influence these activities.

For example, in a State like Egypt, UNHCR has lead responsibility for determining refugee status. Given the policies of Egypt on the admission and recognition of refugees, coupled with an increasing demand for refugee status and declining resources to perform this function, UNHCR's RSD activities in Egypt—and elsewhere[66]—have been critiqued as falling short of the international standards set by UNHCR.[67] Likewise, as a growing number of States in the Global South made the containment of refugees in camps a condition for the continued hosting of refugees, UNHCR became increasingly involved in the management of large refugee camps from the early 1990s. For some two decades, UNHCR acted as a 'surrogate state' in managing isolated and insecure camps in many regions of the world.[68] While UNHCR argued that life in these camps was preferable to early and unsustainable return to the country of origin, the organization was criticized for managing spaces that routinely undermined the rights of refugees, such as the right to work and freedom of movement.[69]

Recent developments, including UNHCR's role in encouraging changes in practice in countries such as Kenya and Ethiopia, however, illustrate that this outcome is not inevitable for UNHCR. In fact, UNHCR has been most effective in domestic contexts as a catalyst for innovative approaches that promote international refugee protection principles and the pursuit of solutions for refugees. For example, UNHCR played a central role in supporting Tanzania's decision to offer naturalization as a solution for some 162,000 Burundian refugees in 2008.[70] More generally, UNHCR's role has been critical in providing technical support and leveraging donor commitments in countries that have expressed a desire to pilot innovative and rights-based solutions for refugees, while translating elements of international refugee law into domestic practice.

[66] Michael Alexander, 'Refugee Status Determination Conducted by UNHCR' (1999) 11 IJRL 251.

[67] See Michael Kagan, 'The Beleaguered Gatekeeper: Protection Challenges Posed by UNHCR Refugee Status Determination' (2006) 18 IJRL 1.

[68] Slaughter and Crisp (n 3).

[69] See Loescher, Milner, Newman, and Troeller (n 3).

[70] See James Milner, 'Can Global Refugee Policy Leverage Durable Solutions? Lessons from Tanzania's Naturalization of Burundian Refugees' (2014) 27 JRS 553.

5. Conclusion

UNHCR clearly plays a prominent role in international refugee law, but its role can often be replete with contradictions. Since 1950, UNHCR has had a mandate from the UNGA to ensure protection for refugees and to find a solution to their plight. This mandate has provided UNHCR with moral authority to promote refugee protection principles, provide guidance on the implementation of international refugee law, and support the progressive evolution of refugee law in global, regional, and national contexts. At the same time, UNHCR has been constrained by its 1950 Statute, which gave it a non-political mandate, made it reliant on voluntary contributions from States, and required UNHCR to cooperate with governments in pursuit of solutions for refugees. As illustrated by the analysis in this chapter, the result has meant that UNHCR has operated as a leading actor in the development and implementation of international refugee law and been critiqued for being complicit in some of the most significant violations of the spirit and the letter of the international refugee protection regime.

These contradictions point to the need to understand the meaning and functioning of international refugee law within specific political contexts.[71] In permissive political contexts, UNHCR has been able to play a transformative and catalytic role in advancing protection and solutions with and for refugees. In restrictive political contexts, UNHCR has been constrained by limited resources and eroding support from those actors upon whom it is reliant to realize its mandate. In turn, this has led UNHCR to pursue actions that it perceives as being in its institutional interest in order to remain relevant in the eyes of States, but which lead to criticisms that it is acting in ways that violate core principles of international refugee law. As such, we need to understand the sources of UNHCR's power and the causes of its pathologies. Such an understanding helps explain UNHCR's actions over time and suggests important ways in which UNHCR can more consistently employ its moral and expert authority to advance protection and solutions for refugees. Given the current state of the international refugee protection regime, such an understanding could not be more timely.

[71] See also Chapter 5 in this volume.

CHAPTER 11

MOVING TOWARDS AN INTEGRATED APPROACH OF REFUGEE LAW AND HUMAN RIGHTS LAW

VINCENT CHETAIL

1. Introduction

Although sharing the same purpose of protecting individuals against abuses, refugee law and human rights law were initially conceived as two different branches of international law and evolved following their own sources, institutions, and ethos. As a side effect of the specialization of international law, refugee lawyers have traditionally apprehended their field within the confines of the Refugee Convention, whereas human rights lawyers have long neglected the relevance of their discipline to protecting displaced persons.

As a result of this professional ethos, the interconnections between refugee law and human rights law were acknowledged quite late following a piecemeal process. Their relationship is conceptualized in successive narratives that unveil a threefold approach: preventive, interactive, and integrated. Originally, their relations were regarded as causal, the violations of human rights being acknowledged as the primary cause of refugee movements.[1] This preventive approach was later enriched by a more interactive one with a focus on the specific linkages between human rights law and the distinctive

[1] Paul Weis, 'Refugees and Human Rights' (1971) 1 Israel Yearbook on Human Rights 35; Michel Moussalli, 'Human Rights and Refugees' [1984] Yearbook of the International Institute of Humanitarian Law 13.

tenets of refugee law, such as the refugee definition[2] and the prohibition of *refoulement*.[3] More recently, this interactive approach has paved the way for a more integrated one. This new impetus focuses on complementary protection[4] and the rights of refugees under human rights law[5] as a supplement to refugee status.[6]

This integrated approach to refugee protection is still a work in progress and deserves further consideration from the broader perspective of international law. While acknowledging refugee law as a subset of human rights law, most commentators do not draw the systemic implications of this evolution by relegating the latter to a secondary source of the former. This professional posture is no longer tenable for two main reasons. First, human rights law provides a unique and vital source of protection in the 43 UN Member States that have not ratified the Refugee Convention. This basic account is frequently overlooked by specialists, despite the fact that many non-parties, like Lebanon, and Pakistan, are amongst the largest countries of asylum. Second, no one contests today that, in States parties, refugees are simultaneously protected by refugee law treaties as a specific category of international concern, as well as by generalist human rights treaties as a result of their applicability to all human beings.

Against this normative background, moving towards an integrated approach to refugee protection calls for acknowledging the plurality of legal sources and articulating them within a comprehensive and coherent framework of analysis. As developed in previous publications,[7] the interface between refugee law and human rights law not only mirrors the evolution of international law but also provides a fertile ground for revisiting the reach and potential of refugee protection.

[2] James C Hathaway, *The Law of Refugee Status* (CUP 1991); T Alexander Aleinikoff, 'The Meaning of "Persecution" in United States Asylum Law' (1991) 3 IJRL 5; Jean-Yves Carlier, K Hulhmann, C Peña Galiano, and Dirk Vanheule (eds), *Who is a Refugee?* (Kluwer 1997) 685; Hélène Lambert, 'The Conceptualisation of "Persecution" by the House of Lords: Horvath v Secretary of State for the Home Department' (2001) 13 IJRL 16.

[3] Hélène Lambert, 'Protection against *Refoulement* from Europe: Human Rights Law Comes to the Rescue' (1999) 48 ICLQ 515; Brian Gorlick, 'The Convention and the Committee against Torture: A Complementary Protection Regime for Refugees' (1999) 11 IJRL 479; Jan Doerfel, 'The Convention against Torture and the Protection of Refugees' (2005) 24(2) RSQ 83; Michelle Foster, 'Non-Refoulement on the Basis of Socio-Economic Deprivation: The Scope of Complementary Protection in International Human Rights Law' [2009] New Zealand Law Review 257; Cornelis Wolfram Wouters, *International Legal Standards for the Protection from Refoulement* (Intersentia 2009).

[4] See Chapter 36 in this volume.

[5] James C Hathaway, *The Rights of Refugees under International Law* (CUP 2005); Alice Edwards, 'Human Rights, Refugees and the Right "To Enjoy" Asylum' (2005) 17 IJRL 293.

[6] See also Marina Sharpe, *The Regional Law of Refugee Protection in Africa* (OUP 2018); Jason M Pobjoy, *The Child in International Refugee Law* (CUP 2017).

[7] Vincent Chetail, 'Are Refugee Rights Human Rights? Some Unorthodox Questioning on the Relations between International Refugee Law and International Human Rights Law' in R Rubio Marin (ed), *Migrations and Human Rights* (OUP 2014) 19–72; Vincent Chetail, 'Armed Conflict and Forced Migration: A Systemic Approach to International Humanitarian Law, Refugee Law and Human Rights Law' in Andrew Clapham and Paula Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (OUP 2014) 700–34.

Following this holistic and de-compartmentalized approach, the broader evolution of international law reflects the changing pattern of refugee protection as initially grounded in the Refugee Convention and subsequently informed by human rights treaties (Section 2). As a result of a gradual process of pollination, human rights law has shaped, updated, and enlarged refugee law. While revamping the basic tenets of the Refugee Convention, it has become the normative frame of reference. The centrality of human rights law does not mean that the Refugee Convention is redundant. On the contrary, its continuing relevance has been possible precisely because it has been reframed and enhanced by human rights law.

Refugee law and human rights law are now so interdependent that they are bound to work in tandem. Their intermingling paves the way for a human rights-based approach to refugee protection (Section 3). Instead of regarding the two branches of international law as silos, this new perspective offers a broader vision of refugee protection. This comprehensive design acknowledges that refugee law and human rights law complement and reinforce each other within one single continuum of protection. Its conceptual foundation relies on the complementarity model as an alternative to the dogma of *lex specialis*. This normative continuum of international protection is further tested by a comparative assessment between the rules of the Refugee Convention and those of human rights treaties. As a result of their close imbrication, human rights law supplements and upgrades refugee law to such an extent that the latter has become an integral component of the former.

2. The Changing Pattern of Refugee Protection under Public International Law

The changing pattern of refugee protection and its continuing resilience cannot be understood in isolation from the broader evolution of international law. Modern refugee law was designed at a time when human rights law was in its infancy. This historical context and the subsequent development of international law explain the specificities of refugee law and the decisive influence of human rights law to shape and inform its content and rationale. Although the Refugee Convention was not conceived as a human rights treaty, human rights law has radically transformed its distinctive tenets and has become the benchmark of refugee protection.

a. The Original Design of Refugee Protection

Refugee law predates human rights law. The former emerged during the inter-war period and was primarily framed by the traditional law of aliens, whereas the latter was endorsed at the international level after the Second World War. Promoting and encouraging respect for human rights was first recognized by the Charter of the United Nations (article 1(3)) (UN Charter),[8] but it was only in 1966 that the UN Covenants were adopted to determine the content of human rights law in universal conventions. It took 10 more years before they came into force in 1976.

Because of this historical disjuncture, the Refugee Convention inevitably reflects the conception of international law at the time of its drafting. Refugee law is accordingly more State-centric than human rights law. Formally speaking, the Refugee Convention is a duty-driven instrument rather than a human rights-based one. Although its preamble acknowledges 'the principle' of the UN Charter and the UDHR that 'human beings shall enjoy fundamental rights and freedoms without discrimination', the binding content of the Convention is framed as duties of States, not as rights of individuals.[9] This normative digression was inevitable at the time: in 1951, individuals did not have human rights that were conventionally binding on the universal plane.[10]

Although one should not overestimate the practical difference between individual rights and States obligations, this highlights the distinctive premise of the Refugee Convention: the refugee was not conceived as a subject of law but as a beneficiary of common standards regulating the conduct of Contracting States. The historical context further explains why the reach of the Refugee Convention was narrow and backward-looking. This post-war instrument was initially limited to refugees having fled before 1951. It only became a universal instrument for current and future refugees in 1967 when the Protocol removed the early restrictions on the refugee definition without updating further the substance of the Convention.

The original design of the Convention and its historical context have heavily shaped the idiosyncratic features of refugee law and exacerbated its differences from subsequent human rights treaties. In schematic terms, refugee law is selective, contingent, and decentralized, whereas human rights law is inclusive, categorical, and control-oriented. Each of these characteristics unveils their distinctive legal nature but also the potential of their interaction.

The selective nature of refugee law is inherent in the personal scope of the Refugee Convention. Whereas human rights are applicable to everyone because of the dignity inherent in every human being, the benefit of the Refugee Convention depends on the identification of a predetermined category of persons. The refugee definition therefore represents both the entry point of the Convention and its main limitation.

The selectivity of the refugee definition is intrinsic in its very structure, which is composed of three layers of requirements: inclusion, exclusion, and cessation. In short, article 1A(2) requires a well-founded fear of persecution to be recognized as a refugee.

[8] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter).

[9] Guy S Goodwin-Gill, 'Refugees and their Human Rights' (2004) Refugee Studies Centre Working Paper No 17, 7.

[10] The UDHR was adopted in 1948 as a non-binding resolution of the General Assembly and only specific treaties focusing on some particular aspects were adopted at the time, mainly under the auspices of the International Labour Organisation with regard, for instance, to the prohibition of forced labour.

Even in such a case, a refugee may be excluded from the Convention due primarily to having committed serious crimes[11] and, once granted, the refugee status is terminated as soon as the need for protection is no longer justified.[12] The notion of persecution represents another significant limitation that excludes many other drivers of forced migration (disasters, famine, pandemics, or extreme poverty). This restrictive stance was intentional. The Conference of Plenipotentiaries recommended in its Final Act that Contracting parties should apply the Convention beyond 'its contractual scope' to other refugees 'who would not be covered by the terms of the Convention'.[13]

The conditionality of refugee law represents another significant distinction with human rights law. Unlike human rights treaties, the Refugee Convention does not enumerate rights without distinction as to their beneficiaries. With some exceptions,[14] the benefit of refugee status is contingent upon two cumulative requirements governing the criteria of entitlement (the applicability of the norm) and the standard of treatment (the content of the norm). The first set of conditions requires a presence or a residence that is further qualified as lawful or physical depending on the relevant provision. Once these entitlement criteria are fulfilled, the content of refugee status is structured and determined by the traditional distinction between nationals and non-nationals. The standards of treatment owed to refugees are identified by analogy with three categories of persons: nationals, most-favoured foreigners, and ordinary aliens. The resulting framework remains extremely complex.

The decentralized nature of refugee law represents another dividing line with human rights law. Echoing the traditional conception of international law at the time, the Refugee Convention sharply distinguishes between the content of protection as detailed therein and a decentralized implementation entrusted to each individual State party. It does not contain any specific provision on domestic asylum procedures. States accordingly recapture, at the implementation level, a portion of the sovereignty they have alienated, at the normative level, by agreeing to a detailed regime of refugee protection.

This decentralized scheme of implementation is aggravated by the lack of a treaty body in charge of monitoring the Convention. Although UNHCR is mandated to supervise its application, the agency has failed to establish a proper reporting procedure for assessing States' compliance.[15] The lack of an independent monitoring mechanism represents 'an historical anomaly'[16] that starkly contrasts with the control-oriented approach of human rights law. In this area, as in many others, the Refugee Convention paid the price for being the forerunner of subsequent human rights treaties.

[11] See Chapter 39 in this volume.

[12] See Part VII, specifically Chapter 57 in this volume.

[13] Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Final Act (25 July 1951) UN doc A/CONF.2/108/Rev.1, para E.

[14] This concerns a core set of fundamental guarantees that applies to all refugees without qualifications, including *non-refoulement*, non-discrimination, and access to domestic courts.

[15] See Chapter 10 in this volume.

[16] Hathaway (n 5) 995.

b. The Evolution of Refugee Protection

The primary design of refugee protection has dramatically evolved as a result of the subsequent expansion of human rights law. The normative implications of this development are threefold: human rights law has revamped the content of the Refugee Convention, transformed its very rationale, and enlarged the scope of international protection.

Firstly, human rights law has updated the refugee definition and mitigated its restrictive stance. Amongst well-known instances, it has played a vital role in defining the traditional notion of persecution as any serious violations of human rights, including those committed by non-State actors in line with the human rights theory of *Drittwirkung*, and in developing a gender-sensitive approach to the refugee definition.[17] Apart from having instilled a dynamic and inclusive meaning of the refugee definition, human rights law has also provided a persuasive device for harmonizing the unilateral interpretations of Contracting States to the Refugee Convention.

Human rights law has also impacted on the content of refugee status. The traditional distinction between nationals and non-nationals which conditions the standards of treatment applicable to refugees has largely been marginalized and superseded by the general applicability of human rights and the principle of non-discrimination. Hence, human rights law requires assimilation with nationals in relation to rights that are determined by reference to the treatment accorded to non-nationals under the Refugee Convention.[18] Inversely, when refugees are assimilated with nationals under the Refugee Convention, this standard of treatment cannot be below the minimum assigned by human rights treaties.[19] A similar influence can be observed with regard to the prerequisites of lawful or physical presence/residence. In particular, the requirements of lawful stay and habitual residence to benefit from the right to association and legal assistance are neutralized by human rights law, because such rights are recognized by the latter without regards to residence or lawful status.

Secondly, while revamping its content, the distillation of human rights norms within refugee law has drastically informed the very rationale of the Refugee Convention. The Convention has been revisited and reconstructed as a human rights treaty. The symbolic reference to human rights in its preamble has been retrospectively viewed as

[17] For further discussion about the impact of human rights on the refugee definition, see James C Hathaway and Michelle Foster, *The Law of Refugee Status* (2nd edn, CUP 2014); Andreas Zimmermann and Claudia Mahler, 'Article 1A, Para 2' in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (OUP 2011) 282, 345–58; Michelle Foster, *International Refugee Law and Socioeconomic Rights: Refuge from Deprivation* (CUP 2007); Jean-Yves Carlier, 'Droit d'asile et des réfugiés: de la protection aux droits' (2008) 332 Recueil des Cours Académie de Droit International 9.

[18] This includes freedom of association and the right to form and join trade unions (art 15) and the right to property (art 13).

[19] This concerns freedom of religion (art 4), legal assistance (art 16(2)), education (art 22(1)), public relief (art 23), labour legislation and social security (art 24).

underpinning the cardinal purpose of the Convention and its *raison d'être*: '[u]nderlying the Convention is the international community's commitment to the assurance of basic human rights without discrimination.'[20] As acknowledged in the landmark case *Horvath* of the UK Supreme Court, 'the purpose of the Convention is to secure that a refugee may in the surrogate state enjoy the rights and freedoms to which all are entitled without discrimination and which he cannot enjoy in his own state'.[21]

Refugee law thus constitutes a right to have rights when victims of human rights violations have no other option than to leave their own country and seek protection of another State. As Hathaway observes, it has become 'a remedial or palliative branch of human rights law'.[22] Nonetheless, the systemic function assigned to international protection collides with the specific ethos of the Refugee Convention and the limits inherent in its content. This highlights the significance of human rights law in enlarging the scope of refugee protection designed in 1951.

The third normative impact of human rights law has been to broaden international protection beyond the confines of the Refugee Convention. As restated by their treaty bodies, the two Covenants (ICCPR and ICESCR) plainly apply to refugees, asylum seekers, and other vulnerable migrants who might face similar risks in their own country.[23] When compared with the Refugee Convention, this enlargement of international protection is both personal and material. As detailed in Section 3 of this chapter, human rights law not only grants refugees an extensive panoply of additional rights, it also provides a unique source of rights for asylum seekers who are excluded from most guarantees of the Refugee Convention due to a restrictive and disputable interpretation of Contracting parties.[24]

The most ground-breaking development initiated by human rights law lies in a new ground of protection derived from the principle of *non-refoulement*. This cornerstone of refugee protection has been expressly endorsed in a broad range of universal and regional conventions, including the CAT (article 3), the Convention for the Protection of All Persons from Enforced Disappearance (article 16),[25] the American Convention on Human Rights (article 22(8)),[26] and the EU Charter of Fundamental Rights (article

[20] *Canada (Attorney-General) v Ward* (1993) 2 SCR 689 para 733 (Laforest J).

[21] *Horvath v Secretary of State for the Home Department* [2000] UKHL 37, [2001] 1 AC 489 para 508 (Lord Clyde).

[22] Hathaway (n 5) 5.

[23] UN Human Rights Committee (HRC) 'General Comment No 31[80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant,' UN doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) para 10; UN Committee on Economic, Social and Cultural Rights (CESCR), 'General Comment No 20: Non-Discrimination in Economic, Social and Cultural Rights,' UN doc E/C.12/GC/20 (2 July 2009) para 30.

[24] Although the declaratory nature of the refugee status would entail its application to both prospective and recognized refugees, contracting parties refuse its benefit to asylum seekers beyond the most basic guarantees contained in articles 1, 31, and 33.

[25] International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3, art 16.

[26] American Convention on Human Rights (adopted 22 November 1969, entered into force 27 August 1979) 1144 UNTS 123, art 22(8).

19(2)). Besides these explicit endorsements, most general human rights treaties are construed by their monitoring bodies as comprising an implicit prohibition of *refoulement*. While being anchored in the human rights theory of positive obligations, this implicit duty has been recognized in a broad variety of contexts, where a person faces a real risk of torture, inhuman or degrading treatment, arbitrary deprivation of life, and other irreparable harms.[27]

Although the human rights principle of *non-refoulement* largely coincides in substance with its refugee law counterpart, the former provides a broader protection than the latter in three significant regards. Firstly, its benefit is not subordinated to the five limitative grounds of persecution under the Refugee Convention. Secondly, contrary to the refugee definition, the human rights principle of *non-refoulement* does not require one to be outside the country of origin: it applies as soon as an individual is under the effective control of a State. Thirdly, the human rights prohibition of *refoulement* is absolute where there is a real risk of torture, inhuman, or degrading treatment.[28] It thus applies to asylum seekers and refugees who are excluded from the Refugee Convention under the exceptions to *non-refoulement* (article 33(2)) or the exclusion clauses to the refugee definition (article 1F). This last feature is emblematic of the impact of human rights law on refugee law: the former is universal and inclusive in essence, whereas the latter is bound to grant protection only to those who deserve it.

3. A Human Rights-based Approach to Refugee Protection

As a result of a gradual process of impregnation, human rights law has become the yardstick of refugee law. It has reframed the basic tenets of the Refugee Convention and expanded the scope of international protection. Following this evolution, the very notion of international protection is no longer the province of the Refugee Convention. It is an integral part of the broader framework of human rights law. The ultimate purpose of refugee protection is to ensure effective respect for human rights and this objective is realized through a broad range of general and specific conventions that are located at the intersection of refugee law and human rights law.

The interface between the two branches of international law calls for a human rights-based approach to refugee protection, whereby the broad variety of applicable

[27] *Soering v The United Kingdom* (1989) 11 EHRR 439, paras 87–8; HRC, 'General Comment No 20: Article 7,' UN doc HRI/GEN/1/Rev.9 (10 March 1992) para 9; Committee on the Rights of the Child, 'General Comment No 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin,' UN doc CRC/GC/2005/6 (1 September 2005) para 27; *MNN v Denmark*, UN doc CEDAW/C/D/33/2011 (15 August 2013) para 8.10.

[28] See further Chapter 50 in this volume.

rules are articulated within a comprehensive and coherent framework. This integrative approach is conceptualized through the complementarity model, as an alternative to *lex specialis*. The complementarity model means in substance that human rights law and refugee law are not exclusive but mutually reinforcing. While sharing the common underlying purpose of protecting human dignity, their cumulative application determines, in turn, the very content of this human rights-based approach to refugee protection.

a. The Conceptual Foundation of the Human Rights-based Approach to Refugee Protection: The Complementarity Model

The interactions between refugee law and human rights law are traditionally conceptualized through either the maxim *lex specialis derogat lex generalis* or the complementarity approach. Although these models mean different things for different people, they rely on two opposite premises: *lex specialis* posits a hierarchical and exclusive relationship between human rights law and refugee law, whereas the complementarity approach promotes a horizontal and cumulative articulation amongst them.

The *lex specialis* principle is frequently invoked by refugee lawyers who postulate the primacy of their Convention as a specialized instrument, in opposition to general human rights conventions. However, this approach fails to provide a cogent and predictable framework of analysis for conceptualizing the subtle interactions between refugee law and human rights law. The *lex specialis* principle suffers from two main drawbacks.

Firstly, it says nothing about what should be considered 'general' or 'special', and how to interpret these vague terms. Whether a norm is more special than another relies on a value judgment, for both tribunals and scholars have been unable to provide an authoritative meaning. Furthermore, even assuming that the Refugee Convention is more detailed, human rights norms cannot be dissociated from their subsequent interpretation by treaty bodies. They thus appear more precise and even clearer than their refugee law counterparts.

Secondly, *lex specialis* presupposes a conflict of norms between human rights law and refugee law. Such conflicts are extremely rare and never resolved through *lex specialis*. The most emblematic case concerns the absolute character of the *non-refoulement* principle under human rights treaties, which contrasts with the exceptions in the Refugee Convention. This conflict has been resolved in favour of the former, thereby discarding the exceptions of the latter.[29] Human rights law thus prevails over refugee law without regard to the alleged speciality of their rules.

[29] See eg *Saadi v Italy* (2008) 49 EHRR 30, paras 138–41; *Chahal v United Kingdom* (1996) 23 EHRR 413, para 80; *Tapia Paez v Sweden*, UN doc CAT/C/18/D/39/1996 (28 April 1997) para 14.5.

Given the weaknesses of the *lex specialis* principle, the normative interactions between refugee law and human rights law are better appraised and conceptualized through the complementarity model. Initially developed with regard to the relations between humanitarian law and human rights law, this approach acknowledges that 'both spheres of law are complementary, not mutually exclusive'.[30] The complementarity model thus posits the simultaneous application of overlapping norms on the same subject matter, instead of the exclusive application of one specific norm overriding another.

The relevance of this approach has been acknowledged in the field of refugee protection on several occasions. Amongst other instances, the Security Council, the General Assembly, and the Human Rights Council have reaffirmed the simultaneous application of refugee law, human rights law, and humanitarian law.[31] As further confirmed by the African Commission of People and Human Rights, 'the provisions [of human rights law and refugee law] are at most complementary to each other and not mutually exclusive'.[32]

While preserving the simultaneous applicability of human rights law and refugee law, the complementarity model promotes their cross-pollination and synergies into one single normative continuum of protection. It prioritizes convergence over conflict through a contextualized interpretation of applicable rules. In other words, refugee law must be construed in light of human rights law and reciprocally.

This method of interpretation relies on the principle of systemic integration and, unlike *lex specialis*, is grounded in the Vienna Convention on the Law of Treaties,[33] with article 31(3)(c) requiring that a treaty be interpreted by taking into account 'any relevant rules of international law applicable in the relations between the parties'.[34] As further restated by the International Court of Justice, 'an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation'.[35] This principle of systemic interpretation has been instrumental in construing and adapting the refugee definition in line with human rights law.

When there is a genuine conflict of norms that cannot be resolved by interpretation, the cumulative application of human rights law and refugee law requires the most protective rule to be implemented. The most favourable treatment constitutes a

[30] HRC (n 23) para 11.

[31] See eg UNSC Resolution 1894 (11 November 2009) para 1; UNGA res 64/77 (8 February 2010) para 2; UN Human Rights Council, Resolution S-8/1 (18 June 2008) para 1.

[32] *Doebbler v Sudan*, African Commission on Human and Peoples' Rights, Comm No 235/2000 (25 November 2009) para 126.

[33] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

[34] Campbell McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 ICLQ 279; Panos Merkouris, *Article 31(3)(c) VCLT and the Principle of Systemic Integration: Normative Shadows in Plato's Cave* (Brill 2015).

[35] *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (Advisory Opinion) [1971] ICJ Rep 16, 31.

common feature of both fields (article 5 of the Refugee Convention, the ICCPR, and the ICESCR). Human rights law and refugee law are thus bound to work hand-in-hand to offer a broader protection for refugees and asylum seekers.

b. The Normative Content of the Human Rights-based Approach to Refugee Protection: The Acid Test of the Cumulative Application of Refugee Law and Human Rights Law

While being framed by the complementarity model, the content of the human rights-based approach to refugee protection is determined by the cumulative application of refugee law and human rights law. Their respective rules not only coexist and overlap in substance, they are also mutually reinforcing following an incremental continuum of protection.

Human rights law and refugee law are so imbricated that they make sense only when understood in relation to one another. When they are approached as two distinct albeit complementary fields of international law, their interactions may be systematized into three scenarios: (1) human rights law supplements refugee law in filling its gaps; (2) reciprocally, refugee law complements human rights law in providing some additional guarantees; (3) when their respective rules govern the same subject matter, human rights law upgrades refugee law.

i) *Human Rights Law Supplements Refugee Law in Filling the Gaps of the Refugee Convention*

Human rights law complements refugee law in a broad range of areas. The most obvious instances relate to the procedural gaps of the Refugee Conventions. The lack of provision for asylum procedures is compensated by the procedural guarantees endorsed in human rights treaties. When combined with the prohibition of *refoulement*, the right to an effective remedy requires an 'access to a remedy with automatic suspensive effect', as well as 'an independent and rigorous scrutiny'.[36] Access to asylum procedures and the right to an individual assessment are reinforced by two interrelated guarantees: the right to seek asylum and the prohibition of collective expulsion under regional human rights treaties.[37]

[36] *Jabari v Turkey*, App No 40035/98 (ECtHR, 11 July 2000) para 50; *Gebremedhin v France* (2010) 50 EHHR 29, para 66.

[37] For further discussion: Vincent Chetail, *International Migration Law* (OUP 2019) 138–42; Chetail, 'Are Refugee Rights Human Rights?' (n 7) 51–4.

Human rights law also addresses the conspicuous lack of a complaint mechanism in the Refugee Convention. Once domestic remedies are exhausted, asylum seekers may bring their case before a regional court of human rights or one of the seven UN treaty bodies.[38] This possibility is far from being trivial given the restrictive application of the refugee definition. To give one example, between 80 and 90 per cent of all individual complaints submitted to the Committee against Torture concern the principle of *non-refoulement*.[39]

While filling the procedural cracks of refugee law, human rights law also supplements it in a very substantive way. It represents a unique source of rights for asylum seekers during and after the asylum procedure. The added value of human rights law stretches far beyond the legal status of asylum seekers. It retains its centrality for asserting the rights of refugees formally recognized under the Convention. Indeed human rights law considerably enriches the material scope of international protection by granting a broad range of supplementary rights that are not guaranteed by refugee status.

These additional rights are both extensive and fundamental. As far as the ICCPR is concerned, they include the right to life, the prohibition of torture, cruel, inhuman, or degrading treatment, freedom from slavery and forced labour, the right to hold opinions, freedom of expression and peaceful assembly, the right to return, the right to private and family life, equality before the law, equality between men and women, the right to an effective remedy, the right of detainees to be treated with humanity, the prohibition of detention for inability to fulfil a contract, the prohibition of retroactive application of criminal law, the right to recognition as a person before the law, the protection of children, and the cultural rights of ethnic, religious, or linguistic minorities.

Amongst this long list of additional rights, the contextualized interpretation of human rights law has been instrumental in asserting the right to family unity that is not guaranteed by the Refugee Convention. The general obligation to protect the family under article 23 of the ICCPR entails 'the unity or reunification of families, particularly when their members are separated for political, economic or similar reasons'.[40] A refusal of family reunification may also amount to an arbitrary or unlawful interference in the right to family life, for refugees have no alternative of enjoying family life in their own country.

[38] For further discussion: special issue of RSQ 'The Role of International Organizations and Human Rights Monitoring Bodies in Refugee Protection' (2015) 34(1); Chaloka Beyani, 'The Role of Human Rights Bodies in Protecting Refugees' in Anne F Bayefsky (ed), *Human Rights and Refugees, Internally Displaced Persons and Migrant Workers* (Martinus Nijhoff 2006) 270; Nick Poynder, '"Mind the Gap": Seeking Alternative Protection under the Convention against Torture and the International Covenant on Civil and Political Rights' in Susan Kneebone (ed), *The Refugees Convention 50 Years On* (Ashgate 2003) 173.

[39] Vincent Chetail, 'Le Comité des Nations Unies contre la torture et l'expulsion des étrangers: dix ans de jurisprudence (1994–2004)' (2006) 26 Revue suisse de droit international et de droit européen 63, 66.

[40] HRC, 'General Comment No 19: Article 23 Protection of the Family, the Right to Marriage and Equality of the Spouses,' UN doc HRI/GEN/1/Rev. 5 (26 April 2001) 138, para 5.

The same contextualized interpretation of human rights law has filled the vacuum of the Refugee Convention with regard to the right to return. The right to enter one's own country under article 12(4) of the ICCPR clearly 'includes… the right to return after having left one's own country' which 'is of the utmost importance for refugees seeking voluntary repatriation'.[41] As restated by the UN Committee on the Elimination of Racial Discrimination, 'all such refugees and displaced persons have the right freely to return to their homes of origin under conditions of safety'.[42]

By contrast, the added value of human rights law is less apparent for economic and social rights because the Refugee Convention grants an extensive range of such rights to facilitate local integration in asylum States. Nonetheless, the importance of the ICESCR shall not be underestimated as a source of refugee protection. On the one hand, even though refugee status already covers in substance most rights of the ICESCR, the Covenant enriches it with several additional guarantees: equality between men and women, protection of the family and children, right to strike, and right to cultural identity.

On the other hand, the ICESCR fills a substantive gap of protection for asylum seekers and other persons at risk in their own countries who are not recognized as refugees. Although the full realization of the Covenant is progressive, this obligation of conduct depends on available resources of States parties and cannot be invoked by wealthy countries as a pretext for non-compliance. Despite the frequent misunderstandings about its exact scope and meaning, the notion of progressive realization also implies for all States parties that any retrogressive measures, such as those targeting asylum seekers or refugees, are *prima facie* incompatible with the Covenant.[43]

In addition to this general safeguard, several Covenant rights are of immediate effect.[44] The most persuasive duty of immediate application is the principle of non-discrimination under article 2(2) of the ICESCR. As restated by the Committee on Economic, Social and Cultural Rights, non-discrimination is 'an immediate and cross-cutting obligation'.[45] Hence, '[t]he Covenant rights apply to everyone including non-nationals, such as refugees, asylum seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation'.[46]

Economic, social, and cultural rights are thus presumably applicable to all refugees and asylum seekers. Nonetheless, this presumption of entitlement is without prejudice to lawful differences of treatment. While States retain a significant margin of appreciation,

[41] HRC, 'General Comment No 27 (67): Freedom of Movement (article 12),' UN doc CCPR/C/21/Rev.1/Add.9 (1 November 1999) para 19.

[42] UN Committee on the Elimination of Racial Discrimination, 'General Recommendation No. 22: Article 5 and Refugees and Displaced Persons,' UN doc A/54/18 (1996).

[43] CESCR, 'General Comment No. 13: The Right to Education (article 13),' UN doc E/C.12/1999/10 (8 December 1999) para 45.

[44] They include equality between men and women, fair wages and equal remuneration, the right to form trade unions, the right to strike, protection of minors, and primary education.

[45] CESCR (n 23) para 7.

[46] ibid para 30.

any differential treatments shall be reasonable, objective, proportionate, compatible with the nature of the Covenant rights, and solely for the purpose of promoting the general welfare in a democratic society.[47]

Furthermore, any differences of treatment shall not derogate from the minimum standards spelt out in the refugee status and the core obligations of the ICESCR. As reaffirmed by the CESCR, a minimum content of Covenant rights is guaranteed in any circumstances to all refugees and asylum seekers.[48] This duty of immediate application binds all States parties without regard to their level of development.[49] As a result of this minimum core obligation, denying economic and social entitlements to asylum seekers who have no other means of subsistence is prohibited. This primary duty of international law finds an additional support in the interdependent and interrelated nature of human rights: denying a minimum of subsistence rights to asylum seekers has been held as a violation of the prohibition of inhuman and degrading treatment.[50]

ii) *Refugee Law Complements Human Rights Law in Specifying some Additional Guarantees*

While human rights law ensures an impressive range of additional rights for both refugees and asylum seekers, the rights exclusively governed by the Refugee Convention remain comparatively rare. Amongst few instances, the prohibition of penalties for irregular entry under article 31(1) constitutes a distinctive feature of refugee law. This provision is aimed at exempting asylum seekers from the entry requirements generally imposed on other migrants. As underlined during its drafting, 'a refugee whose departure from his country of origin is usually a flight, is rarely in a position to comply with the requirements for legal entry'.[51] While heralding the specificity of refugee law, the concrete added value of article 31(1) remains relative, for its benefit requires an individual to come directly from a country of persecution. This leaves aside those who have crossed a third country before seeking asylum. In any event, however, the principle of *non-refoulement* under both refugee law and human rights law applies regardless of irregular entry.

[47] ibid para 13. Article 2(3) establishes another limited exception to non-discrimination on the ground of nationality. It only applies to 'developing countries' and for 'economic rights', excluding social and cultural rights. Article 2(3) remains a virtual exception for no developing States have invoked it: Chetail (n 37) 157–60.

[48] CESCR, 'The Duties of States towards Refugees and Migrants under the International Covenant on Economic, Social and Cultural Rights,' UN doc E/C.12/2017/1 (13 March 2017) paras 9, 11.

[49] CESCR, 'General Comment No 3: The Nature of States Parties Obligations (art 2, para 1 of the Covenant),' UN doc E/1991/23 E/C.12/1990/8 (1991) 85–6, para 10.

[50] *MSS v Belgium and Greece* (2011) 53 EHRR 2, paras 251–63.

[51] Ad Hoc Committee on Statelessness and Related Problems, 'Status of Refugees and Stateless Persons: Memorandum by the Secretary General,' UN doc E/AC.32/2 (3 January 1950) para 3.

Besides article 31(1), the Refugee Convention supplements human rights treaties on very technical and specific matters, such as equality in fiscal charges (article 29) and transfer of assets (article 30). In accordance with the principle of systemic integration, one could still argue that these provisions are practical manifestations of the general principle of equality before the law and the right to property. The same contextualized interpretation applies to identity papers (article 27) and travel documents (article 28), which are frequently heralded as the distinctive advantages of refugee status. Although there are no explicit equivalents in human rights treaties, delivering travel documents and identity papers to refugees is a positive obligations deriving respectively from the right to leave any country and the right to recognition as a person before the law.[52]

Overall, when compared to human rights law, the truly distinctive provision of refugee status is confined to article 25 on administrative assistance. Contracting parties must provide administrative assistance to refugees who are, by definition, unable to avail themselves of the protection of their own States. This highlights the unique nature of refugeehood. The consular function to deliver official certificates that are necessary in the daily life of refugees (marriage, birth, succession etc.), which is normally assigned to States of nationality, is carried out by asylum countries.

While allowing them to build a new life in States of asylum, article 25 ensures the effective enjoyment of the Refugee Convention and strengthens the concrete application of both refugee law and human rights law in a mutually reinforcing way. Indeed, the duty endorsed in article 25 is particularly broad, 'when the exercise of a right by a refugee would normally require the assistance of [public] authorities'. This accordingly encompasses the guarantees attached to refugee status, as well as any other rights under human rights conventions.

iii) *Human Rights Law Upgrades Refugee Law when the Two Fields Govern the Same Subject Matter*

Human rights law and refugee law interact in a mutually supportive manner when they address the same right. The complementarity between the two operates within the content of their overlapping rules. When their respective rules significantly diverge in substance, their cumulative application requires the implementation of the most protective one. From this perspective, human rights law considerably enhances refugee law, even when the rights are common to both of them, because it is more extensive in scope and more detailed in content. Hence, the minimum standards prescribed by the refugee status is increased and, in many instances, superseded by human rights law.

The most salient case concerns the detention of asylum seekers. The Refugee Convention addresses this important issue in a minimalist and oblique way. Article

52 On the right to travel documents as inherent to freedom to leave: HRC (n 41) para 9.

31(2) merely allows States to restrict freedom of movement provided that restrictions are 'necessary' and 'applied until their status in the country is regularized or they obtain admission into another country'. This vague guidance is considerably enhanced by human rights law. In a nutshell, the prohibition of arbitrary detention requires that (1) any deprivation of liberty remains an exception and shall be reasonable, necessary, and proportionate; (2) the grounds and procedures governing detention are in accordance with, and authorized by, law; (3) any person deprived of liberty is informed of the reasons for detention; (4) there is a right to challenge the lawfulness of detention before a court; and (5) any victim of arbitrary detention has an enforceable right to compensation (article 9 of ICCPR).

As confirmed by the Human Rights Committee, any automatic detention of asylum seekers for illegal entry or for an indefinite period is arbitrary.[53] Instead, every deprivation of liberty must be justified and proportionate with due regard to the particular circumstances of each case and, as a result of the proportionality test, States shall provide alternatives to detention.[54] The ICCPR further supplements the Refugee Convention in ensuring that all asylum seekers deprived of their liberty shall be treated with humanity and with respect for human dignity (article 10(1)).

The prevalence of human rights law over refugee law in matters of common interest is further attested by the principle of non-discrimination. Article 3 of the Refugee Convention is limited by three substantial qualifications: (1) it only prohibits discrimination between and amongst refugees (thereby excluding discrimination between refugees and other foreigners or nationals); (2) the prohibited grounds of discrimination are restricted to race, religion, or country of origin; and (3) the scope of article 3 is confined to the application of the Refugee Convention.

By contrast, the principle of equality before the law, as endorsed in article 26 of the ICCPR, provides a free-standing and autonomous protection which extends beyond the rights provided by that treaty. This far-reaching principle 'prohibits discrimination in law or in fact in any field regulated and protected by public authorities'.[55] Furthermore, the prohibited grounds of discrimination are particularly extensive. In addition to race, religion, and national origin as equally mentioned in the Refugee Convention, they encompass colour, sex, language, political or other opinion, social origin, property, or birth. More fundamentally, these grounds are not exhaustive but merely illustrative. They extend to any 'other status', including thus refugee status or nationality.[56] The principle of equality before the law accordingly covers any form of discrimination both in law and practice, whether amongst refugees, between the lat-

[53] See eg *A v Australia*, UN doc CCPR/C/59/D/560/1993 (30 April 1997) para 9.4.

[54] See eg *Kwok v Australia*, UN doc CCPR/C/97/D/1442/2005 (23 November 2009) para 9.3.

[55] HRC, 'General Comment No 18: Non-Discrimination', UN doc HRI/GEN/1/Rev.6 (12 May 2003) 148–9, para 12.

[56] See with regard to nationality *Gueye et al v France*, UN doc CCPR/C/35/D/196/1985 (3 April 1989) para 9.4.

ter and other non-nationals, or between refugees and nationals. As a result of its broad scope, article 26 of the Covenant neutralizes and supersedes article 3 of the Refugee Convention.

Nonetheless, refugee law retains its relevance for consolidating and refining the principle of equality on more specific issues related to economic and social rights. According to articles 23 and 24 of the Refugee Convention, equality with nationals applies to refugees lawfully staying in the territory of Contracting parties with regard to public relief, labour legislation and social security. This assimilation with nationals clarifies and reinforces the protection deriving from the minimum core obligations of the ICESCR and the principle of equality before the law under the ICCPR.[57]

Conversely, human rights law retains its centrality for asserting the right to work for refugees. In addition to the principle of equality before the law, the core content of the right to work under the ICESCR 'encompasses the obligation to ensure non-discrimination and equal protection of employment'.[58] This includes the direct and immediate duty of States parties 'to ensure the right of access to employment, especially for disadvantaged and marginalized individuals and groups'.[59] Human rights law accordingly upgrades the minimum standards contained in the Refugee Convention: the former guarantees access to employment for all recognized refugees,[60] without regard to the rather demanding requirements of the latter.[61] In sum, while both branches of international law converge in granting the right to work, human rights law strengthens refugee law and increases its level of protection.

A similar pattern of convergence and complementarity can be found in the right to a fair trial. Article 16(1) of the Refugee Convention provides free access to domestic courts but says nothing about judicial proceedings and due process guarantees. While equal access to courts is inherent in the right to a fair trial,[62] human rights law enriches and upgrades refugee law by granting a significant set of due process guarantees. Article 14 of the ICCPR ensures the principle of equality before courts, the right to a fair hearing by an independent tribunal established by law, the presumption of innocence, the right to judicial review by a higher tribunal, and the right to compensation for a miscarriage of justice.

The added value of human rights law is sometimes much more subtle and operates within the interstices of its refugee law counterpart. A typical instance is provided by the

[57] On the application of the principle of equality to economic and social rights, see eg *Zwaan-de Vries v The Netherlands*, UN doc CCPR/C/29/D/182/1984 (9 April 1987).

[58] CESCR, 'General Comment No 18: The Right to Work,' UN doc E/C.12/GC/18 (6 February 2006) para 3.

[59] ibid.

[60] CESCR, 'Concluding Observations: Kenya,' UN doc E/C.12/KEN/CO/1 (19 November 2008) para 13.

[61] Refugees must be lawfully staying in Contracting parties and they are treated like any other foreigners for self-employment and liberal professions, while being assimilated to most-favoured foreigners for wage-earning employment: articles 17, 18, and 19 of the Refugee Convention.

[62] HRC, 'General Comment No 32: Right to Equality before Courts and Tribunals and to a Fair Trial,' UN doc CCP/GC/32 (23 August 2007) para 9.

right to liberty of movement and freedom to choose his residence.[63] This right is acknowledged in similar terms by the Refugee Convention (article 26) and the ICCPR (article 12(1)) for those who are lawfully within the territory of States. Despite this convergence, human rights law still remains more inclusive (its benefit being not limited to recognized refugees) and more protective with regards to permissible restrictions. The Refugee Convention allows extensive restrictions under 'any regulations applicable to aliens generally'. By contrast, the ICCPR is more demanding. Article 12(3) requires three cumulative conditions: restrictions are provided by law, necessary to protect national security or public order, and consistent with the other rights of the Covenant. The central purpose is to ensure that 'the restrictions must not impair the essence of the right',[64] as may be the case under the vague and permissive provision of the Refugee Convention.

4. Conclusion

Refugee protection is part and parcel of the broader international human rights framework. It stands out as a practical and powerful means to guarantee due respect for fundamental rights. Reciprocally, human rights law upgrades and reinforces refugee law within a normative continuum of protection. The gravitational force of human rights law has attracted the Refugee Convention into its orbit and anchored it as a satellite within the vast constellation of the other human rights treaties. As a result of this centrifugal force, human rights law has become the new orthodoxy of refugee law with the overall result of encapsulating it within its ambit. However, the evolution of international law collides with a powerful force of inertia: domestic law is still imbued by the Refugee Convention following a compartmentalized approach to protection.

Isolating the Refugee Convention from other human rights treaties offers the perfect excuse for States to undermine their duties under international law. Refugee law is increasingly implemented as a tool of migration control rather than a means for protecting victims of human rights violations. The alleged primacy of the Refugee Convention provides, in turn, a powerful rhetorical device for justifying a bias that has no rationale under international law. The ghettoization of the principle of *non-refoulement* under human rights law offers a paradigmatic illustration. It has been primarily confined to a mere obstacle to removal, whereas its counterpart under the Refugee Convention is associated with international protection *tout court*, notwithstanding the absence of any provision on asylum. Despite, and because the human rights principle of *non-refoulement* is wider than that provided in the Refugee

[63] See also with regard to procedural guarantees governing expulsion under article 32 of the Geneva Convention and article 13 of the ICCPR: Chetail, 'Are Refugee Rights Human Rights?' (n 7) 58–61.

[64] HRC (n 41) para 13.

Convention, States have not yet drawn all the consequences of human rights law as a vehicle of international protection. This double standard fails to acknowledge that, when compared with human rights law, refugee law has much more to receive than to give.

International law is not a *menu à la carte*. It is binding as a whole and its overall design makes sense only when its rules are understood and applied in their totality. Following this stance, an integrated approach to refugee protection reflects the unity and diversity of international law, whereby States are bound by a plurality of legal commitments within the same international legal system. This holistic approach opens up new perspectives to rethink and revisit the reach of refugee protection. From this angle, acknowledging the pervasiveness of human rights law goes beyond the range of States parties to the Refugee Convention. It provides an authoritative framework of international protection for non-States parties and it addresses the responsibility of States of origin.

CHAPTER 12

INTERNATIONAL HUMANITARIAN LAW AND REFUGEE PROTECTION

REUVEN (RUVI) ZIEGLER

1. IHL and Displacement—An (Un)Easy Relationship?

Conflicts are prevalent,[1] displacement from conflict is rampant,[2] and the image of a person fleeing conflict is commonly associated in our collective psyche with the notion of human displacement. Yet international humanitarian law (IHL),[3] the body of law

[1] The Heidelberg Institute for International Conflict Research, 'Conflict Barometer' (2019) <https://hiik.de/conflict-barometer/current-version/?lang=en> accessed 13 October 2020, observed 358 conflicts worldwide in 2019. According to the Barometer 55 per cent of conflicts (196) were violent and 162 were non-violent. Of the violent conflicts, there were 15 full-scale wars, 23 limited wars, and 158 violent crises. Of non-violent conflicts, 91 were non-violent crises and 71 were disputes.

[2] Helen Obrego'n Gieseken, 'The Protection of Migrants under International Humanitarian Law' (2017) 99 International Review of the Red Cross 121, 122.

[3] In scholarship, IHL is sometimes referred to as 'Law(s) of Armed Conflict'. This chapter considers the following IHL instruments: The Four 1949 Geneva Conventions (referred to as the GCs) and the first two Additional Protocols to the GCs (APs). GCs: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 (GCI); Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85 (GCII); Convention (III) relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (GCIII); Convention (IV) relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (GCIV). APs: Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977,

regulating the conduct of hostilities, explicitly offers rather limited protections to persons fleeing conflict *qua* displaced persons. Its status-based distinctions entail selective application, depending *inter alia* on whether persons find themselves in the territory of a State party to the conflict or of a non-belligerent State.

The IHL legal framework represents a compromise between two principles, military necessity (permitting the degree and kind of force required to achieve legitimate purposes of a conflict) and humanity (prohibiting the infliction of all suffering, injury, or destruction deemed unnecessary for achieving such purposes).[4] IHL's underlying assumption is that conflicts will occur, and so they should be regulated; and that while indiscriminate attacks should be prohibited, some destruction and death is inevitable. IHL shares the concerns of international refugee law (IRL) and, indeed, international human rights law (IHRL) for vulnerable individuals, but unlike other regimes, its frame of reference is minimization of harm.

This chapter considers interrelations between IHL and IRL in armed conflict situations. The two regimes have evolved at different times and with their own specific sources, institutions, and ethos.[5] Despite their divergent points of departure, the regimes share several normative features. First, they are generally framed as obligations of States rather than individual rights. Secondly, the traditional distinction between nationals and non-nationals is a foundation stone for identifying and framing the applicable norms. Thirdly, both regimes rely on a decentralized scheme of implementation absent robust international supervisory mechanisms.[6]

Yet there are at least six ways in which IHL can be distinguished from other protection regimes.

First, the application of IHL norms is contingent on the existence of an armed conflict as understood in IHL. IHL regulates two types of conflicts: International Armed Conflicts (IACs)[7] and Non-international Armed Conflicts (NIACs).[8] IHL norms do not apply to a conflict that does not meet either an IAC or a NIAC threshold. Hence, whereas the 1967 Protocol removed the temporal restriction on the applicability of the Refugee Convention, IHL treaties—and associated Customary International Law (CIL) norms—are temporally constrained.[9] While it could be argued that IHL and IRL are similar in that their applicability is triggered by circumstances that are viewed as being exceptional in character,[10] the

entered into force 7 December 1978) 1125 UNTS 3 (API); Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (APII).

[4] International Committee of the Red Cross (ICRC), 'What is IHL' (18 September 2015) <https://www.icrc.org/en/document/what-ihl> accessed 13 October 2020.

[5] Vincent Chetail, 'Armed Conflict and Forced Migration: A Systemic Approach to International Humanitarian Law, Refugee Law and Human Rights Law' in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (OUP 2014) 702.

[6] ibid 733. [7] GCs (n 3) common art 2 (CA2). [8] ibid common art 3 (CA3).

[9] Nevertheless, certain IHL obligations apply after the end of an armed conflict: Gieseken (n 2) 123.

[10] David J Cantor and Jean-François Durieux, 'Refuge from Inhumanity? Canvassing the Issues' in David J Cantor and Jean-François Durieux (eds), *Refuge from Inhumanity? War Refugees and International Humanitarian Law* (Brill 2014) 10.

triggers are different. Given that IHL applies in exceptional (conflict) situations only, its norms cannot be derogated from.

Secondly, IHL classifies individuals and apportions corresponding obligations. It distinguishes between civilians and combatants, protecting the former from attack and the latter from subjection to penal sanctions for participation in hostilities ('combatant immunity'). Certain protections are accorded to those 'no longer taking direct part in hostilities' (persons *hors de combat*). IHL offers heightened protection, including from displacement, to those who qualify as 'protected persons'. In turn, IHL's explicit offering to persons deemed particularly vulnerable, including 'refugees' and those in refugee-like situations, is rather limited.

Thirdly, whereas violations of IHL norms are relevant to IRL exclusion from refugee status as per article 1F(a) of the Refugee Convention, pursuant to their designation as 'war crimes' in the Rome Statute of the International Criminal Court Statute (Rome Statute),[11] individuals are not 'excluded' from status-based protection under IHL, though the above-mentioned combatant immunity does not extend to IHL violations.

Fourthly, whereas a failure of State protection is a constitutive element of the Refugee Convention definition,[12] IHL operates on a (rebuttable) assumption that individuals can and will enjoy their State's protection during an armed conflict: nationals of a State held by that State are ineligible for 'protected persons' status,[13] and, when held by other States, they are considered to bear allegiance to their State, absent exceptional circumstances.

Fifthly, IHL norms bind all parties to an armed conflict and thus establish an equality of rights and obligations between State and non-State actors for the benefit of those who may be affected by their conduct. Hence, armed groups that participate in an IHL-regulated armed conflict have treaty and CIL-based obligations. This chapter centres on the obligations of *States*, both parties to a conflict and non-belligerent, whereas Chapter 63 in this volume appraises responsibilities of armed groups.

Sixthly, whereas the scope and extent of the extraterritorial application of other protection regimes is the subject of ongoing debate,[14] it is uncontentious that IHL governing IACs applies extraterritorially, given its purpose is to regulate the conduct of one or more States involved in an armed conflict on the territory of another. This reasoning applies *mutatis mutandis* in NIACs with an extraterritorial element: parties to such conflict are not absolved of their IHL obligations when the conflict reaches beyond the territory of a single State.

[11] Article 1F(a) stipulates that the Refugee Convention shall not apply where there are serious reasons for considering that a person has committed 'a war crime … as defined in the international instruments drawn up to make provision in respect of such crimes'. In turn, 'grave breaches' of the GCs constitute 'war crimes' in IACs as per art 8 of the Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2000) 2187 UNTS 90 (Rome Statute). See also arts 8(2)(c), 8(2)(d), and 8(2)(e). Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (CUP 2005) rules 156–8 (CIHL Study). For discussion of the exclusion clauses see Chapter 39 in this volume.

[12] cf James C Hathaway and Hugo Storey, 'What is the Meaning of State Protection in Refugee Law? A Debate' (2016) 28 IJRL 480.

[13] Theodor Meron, 'The Humanization of Humanitarian Law' (2000) 94 AJIL 239, 258.

[14] See eg re IHRL, Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (OUP 2011); re IRL see Chapter 50 in this volume.

Section 2 considers questions of 'regime interaction'[15] between IHL and the (global and regional) refugee protection regimes which continue to apply during conflict. It queries whether the IHL threshold of application and references to IHL terms-of-art, such as 'civilian', should guide the interpretation of IRL. The chapter thus converses with IRL analysis of 'Conflict Refugees'[16] and with chapters considering regional protection regimes in Latin America,[17] Africa,[18] and the EU.[19]

Section 3 considers the scope of application of IHL norms. It appraises the significance of IHL classification, including the question who classifies conflicts. Given that, globally, most armed conflicts are NIACs, the scope of IHL norms that apply to such conflicts depends on the extent to which IAC norms apply in NIACs as CIL.[20]

Section 4 appraises IHL displacement-related norms and the extent to which IRL interpretations affect them. It considers three perspectives: first, prevention of displacement in conflict through placing restrictions on means and methods of warfare, and through the fundamental principle of distinction which, if observed, would minimize harming civilians and causing their displacement;[21] secondly, treatment of displaced persons in conflict;[22] thirdly, *non-refoulement*[23] including repatriation during and post-conflict.[24] Section 5 concludes.

2. Effects of IHL on Global and Regional Refugee Protection Regimes

a. Regime Interaction

That global and regional refugee protection regimes continue to apply during armed conflict is uncontroversial.[25] It is less clear whether the IHL threshold and IHL terms-of-art should affect interpretation of norms of such regimes. The Vienna Convention on the Law of Treaties (VCLT)[26] stipulates that a treaty be 'interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.[27] In its study on fragmentation of international law, the International Law Commission (ILC) noted the *lex specialis derogat legi*

15 Margaret A Young (ed), *Regime interaction in International Law: Facing Fragmentation* (CUP 2012).

16 See Chapter 45 in this volume.

17 See Chapter 17 in this volume.

18 See Chapter 15 in this volume.

19 See Chapter 19 in this volume.

20 CIHL Study (n 11).

21 GCIV (n 3) art 49.

22 ibid arts 44, 70(2), 73.

23 See Chapter 50 in this volume.

24 GCIV (n 3) art 45(4); GCs (n 3) common art 1 (CA1).

25 Walter Kälin, 'Flight in Times of War' (2001) 83(843) International Review of the Red Cross 629, 637. See also Eric Fripp, 'International Humanitarian Law and the Interpretation of "Persecution" in Article 1A(2) CSR51' (2014) 26 IJRL 382, 396.

26 (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT).

27 ibid art 31(1). In an IHL interpretive context, see Jakob Kellenberger, 'Foreword' in CIHL study (n 11) xvi.

generali interpretive principle, namely that 'whenever two or more norms deal with the same subject matter, priority should be given to the norm that is more specific'.[28] Given that both IHL and IRL arguably qualify as '[s]pecial ("self-contained") regimes' as per the ILC fragmentation study,[29] it is not clear whether IHL norms should be prioritized in interpreting refugee protection regimes or whether IRL norms should be given a 'truly autonomous meaning' and, indeed, dominate IHL interpretation. Chetail proposes resolving interpretive challenges in displacement contexts by adopting a complementarity approach: overlapping IHL, IRL, and IHRL norms are applied cumulatively, with a view to implementing the most protective norm.[30] Yet, we should remember that, precisely because of the regimes' divergent objectives, it is not obvious that, for instance, using a wider definition of 'civilian' than its IHL equivalent to interpret an IRL norm would be considered a more protective outcome *in IHL terms*.

A different interpretive approach builds on the VCLT stipulation that, in addition to the context, 'any relevant rules of international law applicable in the relations between the parties' should be 'taken into account'.[31] Peters suggests that, in respect of 'relations between the parties', the better (and prevailing) view is that it is not necessary that all States in the organization/treaty are also parties to the other treaty to make the latter usable, if the other States are not involved in the dispute.[32] Even on a more restrictive view, taking IHL norms into account in interpreting global and regional refugee law treaties would not ordinarily be contentious, given the wide ratification of IHL treaties and the CIL status of many of its norms.[33] In the same vein, the ILC study advocated 'harmonization' such that 'when several norms bear on a single issue they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations'.[34] Yet, whereas aspiring to achieve harmonious interpretation is desirable, it is not always obtainable: when treaty norms are clearly designed to achieve different objectives, relying on an external norm risks undermining the treaty's object and purpose.

b. The Refugee Convention

Section 3 considers IHL's scope of application. Should it affect the application of the Refugee Convention? The UNHCR Handbook (still) stipulates that 'persons compelled to leave their country of origin as a result of international or national armed conflicts are

[28] International Law Commission (ILC), *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, Conclusions of the Work of the Study Group*, UN doc A/CN.4/L.702 (18 July 2006) conclusion 5.

[29] ibid conclusion 12. [30] See Chapter 11 in this volume. [31] VCLT (n 26) art 31(3)(c).

[32] Anne Peters, 'The Refinement of International Law: From Fragmentation to Regime Interaction and Politicization' (2017) 15 International Journal of Constitutional Law 671, 694.

[33] See also Cantor and Durieux (eds) (n 10) 19.

[34] ILC (n 28) conclusion 4. See eg Peters (n 32) 692.

not normally considered refugees under the 1951 Convention or 1967 Protocol'.[35] Yet, UNHCR's contemporary interpretive position is that it is neither necessary nor sufficient for an 'armed conflict' in the IHL sense to take place for a person to be recognized as a refugee pursuant to the Refugee Convention, though it may assist in contextualizing the claim.[36]

Storey contends that IHL should be the starting interpretive point for considering applicability of the Refugee Convention in an armed conflict context, to be departed from wherever norms from other regimes are more protective.[37] Durieux, however, argues that the existence of an armed conflict is more aptly conceived as contextual or 'neutral', given that none of the constituent conditions of the 'inclusion' clause in article 1A(2) of the Refugee Convention refers to conflict, and that its focus is on *persecution*.[38]

I would respectfully posit that crossing an IHL threshold *as such* does not significantly alter the interpretation of constitutive elements of the refugee definition, and it would therefore be misguided to treat an asylum application differently merely because it is submitted prior to or after the commencement of an armed conflict as construed in IHL. There can be 'riots, isolated and sporadic acts of violence' (as per article 1(2) of Additional Protocol II (APII)) that fall short of the IHL threshold and yet give rise to a well-founded fear of persecution; and, conversely, not all persons displaced by IHL conflicts are 'unwilling' or 'unable' to avail themselves of the protection of their country of nationality or habitual residence, due to a well-founded fear of persecution for a convention reason. An IHL threshold should not therefore be the primary reference, let alone a decisive factor, in determining the assessment of an asylum claim.[39]

Whereas the article 1A(2) definition arguably does not include references to IHL terms-of-art, the article 1F(a) exclusion clause manifestly requires engagement with the notion of 'war crimes' in IACs and NIACs.[40] The only other direct reference in the Refugee Convention to an IHL term-of-art appears in article 9, which notes 'war' as a justificatory base for a State taking 'provisionally measures which it considers to be essential to the national security in the case of a particular person'. The drafters may have sought to rely on this provision to justify internment of enemy nationals 'masquerading

[35] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/1P/4/ENG/REV.4 (1979, reissued 2019) para 164.

[36] UNHCR, 'Guidelines on International Protection No 12: Claims for Refugee Status relating to Situations of Armed Conflict and Violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees and the Regions Refugee Definitions,' UN doc HCR/GIP/16/12 (2 December 2016) para 5. See Chapter 45 in this volume.

[37] Hugo Storey, 'Armed Conflict in Asylum Law: The War Flaw' (2012) 31(2) RSQ 1; Hugo Storey, 'The "War Flaw" and why it Matters' in Cantor and Durieux (eds) (n 10) 39, 40.

[38] Jean-François Durieux, 'Of Wars, Flows, Laws, and Flaws: A Reply to Hugo Storey' (2012) 31(3) RSQ 161, 163.

[39] See eg Fripp (n 25) 402. Compare Stephane Jacquemet, 'Expanding Refugee Protection through International Humanitarian Law: Driving on a Highway or Walking near the Edge of the Abyss' in Cantor and Durieux (eds) (n 10) 79, 97.

[40] Fripp (n 25) 384.

as refugees',[41] the risk of so-called 'fifth columnists'. Yet, as noted above, the occurrence of 'war' is not an IHL threshold in either IACs or NIACs, and so the provision's application does not depend on an IHL-defined conflict, not least because its alternative basis for operation is 'other grave and exceptional circumstances'. Moreover, article 9 does not affect eligibility for protection: provisional measures, which must be necessary 'in the interests of national security', can only last until refugee status determination is finalized.

c. Regional Refugee Definitions: OAU and Cartagena

Refugee definitions in Africa and Latin America identify conditions when refugee status is delinked from the Refugee Convention's persecution requirement. Do some of their added contextual circumstances merit interpretive recourse to IHL?

The OAU Convention definition includes four refugee-producing events arguably relating to conflict situations: 'external aggression', 'foreign domination', 'occupation', and 'events seriously disturbing public order'. Yet, in international law, the term 'aggression' is associated with *jus ad bellum* (related to the use of force) rather than *jus in bello* (IHL); 'foreign domination' is not an IHL term-of-art; and the existence of an IAC or a NIAC is neither necessary nor sufficient to define an event as 'seriously disturbing public order'.[42] In contradistinction, it may be justifiable to give 'occupation' similar meaning in OAU interpretation as per IHL.

In Latin America, the Cartagena Declaration refers to 'generalized violence', 'foreign aggression' and 'internal conflicts'. The abovementioned reservations about the application of IHL to 'aggression' apply here, too, whereas 'generalized violence' is not an IHL term-of-art. One may also question whether it is desirable to read 'internal conflict' to mean NIACs, given that conflicts which fall short of an IHL threshold could cause displacement.[43]

d. Subsidiary Protection in EU Law

Unlike the OAU Convention and the Cartagena Declaration, the EU Qualification Directive does not expand the applicable refugee definition in its region beyond that in the Refugee Convention. Rather, it creates a 'subsidiary protection' status based on three alternative protection grounds. Article 15 protects persons where there is a serious risk

[41] Atle Grahl-Madsen, *Commentary on the Refugee Convention* (UNHCR 1963) 44.

[42] Tamara Wood, 'The African War Refugee: Using IHL to Interpret the 1969 African Refugee Convention's Expanded Refugee Definition' in Cantor and Durieux (eds) (n 10) 179, 192–7.

[43] David J Cantor and Diana Trimiño Mora, 'A Simple Solution to War Refugees? The Latin American Expanded Definition and its Relationship to IHL' in Cantor and Durieux (eds) (n 10) 204, 207, 214–15. cf José H Fischel de Andrade, 'The 1984 Cartagena Declaration: A Critical Review of Some Aspects of Its Emergence and Relevance' (2019) 38 RSQ 341.

that they would suffer serious harm elsewhere, which it defines *inter alia* as (c) a 'serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict'. The provision uses several terms that borrow *inexactly* from IHL: 'civilian', 'indiscriminate violence', and 'international or internal armed conflict'.[44] Should they be given an 'IHL' meaning when interpreted in a (regional) refugee protection context?

Balouz warns against adopting a pure IHL approach to article 15(c).[45] An IHL interpretation of 'indiscriminate violence' would be limited to attacks that violate IHL, yet IHL permits 'incidental harm' to civilians. In contrast, attacking civilian areas where the population is suspected of siding with an armed opposition group is prohibited under IHL as 'indiscriminate'[46] in failing to distinguish between combatants and civilians. However, in an IRL context, it is unhelpful to describe such an attack as 'indiscriminate' since it implies the attack does not have the persecutory character required for recognition as a refugee under the Refugee Convention definition.[47] Balouz therefore claims that 'indiscriminate violence' should be understood as referring to the *effects* of the violence on civilians.[48] A similar challenge arises in interpreting the term 'civilian', rooted in the IHL principle of distinction. As previously noted, a military deserter would not necessarily be considered a civilian under IHL and would therefore be denied subsidiary protection (though they may enjoy IHL protections). Moreno-Lax cogently argues that the fact that violations of IHL *may* be persecutory in an IRL sense does not, in the reverse, reduce persecution for the purposes of qualification as a refugee to conduct contrary to IHL. In her view, IHL may be 'a factor' aiding interpretation but it cannot replace a construction of article 15(c) in light of its object and purpose, with the Refugee Convention and the EU Charter of Fundamental Rights as the primary reference framework.[49] Notably, the European Court of Justice (CJEU) in *Elgafaji* accorded an autonomous meaning to the terms 'indiscriminate violence' and 'civilian' in article 15(c).[50]

Given that article 15(c) applies only in stations of 'international or internal armed conflict', the interpretive question is whether to apply an IHL meaning to both these terms. In *Diakité*, the CJEU held that

> an internal armed conflict exists, for the purposes of applying [article 15(c)], if a State's armed forces confront one or more armed groups or if two or more armed groups confront each other . . . it is not necessary for that conflict to be categorised as 'armed conflict not of an international character' under international humanitarian law; nor is it necessary to carry out, in addition to an appraisal of the level of violence

[44] There is also a crossover effect of IHL on article 3 of the ECHR. See eg *Sufi v United Kingdom* (2012) 54 EHHR 9. See also Chapter 11 in this volume.

[45] Celine Balouz, 'The (Mis)use of International Humanitarian Law under Article 15(c) of the EU Qualification Directive' in Cantor and Durieux (eds) (n 10) 247, 248.

[46] CIHL Study (n 11) rules 11, 12.

[47] Durieux (n 38) 165.

[48] Balouz (n 45) 261.

[49] Violeta Moreno-Lax, 'Of Autonomy, Autarky, Purposiveness and Fragmentation: The Relationship between EU Asylum Law and International Humanitarian Law' in Cantor and Durieux (eds) (n 10) 295, 308.

[50] Case C-465/07 *Elgafaji v Staatssecretaris van Justitie* [2009] ECR I-921, para 43.

> present in the territory concerned, a separate assessment of the intensity of the armed confrontations, the level of organisation of the armed forces involved or the duration of the conflict.[51]

The CJEU cited approvingly the Advocate General's opinion, which proposed assessing whether there is a *de facto* situation of armed conflict.[52] Clearly, confining article 15(c)'s application to conflicts that meet an IHL threshold will deny subsidiary protection to persons detrimentally affected by such conflicts.

Having considered indirect effects of IHL on global and regional protection regimes, Section 3 turns to IHL's scope of application, setting the scene for Section 4's appraisal of IHL's regulation of displacement in conflict.

3. The Scope of Application of IHL

a. International Armed Conflicts and Non-international Armed Conflicts

IHL protections for displaced persons are dependent on the (current or previous) existence of an IAC or a NIAC. As per CA2 of the GCs, IAC norms apply to 'all cases of declared war or of any other armed conflict which may arise between two or more' High Contracting Parties as well as to 'partial or total occupation of the territory of a High Contracting Party'. The test is therefore *factual*: formal declaration of war, warning, ultimatum, or recognition of the state of conflict are not necessary; neither the length nor the intensity of the conflict matters. Additional Protocol I (API) article 1(4) stipulates that IACs include 'armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination'.

IACs are far more thoroughly regulated than NIACs, to which CA3 technically refers as 'armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties'. NIACs may occur between State armed forces and non-State organized armed groups (OAGs) or between such groups. Whereas CA3 does not spell out applicability conditions, the International Criminal Tribunal for the former Yugoslavia (ICTY) in *Tadić* held NIACs require *protracted armed violence*.[53] NIACs which meet the higher APII article 1(1) threshold are also subject to CA3's stipulations. Such conflicts must take place

[51] Case C-285/12 *Diakité v Commissaire general aux refugies et aux apatrides* (CJEU, 30 January 2014), para 35.

[52] ibid para 66.

[53] Judgment, *Tadic* (IT-94-1-A ICTY) Appeals Chamber, 15 July 1999, para 70.

> in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

One can therefore consider four types of armed conflicts (though in complex conflicts, two or more of these prototypes may apply simultaneously).[54] First, there are conflicts 'not of an international character' that do not meet the CA3 threshold. Displacement in and from such conflicts is not regulated by IHL. Secondly, there are IACs that meet the CA2 threshold. Such conflicts are subject to the full scope of the GCs, including CA3 (which was recognized as having CIL status), and to the full scope of API for the 174 States parties thereto.[55] API norms that have crystallized into CIL norms bind non-signatory States as well as OAGs in 'internationalized' armed conflicts. Thirdly, there are NIACs that meet the CA3 threshold but fall short of the APII threshold. Formally, they are only regulated by CA3, though many IAC norms apply to such conflicts as CIL. Fourthly, there are NIACs that meet the APII threshold[56] and are subject, in respect of the territory of the 169 States parties thereto, to APII norms.[57] APII norms that have crystallized into CIL norms bind non-signatory States as well as OAGs.

b. Who Classifies Conflicts, and does Classification Matter?

As a practical matter, States must classify conflicts as IACs, NIACs or indeed as an 'internationalized' NIAC between a State and an OAG. For States parties, conflict classification and consequent application of IHL norms pose a challenge: while certain means and methods are permissible only in armed conflict, there are also protections and obligations that accrue. For non-belligerent States, international relations considerations may enter, including political implications of a determination that the

[54] Not all armed conflicts can be neatly classified as IACs or NIACs: some conflicts may commence as NIACs and subsequently 'internationalize'. Mačák describes four such modalities: Kubo Mačák, *Internationalized Armed Conflicts in International Law* (OUP 2018) 241–3. See further ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (2nd edn CUP 2016) paras 237 and 262, and Andrew Clapham, 'Defining Armed Conflicts under the Additional Protocols: Is there a Need for Further Clarification?' in Fausto Pocar (ed), 'The Additional Protocols 40 Years Later: New Conflicts, New Actors, New Perspectives' (International Institute of Humanitarian Law 2018) 33.

[55] ICRC, 'States Parties to the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 July 1977' <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=Xpages_NORMStatesParties&xp_treatySelected=470> accessed 13 October 2020.

[56] Yoram Dinstein, *Non-International Armed Conflicts in International law* (CUP 2014) 39. See also Marco Pedrazz, 'Additional Protocol II and Threshold of Application' in Pocar (n 54) 48, 54.

[57] ICRC, 'States Parties to the Protocol Additional to the Geneva Conventions on 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977' <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=475> accessed 13 October 2020.

situation in a neighbouring State amounts to an IAC or a NIAC. Given the diffused nature of IHL application, it is conceivable that a conflict situation would be treated by certain States or indeed by international bodies as an armed conflict but that some or all parties to the conflict would resist that classification.

Internationally, an International Committee of the Red Cross (ICRC) classification of a situation as IAC or NIAC allows it to commence its activities pursuant to the GCs, but it is not binding on the parties concerned or, indeed, on other treaty bodies. Similarly, while a UN Security Council resolution determining the existence of a 'threat to the peace, breach of the peace, or act of aggression'[58] can trigger enforcement measures, it is not a legally binding finding that an armed conflict exists (though if a resolution calls upon parties to a conflict to respect the GCs, whose application presupposes the existence of an IAC or a NIAC, it may have persuasive force). International and/or domestic courts may be required to make determination of the existence of a conflict *ex post facto* when they try individuals for alleged violations of IHL. Depending on the approach taken to interpreting refugee protection, they may (choose to) make determinations while conflicts are ongoing.

The ICRC Customary International Humanitarian Law study suggests that many customary rules derived from IAC treaties apply in NIACs, including general rules or principles designed to protect the civilian population as well as rules governing means and methods of warfare. Nevertheless, for appraisal of States' displacement-related obligations, it (still) matters not only *whether* an armed conflict exists, but also the conflict's *classification*. As the analysis in Section 4 demonstrates, NIACs remain less regulated—and protective—than IACs.

4. Displacement in IHL

a. Context

The question whether displacement took place from a territory experiencing an armed conflict and, if so, which type of conflict is applicable, is critical to determining whether (and which) IHL norms apply. If so, alongside the reason for displacement, an individual's personal status, as a civilian (which may or may not be a 'protected person') or combatant, and the status of the State to which they were displaced (belligerent, co-belligerent, or non-belligerent) determines the scope and content of IHL obligations. Whereas IHL differs from other (protection) regimes, some treaty provisions reference IRL terms-of-art: should those provisions be given IRL-compatible interpretations, or should it be autonomous?

[58] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter), art 39.

b. Adherence to IHL, the Principle of Distinction, and Prevention of Displacement

No IHL provision generally prohibits displacement *as such* in all conflict situations:[59] IHL envisages destruction, death, and ultimately displacement. Nevertheless, adherence to, and respect for, IHL rules, not least those protecting civilians against the effects of hostilities, can minimize displacement of civilians either across international borders or within a country *for reasons related to the armed conflict*. Indeed, displacement of the civilian population for reasons related to the conflict that are *not* required for the security of the civilians involved, or are an imperative military necessity, may be part of an overt or covert 'ethnic cleansing' policy.

Parties to a conflict do not have an unrestricted right to choose methods or means of warfare and are prohibited from using them if they are 'indiscriminate' or are likely to cause superfluous injury or unnecessary suffering. In conducting hostilities, the fundamental principle is that 'parties to a conflict must, at all times, distinguish between civilians and combatants and between civilian objectives and military objects'.[60] Civilians are protected from attack 'unless and for such time as they take a direct part in hostilities'[61] and neither the civilian population as a whole nor individual civilians may be directly attacked. There is a duty to take precautions in attack and against the effect of attacks on the civilian population,[62] a prohibition on the destruction of objects indispensable to the population's survival,[63] a prohibition on reprisals against the civilian population and its property,[64] and a requirement to allow unhindered passage of relief supplies and assistance necessary for the survival of the civilian population.[65] Nevertheless, adherence to the prohibition on use of civilians as 'human shields', protection of women,[66] and protection of children[67] may require civilian evacuation.[68]

In order to protect the civilian population, attacks are only permitted on military objectives that 'by their nature, location and purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage'.[69] Refugee camps are presumed not to be used for military purposes, even when a refugee camp is located in places where military activities are carried out and notwithstanding the presence of armed elements therein: the onus lies with those claiming that a civilian object has been turned into a military one, given that 'the presence within the civilian population of individuals' who are not civilians 'does not deprive the population of its civilian character'. The clear intention is to preserve the safety of displaced populations on the territory of a party to the conflict.

[59] David James Cantor, 'Laws of Unintended Consequence? Nationality, Allegiance and the Removal of Refugees during Wartime' in Cantor and Durieux (eds) (n 10) 345.
[60] API (n 3) arts 48–54, APII (n 3) arts 13–14; CIHL Study (n 11) rules 1, 7.
[61] CIHL Study (n 11) rule 5. [62] API (n 3) arts 57–8. [63] ibid art 54. [64] ibid art 20.
[65] ibid art 70. [66] ibid art 76. [67] ibid arts 77–8. [68] ibid arts 57–8.
[69] ibid art 52(2).

c. Individual Status in Conflict

IHL protections in conflict flow from individual status. API article 50 defines a 'civilian' in an IAC as a person who does not belong to one of the categories of persons referred to in GCIII article 4A(1), (2), (3), and (6) and in API article 43. It stipulates that 'in case of doubt whether a person is a civilian, that person shall be considered to be a civilian'.[70] Conversely, 'combatants' are targetable; however, if captured, they are entitled to Prisoner of War (PoW) status: the so-called 'combatant privilege'.[71] That the GCIII combatant category in IACs has been substantially extended by API is at the core of certain States' unwillingness to ratify it; the consequence is that PoW protections, including in respect of *refoulement*, do not universally apply.[72] Meanwhile, in NIACs, there is no 'combatant' status, and no PoW status: members of OAGs participating in conflict may be prosecuted under domestic law for doing so.

Civilian protections apply in both IACs and NIACs. However, in IACs, some civilians are 'protected persons': as subsequent sections demonstrate, they enjoy special IHL protections, including in respect of prevention of displacement and treatment *qua* displaced persons. 'Protected persons' are those who, 'at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals'.[73] Nationals of the capturing State, of a co-belligerent State, or of a neutral State are excluded, unless the neutral State and the concerned national's State do not enjoy 'normal diplomatic relations'.[74] Given their universal ratification, the stipulation that nationals of a State that has not ratified the GCs cannot be 'protected persons' is moot.[75]

IHL operates on a rebuttable assumption that a person can enjoy their State's protection.[76] 'Protected persons' are presumed to *no longer* enjoy an effective protection of their State, either because there is a conflict between their State and the State in whose power they are held, or because their State has no diplomatic relations with that State.

IHL offers limited protections to a broader category, of 'persons who are not or are no longer taking an active part in hostilities' which includes, alongside 'civilians', non-combatant members of the armed forces (ie medical and religious personnel, members of the armed forces who have laid down their arms, and those placed *hors de combat* (out of action)). They are entitled to respect for their lives and for their physical and mental integrity and must in all circumstances be protected and treated with humanity.[77]

[70] CIHL Study (n 11).

[71] See eg Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare* (Edward Elgar 2019).

[72] See Yoram Dinstein, 'Lawful Combatancy' in Dinstein (n 56).

[73] GCIV (n 3) art 4(1).

[74] ibid art 4(3).

[75] ibid art 4(2).

[76] In *Tadic* (n 53) paras 164, 169 the ICTY sought to move from legal to factual test. See further, Gary D Solis, *The Law of Armed Conflict* (2nd edn CUP 2016) 252.

[77] CIHL Study (n 11).

d. Prevention of Displacement from Conflict

Whereas IHL does not prohibit displacement as such, in IAC situations of occupation, individual or mass forcible transfers of protected persons, both within the occupied territory and beyond its borders, is prohibited.[78] Unless they are nationals of the occupying State, migrants are similarly protected. The deportation or transfer of all or parts of the population of the occupied territory within or outside this territory is a war crime.[79]

A limited exception permits an occupying power to evacuate the inhabitants of an area if this is necessary for the security of the civilian population or for imperative military reasons that are hampered by the presence of the civilian population; such evacuations should not involve displacement of civilians outside the occupied territory unless this is impossible for material reasons, and displaced persons must be transferred back to their homes as soon as the hostilities in the area in question have ceased.[80] A parallel prohibition in NIACs (whether or not they meet the APII threshold) prevents parties to the conflict from 'ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand';[81] breaching this prohibition constitutes a war crime.[82]

e. Displaced Persons in Conflict

i. *'Refugees'*

'Protected persons', including non-nationals, have a right to leave a State's territory at the outset of or during a conflict, unless their departure is contrary to the national interests of that State.[83] The right to leave an occupied territory extends to 'protected persons' who are not nationals of the Power whose territory is occupied.[84]

Some of those fleeing their State during conflict may seek refuge in a State where they are considered 'enemy aliens'; yet, *de facto*, they do not bear allegiance to their State of nationality and should thus not be considered as a potential threat to the host country. Hence, inspired by the plight of German Jews in the Second World War,[85] IHL instructs States not to treat 'refugees' 'who do not, in fact, enjoy the protection of any government' as 'enemy aliens exclusively on the basis of their nationality *de jure* of an enemy State'.[86] The provision invites States parties to take into consideration what might be called the 'spiritual affinity' or 'ideological allegiance' of a protected person. 'Refugees' are not exempt from being subject to security measures, including internment.

[78] GCIV (n 3) art 49(1). See also CIHL Study (n 11) rule 129(A).
[79] Rome Statute (n 11) art 8(2)(b)(viii).
[80] GCIV (n 3) art 49(2). CIHL Study (n 11) rule 132.
[81] CIHL Study (n 11) rule 129(B). See also Office of Coordination and Humanitarian Assistance, *Guiding Principles on Internal Displacement*, UN doc E/CN.4/1998/53/Add.2 (11 February 1998); Adama Dieng, 'Protecting Internally Displaced Persons: The Value of the Kampala Convention as a Regional Example' (2017) 99 International Review of the Red Cross 263, 279.
[82] Rome Statute (n 11) art 8(2)(e)(viii).
[83] GCIV (n 3) art 35(1).
[84] ibid art 48.
[85] Cantor (n 59) 357.
[86] ibid 345.

Despite the provision's title ('refugees'), the (1958) Commentary rejects interpretive references to refugee definitions that 'are valid for the particular purposes of law for which they were formulated, but are too technical and too limited in scope to meet the requirements of the Geneva Convention'.[87] Instead, it suggests that the provision 'should be applied in the broadest humanitarian spirit'[88] and has been interpreted to mean *de facto* absence of protection by any government.[89] Non-reliance on IRL definitions means States parties to a conflict are not required to treat such persons as *ipso facto* refugees within the meaning of those instruments.[90]

ii. *Persons in Refugee-like Situations in Occupied Territory*

Nationals of the occupying power are not generally considered 'protected persons', given the rebuttable presumption that their relations with their State of nationality are not severed during conflict. GCIV article 70(2), entitled 'offences committed before occupation', shields 'nationals of the occupying power who, before the outbreak of hostilities, have sought refuge in the territory of the occupied State' from arrest, prosecution, conviction, or deportation from the occupied territory 'except for offences committed after the outbreak of hostilities, or for offences under common law committed before the outbreak of hostilities which, according to the law of the occupied state, would have justified extradition in time of peace'.

The provision intends to ensure that those who have sought 'refuge' (a term which the treaty does not define) are not punished for acts, such as political offences, which may have been the cause of their flight or for the mere fact of having sought refuge in a State that has subsequently been occupied. The *status quo ante* (before the outbreak of hostilities) is thus preserved; an important exception, which can perhaps be analogized to exclusion pursuant to article 1F(b) of the Refugee Convention, pertains to pre-occupation extraditable offences, which can be prosecuted.

iii. *Pre-conflict Refugees*

In IACs, API stipulates that refugees 'considered as such under the relevant international instruments accepted by the Parties concerned or under the national legislation of the State of refuge or State of residence…before the beginning of hostilities' should be considered 'protected persons' in all circumstances and without any adverse distinction,[91] and acts 'qualified as grave breaches' in the Conventions constitute 'grave breaches of the Protocol' if they are committed against such persons.[92] Consequently, each party to the conflict is obliged to *respect* decisions taken by another party granting

[87] ICRC, *Commentary on the Fourth Geneva Convention: Convention (IV) relative to the Protection of Civilian Persons in Time of War* (1958) 263–4.

[88] ibid.

[89] See eg discussion in Emanuela Gillard, 'Humanitarian Law, Human Rights and Refugee Law-Three Pillars' (*ICRC*, 23 April 2005) <https://www.icrc.org/en/doc/resources/documents/statement/6t7g86.htm> accessed 13 October 2020.

[90] See also Eric Fripp, 'Inclusion of Refugees from Armed Conflict: Combatants and Ex-combatants' in Cantor and Durieux (eds) (n 10) 128, 141.

[91] API (n 3) art 73. [92] ibid art 85(2).

refugee status whether such decisions are taken on the basis of an international instrument, on the basis of national legislation, or on the basis of both.[93]

Thus, the provision extends 'protected person' status to refugees who are nationals of co-belligerent and neutral States and, in occupied territory, to refugees who are nationals of the occupying State. Relatedly and importantly, States have a duty to preserve the humanitarian and civilian character of asylum,[94] to address security threats posed by armed elements, and to prevent subversive acts directed at other States.[95]

f. (*Non-*)*Refoulement* and Repatriation During and Post Conflict

i. *Obligations of Parties to the Conflict*

A PRESUMPTION OF RETURN?

IHL's rebuttable presumption that nationals enjoy the protection of their State of nationality also presumes their wish to return thereto as soon as reasons for displacement cease to exist, and their right to do so, which does not generally extend to lawfully expelled migrants.[96] In turn, States may wish to repatriate, expel, or deport non-nationals during hostilities or upon their cessation. Such States may seek to return persons to an area of the State that is arguably unaffected by the conflict.[97] Yet, some nationals do not wish to return to their State of nationality, be it during conflict or upon cessation of hostilities; the extent to which IHL explicitly respects their preferences depends on whether they qualify as 'protected persons' or PoWs at the hands of the party to the conflict.

'TRANSFER TO ANOTHER POWER' OF PROTECTED PERSONS

The clearest IHL articulation of the IRL principle of *non-refoulement* is found in GCIV article 45(4): protected persons should 'in no circumstances be transferred to a country where [they] may have reason to fear persecution for [their] political opinion or religious beliefs'.[98] The prohibition applies to any type of transfer, such as expulsion, deportation, extradition, or return, regardless of its formal designation. Transfer of individuals is prohibited irrespective of whether the danger of fundamental rights violations emanates from State or non-State actors: in latter cases, it must be shown

[93] Yves Sandoz, Christophe Swinarski, and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977* (Martinus Nijhoff 1987) para 2981.

[94] UNHCR Executive Committee Conclusion No 94 (LIII) 'The Civilian and Humanitarian Character of Asylum' (2002).

[95] UN Charter (n 58) art 2(4).

[96] ICRC, 'Note on Migration and the Principle of *Non-refoulement*' (2017) 99 International Review of the Red Cross 345.

[97] cf UNHCR (n 36) para 40. See also Bríd Ní Ghráinne, 'Safe Zones and the Internal Protection Alternative' (2020) 69 ICLQ 335 and Chapter 38 in this volume.

[98] GCIV (n 3) art 45(4).

that authorities in the State of return were unable or unwilling to protect that person. Yet, despite referencing persecution for 'political opinions or religious beliefs', two of the five convention reasons under article 1A(2) of the Refugee Convention, the Commentary does not engage IRL standards in interpreting these terms; rather, it notes that 'the term persecution is not defined [in IHL] but refers, at a minimum, to serious violations of human rights (right to life, freedom, and security)' on the enumerated grounds.[99]

The provision appears to prohibit indirect or secondary *refoulement*, namely transfers where the receiving State is unwilling or unable to apply GCIV's humanitarian provisions;[100] and if a receiving State fails to observe GCIV 'in any important respect', the transferring State is required to take effective measures to correct the situation, or request the return of the transferees, a request with which the receiving State must comply. Prohibition on indirect *refoulement* arguably also follows from the transferring State's CA1 duty to 'ensure respect' for the GCs.[101]

POWS *DURING* CONFLICT AND *AFTER CESSATION* OF ACTIVE HOSTILITIES

PoWs are ordinarily interned as a way of preventing them from resuming their hostile activities. IHL's assumption is that a PoW's allegiance lies with their State. Yet, GCIII stipulates that, while sick or injured PoWs are eligible for repatriation, they may not be repatriated against [their] will during hostilities'. This is a rare textual recognition in IHL that the presumption of national allegiance is rebuttable, and an articulation of *non-refoulement*.[102]

GCIII is *prima facie* unequivocal about release and repatriation of able-bodied PoWs after 'cessation of active hostilities': they shall take place 'without delay'.[103] This duty is premised on the assumption that, ordinarily, a PoW would wish to be repatriated, and that giving PoWs a 'right of option' would enable detaining powers to delay repatriation, given PoWs may not be able to freely express themselves.[104] An IRL-sensitive interpretation would, however, require reading-in a 'free choice whether or not to return … exercised in such objective conditions … that there cannot be any doubt as to the free exercise of that choice'[105] as was done regarding repatriation after the 1991 Gulf War.[106] Indeed, whereas some repatriated PoWs may be viewed as heroes, others may wish to avoid returning to a State where they could be seen as collaborators or as 'cowards' who had been captured rather than endure a courageous death. So long as there is no obligation to release them, PoWs are protected by GCIII.[107] When repatriation obligation arises,

[99] ICRC (n 87) 143. See also ICRC (n 55) para 715, Cantor (n 59) 369.
[100] GCIV (n 3) art 45(3).
[101] See Section 4.f.ii *infra*.
[102] See also ICRC (n 55) para 711.
[103] GCIII (n 3) art 118.
[104] Meron (n 13) 256. See also Jan P Charmatz and Harold M Wit, 'The Repatriation of Prisoners of War and the 1949 Geneva Convention' (1952) 62 Yale Law Journal 392, 413.
[105] Yoram Dinstein, 'Refugees and the Law of Armed Conflict' (1982) 12 Israel Yearbook on Human Rights 101, 102.
[106] Françoise J Hampson, 'The Scope of the Obligation not to Return Fighters under the Law of Armed Conflict' in Cantor and Durieux (eds) (n 10) 373, 377.
[107] GCIII (n 3) art 12.

that State is no longer a detaining power but instead takes on new responsibilities deriving from refugee instruments and principles including *non-refoulement*.

RETURN OF INTERNEES TO THEIR LAST PLACE OF RESIDENCE OR FACILITATION OF REPATRIATION 'UPON THE CLOSE OF HOSTILITIES OR OCCUPATION'

All parties shall 'endeavour upon the close of hostilities or occupation, to ensure the return of all internees to their last place of residence, or to facilitate their repatriation'. The Commentary notes that this entails enabling those wishing to travel to other countries to do so and providing them with passports or equivalent documents.[108] An IRL-mindful interpretation of the obligation to repatriate would require States to give internees an effective opportunity to apply for asylum. For instance, nationals of a party to the conflict may evade military service in order to avoid committing IHL violations and be interned during conflict: upon the close of hostilities, they may seek protection from persecution-like punishment.

ii. *Obligations of all High Contracting Parties*

Parties to the GCs undertake to 'respect and to ensure respect' for them in all circumstances.[109] The Commentary notes that such obligations go beyond the general international law principle of *pacta sunt servanda*[110] and that they do not depend on reciprocity.[111] States may neither encourage, nor aid or assist in violations of the Conventions by parties to a conflict; and they must do everything reasonably in their power to prevent and bring such violations to an end, including through reaching out to parties to an armed conflict to try to facilitate the carrying out of their obligations.[112] Most obviously, this means non-belligerent States should not encourage or assist displacement.

Elsewhere, I argued that CA1 imposes a duty on all High Contracting Parties, including non-belligerent States, to refrain from returning persons 'not taking an active part in hostilities' to territories in which an armed conflict is taking place if there are reasons to believe that there is a real risk of CA3 violations: they would thus be preventing further IHL violations by separating potential victims from potential perpetrators.[113] By refraining from *refoulement*, States would also be taking measures 'necessary for the suppression of acts contrary to the provisions of the present Convention'.[114] Whereas CA3 does not contain an explicit prohibition of *refoulement*, its 'categorical prohibitions would also prohibit a transfer of persons to places or authorities where there are substantial grounds for believing that they will be in danger of being subjected to violence to life and person, such as murder or torture and other forms of

[108] ICRC (n 87) 516. [109] CIHL Study (n 11) rule 139. [110] VCLT (n 26) art 26.

[111] CIHL Study (n 11) rules 140, 144. ICRC (n 53) para 154. [112] Gieseken (n 2) 151.

[113] Reuven (Ruvi) Ziegler, '*Non-Refoulement* between "Common Article 1" and "Common Article 3"' in Cantor and Durieux (eds) (n 10) 386.

[114] GCI (n 3) art 49(3) (identical provisions: GCII (n 3) art 50; GCIII (n 3) art 129; GCIV (n 3) art 146(3)). See also Solis (n 76) 102.

ill-treatment'.[115] The *non-refoulement* obligation of non-belligerent States, derived from CA1, could close an IRL protection gap during IHL conflicts, given that not all violations of CA3 are persecutory within the meaning of the Refugee Convention definition.[116] The proposed framework bears some conceptual similarities to contemporary understanding of *non-refoulement* obligations derived from IHRL instruments such as 'the inherent right to life' and the prohibition on 'torture or . . . cruel, inhuman or degrading treatment or punishment'.[117]

5. Concluding Thoughts

The chapter sought to illustrate that, in displacement contexts, interactions between IHL and (global and regional) refugee protection regimes are both inevitable and challenging, due to terminological, institutional, and structural divergences, and to their being specialized regimes designed to be invoked in (divergent) exceptional circumstances. The healthy scepticism with which scholars and decision-makers approach references to IHL terms-of-art in refugee protection contexts is justified; half-way-house drafting, such as article 15(c) of the EU Qualification Directive, and contextual references to 'external aggression' (in the OAU Convention) and to 'internal conflicts' (in the Cartagena Declaration) renders their interpretive task harder—and calls for further scholarly inquiry.

As complex and protracted conflicts proliferate, so will refugee scholars and courts' engagement with IHL to determine inclusion and exclusion from protection status. Meanwhile, direct references to displacement *in* and *from* IACs and NIACs in IHL, the regime which regulates such conflicts, are limited and chequered. Further probing is called for in respect of the extent to which other, newer, protection regimes (should) affect IHL interpretation of IRL terms-of-art and indeed of the role of non-belligerent States in addressing displacement.

115 ICRC (n 55) para 710.
116 Ziegler (n 113).
117 ICCPR, arts 6,7 respectively. See also Chapter 11 in this volume.

CHAPTER 13

CUSTOMARY REFUGEE LAW

HÉLÈNE LAMBERT*

1. Introduction

Refugee law is primarily treaty law. However, many of the major refugee-receiving countries are not parties to either the Refugee Convention or the Refugee Protocol, for example Bangladesh, Pakistan, India, Iran, Jordan, Lebanon. Hence, customary international refugee law can be 'critically important' in the identification of key principles of refugee protection and as an indication of what is permitted (or not).[1]

a. Customary International Law: A Disputed but Powerful Rule of Law

Customary international law is notoriously difficult to identify as a source of international law, or more accurately as a rule of law (validated by its source), which the International Court of Justice (ICJ) can apply when deciding a dispute.[2] International custom emerges from 'evidence of a general practice accepted as law'.[3] Each element (practice and *opinio juris*) must be ascertained individually, with due regard to context, circumstances, and nature of the rule in question.[4] In the present state of international

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[1] Guy S Goodwin-Gill, 'UNHCR and the Sources of International Refugee Law' (2020) 69 ICLQ 1, 26.

[2] *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* [1969] ICJ Rep 3, paras 21–3.

[3] ibid paras 73–4, 77; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, para 207.

[4] International Law Commission (ILC), 'Draft Conclusions on Identification of Customary International Law' in 'Report of the International Law Commission: Seventieth Session,' UN doc A/73/10 (2018) 119, para 65, conclusion 3.

law, the actors of practice and *opinio juris* are primarily State organs.[5] It has been suggested that State practice and *opinio juris* exist 'on a spectrum'[6] or a 'sliding scale',[7] such that the more evidence there is of one element, the less is required of the other. However, in other instances, international custom 'is simply asserted'.[8] Added to these uncertainties, Greenman observes 'how flexible the material is' and how it can be 'marshalled to support various different, even dramatically opposed, positions'.[9]

Despite such challenges, customary law is a powerful tool for legal argument.[10] Through this process 'the way things *have* been done becomes the way things *must* be done'.[11] Once established, it is 'a general rule of international law applicable to every State, subject only to the exception of persistent objector'.[12] International custom is therefore both a process of lawmaking and the end result of that process.[13]

b. The Restricted Role of International Custom in Refugee Law

Perhaps more so than elsewhere, contention and incertitude dominate the debate on which practices of refugee protection constitute customary law. Some possible explanations might be, first, that while the ICJ is competent to settle disputes or give an advisory opinion relating to the interpretation or application of the Refugee Convention under article 38 of its Statute, in practice it has never been called upon to do so.[14] To be sure, regional courts have played an important role in the interpretation and application of regional instruments on refugee protection, which in some instances incorporate provisions of the Refugee Convention, but that is not the same as the world court identifying a particular practice as international custom. A second explanation may be

[5] Anthea Roberts and Sandesh Sivakumaran, 'The Theory and Reality of the Sources of International Law' in Malcolm Evans (ed), *International Law* (OUP 2018) 104.

[6] Anthea Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) 95 AJIL 757.

[7] Frederic L Kirgis, 'Custom on a Sliding Scale' (1987) 81 AJIL 146.

[8] Roberts and Sivakumaran (n 5) 105, referring to *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* [2007] ICJ Rep 43, para 420.

[9] Kathryn Greenman, 'Aliens in Latin America: Intervention, Arbitration and State Responsibility for Rebels' (2018) 31 Leiden Journal of International Law 617, 621.

[10] Jan Klabbers, 'The Curious Condition of Custom' (2002) 8 International Legal Theory 29, 36–7.

[11] Roberts and Sivakumaran (n 5) 92.

[12] Goodwin-Gill (n 1) 26–7.

[13] Pierre-Marie Dupuy, 'Formation of Customary International Law and General Principles' in Daniel Bodansky, Jutta Brunnée, and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (OUP 2007) 451.

[14] Achilles Skordas, 'The Missing Link in Migration Governance: An Advisory Opinion by the International Court of Justice' (*EJIL Talk!*, 11 May 2018) <https://www.ejiltalk.org/the-missing-link-in-migration-governance-an-advisory-opinion-by-the-international-court-of-justice/> accessed 16 March 2020. Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 3 Bevans 1179, 59 Stat 1055, TS No 993 (ICJ Statute), art 38.

the 'politics of refugee protection', as States believe they retain the right to admit or to exclude aliens from their territory, with 'little clear sense of the refugee as an individual *entitled* to international protection'.[15] Thirdly, the absence of reciprocity in this particular area of international law arguably makes it better suited to the emergence of general principles of law than international custom.[16] Fourthly, there is a limited appreciation of the role of UNHCR in 'identifying the source and confirming its content and binding nature'.[17]

Refugee law nevertheless overlaps with other areas of international law in which customary law plays a significant role as a source of law. For instance, the prohibitions of torture, racial discrimination, and genocide are customary law;[18] so too the prohibition of arbitrary deprivation of liberty,[19] the right to leave any country,[20] and the right to family reunification (by derivation from the right to respect for family life).[21] Other areas of international law overlapping with refugee law, such as the law of the sea and international humanitarian law, also recognize the customary character of some of its rules, for example, the obligation to assist persons in danger at sea;[22] the basic rules of international humanitarian law,[23] including the prohibition of child recruitment;[24] and the 'elementary considerations of humanity'.[25] Depending on context and facts, these rules can interact with principles and standards of refugee protection and contribute to the emergence of a particular rule of customary refugee law.

Thus, it is fair to say that customary international law may not play as significant a role in refugee law as it does in other areas of international law. However, there are at least three practices of refugee protection aimed at safeguarding access and admission to refugee protection for which varying degrees of agreement exist in favour of a rule (or emerging rule) of customary law: *non-refoulement*, temporary refuge, and the right to

[15] Guy S Goodwin-Gill, 'The Politics of Refugee Protection' (2008) 27 RSQ 8.

[16] Thomas Kleinlein, 'Customary International Law and General Principles' in Brian D Lepard (ed), *Reexamining Customary International Law* (CUP 2017).

[17] Goodwin-Gill (n 1) 40.

[18] According to the International Law Commission they are not only customary law, they are also peremptory norms or *jus cogens*; ILC, 'Fourth Report on Peremptory Norms of General International Law (*Jus Cogens*) by Dire Tladi, Special Rapporteur,' UN doc A/CN.4/727(31 January 2019) para 60.

[19] UN Working Group on Arbitrary Detention, 'Revised Deliberation No 5 on Deprivation of Liberty of Migrants' (7 February 2018) paras 7–8; UN Human Rights Council, *Report of the Working Group on Arbitrary Detention* UN doc A/HRC/22/44 (24 December 2012) 16–25; UNHCR, 'Engaging with the Working Group on Arbitrary Detention' (6 November 2018) 2.

[20] Vincent Chetail, 'The Transnational Movement of Persons Under General International Law' in Vincent Chetail and Céline Bauloz (eds), *Research Handbook on International Law and Migration* (Edward Elgar 2014) 20–7.

[21] Vincent Chetail, *International Migration Law* (OUP 2019) 124–32.

[22] Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (OUP 1996) 278.

[23] International Committee of the Red Cross, 'Rules', *Customary International Humanitarian Law Database* (2005) vol 1 <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_in> accessed 16 March 2020.

[24] UNSC, *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, UN doc S/2000/915 (4 October 2000) para 17.

[25] Skordas (n 14) comments/responses.

be granted (to receive) asylum. These practices are deeply intertwined in their humanitarian purpose,[26] although they are discussed separately below for the sake of clarity.

2. *Non-refoulement*

Protection against *refoulement* is the cornerstone of international refugee law and a cardinal principle of international human rights law.[27] The principle of *non-refoulement* prohibits the removal, in any manner whatsoever, of a person to a territory where she or he could face persecution or be at risk of torture or other cruel, inhuman or degrading treatment or punishment.[28] It is strongly related to asylum[29] (though the two are distinct),[30] and the protection of human life and dignity.[31] Mansfield describes it as a prohibition with two strands: persecution and torture.[32] While the torture strand of the prohibition against *refoulement* under international human rights law is generally accepted as customary law,[33] the customary character of the persecution strand under refugee law requires deeper examination.

a. *Non-refoulement* in Article 33(1) of the Refugee Convention

As a core principle of refugee law, *non-refoulement* is enshrined in treaty law. According to article 33(1) of the Refugee Convention:

[26] Goodwin-Gill and McAdam (n 22) 415.

[27] Elihu Lauterpacht and Daniel Bethlehem, 'The Scope and Content of the Principle of Non-Refoulement: Opinion' in Erika Feller, Volker Türk, and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (CUP 2003) 107, 155. See also Walter Kälin, Martina Caroni, and Lukas Heim, 'Part Six Administrative Measures, Article 33, para. 1' in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol* (OUP 2011).

[28] See Chapter 50 in this volume.

[29] eg 'The Brazil Declaration: A Framework for Cooperation and Regional Solidarity to Strengthen the International Protection of Refugees, Displaced and Stateless Persons in Latin America and the Caribbean' (Brasilia, 3 December 2014); 'Report of the United Nations High Commissioner for Refugees', UNGA res 34/60 (29 November 1979) para 3.

[30] William Thomas Worster, 'The Contemporary International Law Status of the Right to Receive Asylum' (2014) 26 IJRL 477, 492.

[31] UNHCR ExCom Conclusion No 112 (LXVII), 'International Cooperation from a Protection and Solutions Perspective' (2016) para 6.

[32] James Mansfield, 'Extraterritorial Application and Customary Norm Assessment of Non-Refoulement: The Legality of Australia's Turn-Back Policy' (2015) 17 University of Notre Dame Australia Law Review 18, 37.

[33] ibid 37; Lauterpacht and Bethlehem (n 27) 153–6.

> No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.[34]

The provision applies without territorial restriction to 'the conduct of State officials or those acting on behalf of the State wherever this occurs, whether beyond the national territory of the State in question, at border posts or other points of entry, in international zones, at transit points etc'.[35] It is concerned with acts of expulsion, deportation, return, rejection or non-admittance at the frontier, and extradition, and applies to 'refugees' in the declaratory sense, that is, whether or not they have been formally recognized as refugees, hence it applies to all asylum seekers.[36] The prohibition is concerned with both direct and indirect *refoulement*. It protects individuals (whether the person in question is part of a mass influx or not) against threats to their life or freedom, which include a well-founded fear of being persecuted, generalized violence, threat to physical integrity or liberty, threat to safety, a real risk of torture or cruel, inhuman, or degrading treatment or punishment;[37] the threat in question must be for reason of race, religion, nationality, membership of a particular social group, or political opinion.

b. An International Custom of *Non-refoulement*

Considering the centrality of article 33(1) in refugee law, a key issue is whether this provision has crystallized into custom and hence developed into a separate, independent legally binding customary norm, as both treaty and custom can coexist alongside each other.[38]

In the *North Sea Continental Shelf* case, the ICJ identified three necessary elements before one could say that such crystallization had happened.[39] First, the provision is of a fundamentally norm-creating character. Secondly, participation of States most affected in the treaty is widespread and representative. Thirdly, conforming State practice is both extensive and virtually uniform (in the sense of generally consistent)[40] and indicates a sense of legal obligation.[41] Provided these elements are met, time is not an essential requirement.[42]

[34] According to art 1 para 1 of the 1967 Protocol, a State party to the Protocol but not the Refugee Convention will also be bound 'to apply Articles 2 to 34 inclusive of the Convention'.

[35] Lauterpacht and Bethlehem (n 27) 111. See also UNHCR, 'Submission of the Officer of the United Nations High Commissioner for Refugees: Seeking Leave to Intervene as Amicus Curiae', Submission in *CPCF v Minister for Immigration and Border Protection*, No 169 of 2014, NO S169 of 2014, 15 September 2014, para 38.

[36] Lauterpacht and Bethlehem (n 27) 112–18; Goodwin-Gill and McAdam (n 22) 232–3.

[37] Lauterpacht and Bethlehem (n 27) 118–25.

[38] *Nicaragua* (n 3); *North Sea Continental Shelf* (n 2).

[39] *North Sea Continental Shelf* (n 2).

[40] *Nicaragua* (n 3) para 186.

[41] Mansfield (n 32) 37.

[42] *North Sea Continental Shelf* (n 2) para 74.

Conclusions of the Executive Committee (ExCom) of the UNHCR[43] and various other binding and non-binding instruments of refugee law[44] are often cited in support of the fundamentally norm-creating character of the prohibition of *refoulement*. These share in common the recognition of *non-refoulement* as a cardinal principle, the cornerstone of refugee law, and a fundamental rule of law.[45] Goodwin-Gill emphasizes the importance of ExCom Conclusions as evidence of *opinio juris*, adding to those the often-overlooked UNHCR's Guidelines on International Protection issued since 2002.[46] Further significant support to the argument that *non-refoulement* is of a fundamentally norm-creating character can be found in human rights law, where *refoulement* is prohibited explicitly in the CAT and article 16 of the 2006 International Convention for the Protection of All Persons from Enforced Disappearance, and implicitly, through interpretation, in the ICCPR (article 7), and the ECHR (article 3).[47] International humanitarian law provides further explicit, albeit more limited, protection against *refoulement* in articles 45 and 49(5) of the Fourth Geneva Convention, and possibly also Common articles 1 and 3 of the 1949 Geneva Conventions.[48]

[43] See those cited in Lauterpacht and Bethlehem (n 27) 143 and Cathryn Costello and Michelle Foster, 'Non-Refoulement as Custom and Jus Cogens? Putting the Prohibition to the Test' (2015) 46 Netherlands Yearbook of International Law 273.

[44] Lauterpacht and Bethlehem (n 27) 144, referring to Asian-African Legal Consultative Organization, 'Final Text of the AALCO's 1966 Bangkok Principles on Status and Treatment of Refugees' (24 June 2001) art III, para 3 (Bangkok Principles); 'Declaration on Territorial Asylum', UNGA res 2312(XXII) (14 December 1967) art 3; OAU Convention, art II; Declaration on the Protection of Refugees and Displaced Persons in the Arab World (1992) (Cairo Declaration), art 2; Cartagena Declaration, conclusion III; Council of Europe Committee of Ministers Resolution (67) 14, 'Asylum to Persons in Danger of Persecution' (29 June 1967) 23, principle 2; Council of Europe Committee of Ministers, 'Recommendation No R (84) 1 on the Protection of Persons Satisfying the Criteria in the Geneva Convention who are not Formally Recognised as Refugees' (adopted 25 January 1984) 1.

[45] See also UNHCR, 'UNHCR Note on the Principle of Non-Refoulement' (November 1997) pt A; UNHCR, 'Declaration Reaffirming Principles of 1951 Refugee Convention' (13 December 2001) para 4 (signed by 147 States); International Organization for Migration, 'IML Information Note on the Principle of Non-Refoulement' (April 2014) 3–4; UNHCR, 'Onward Movement of Asylum-Seekers and Refugees: Discussion Paper Prepared for the Expert Roundtable on Onward Movement' (25 September 2015) 3–4; UNHCR, 'Addressing the Challenges of Mixed Migration: Protection and Assistance in Mixed Migration' (2016) 36-37; UNHCR, 'Submission to the Inter-American Court of Human Rights in the Framework of Request for an Advisory Opinion on the Scope and Purpose of the Right to Asylum' (April 2017) para 2.6; UNHCR, 'Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights Compilation Report, Universal Periodic Review: Mauritius' (July 2018) 2; New York Declaration for Refugees and Migrants, para 67; Global Compact on Refugees.

[46] Goodwin-Gill (n 1). See also Guy S Goodwin-Gill, 'The Search for the One, True Meaning…' in Guy S Goodwin-Gill and Hélène Lambert (eds), *The Limits of Transnational Law* (CUP 2010).

[47] CAT, art 3; International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3, art 16; ICCPR, art 7; ECHR, art 3.

[48] Costello and Foster (n 43) 283–5; Reuven (Ruvi) Ziegler, 'Non-Refoulement Between "Common Article 1" and "Common Article 3"' in David Cantor and Jean-François Durieux (eds), *Refuge from Inhumanity? War Refugees and International Humanitarian Law* (Brill 2014).

Addressing the element of widespread and representative State support, there are currently 148 States parties to either the Refugee Convention and/or the Protocol.[49] Although a significant slice of the international community of States, Mansfield observes that this is not quite the 186 States parties to the four Geneva Conventions of 1949, the basic rules of which are regarded by the ICJ as customary international law (CIL).[50] Hence doubts may be raised as to whether 'state participation is widespread and representative enough on its own to justify concluding a CIL rule exists'; a concern shared with Hathaway.[51] However, since the prohibition against *refoulement* in human rights law is sufficiently similar to that in refugee law, Costello and Foster argue that the 'wide range of [human rights] treaties ha[ving] the same fundamental core' can be relied on towards identifying widespread and representative State support.[52]

It may be noted that despite Lauterpacht and Bethlehem showing *non-refoulement* to be 'near universal, including by States whose interests are specially affected',[53] the notion of 'specially affected states'[54] has been discredited for being 'of limited value' in the area of human rights, including refugee law.[55] Similarly, the idea that non-accession to the Refugee Convention or Protocol by some States in Asia and the Middle East is an indication of the unwillingness of these States to be bound by the duty of *non-refoulement* has been criticized.[56] One simply needs to look at the current practices of States such as Jordan and Lebanon but also Pakistan, India, and Bangladesh, which host a significant proportion of the global refugee population without being a party to the Refugee Convention or Protocol, to realize the weakness of the argument.[57]

[49] UNHCR, 'States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol' (17 April 2015) <https://www.unhcr.org/en-au/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html> accessed 16 March 2020.

[50] See Geneva Conventions for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 20 October 1950) 75 UNTS 31; Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 20 October 1950) 75 UNTS 85; Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 2 November 1950) 75 UNTS 135; Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 2 November 1950) 75 UNTS 287.

[51] Mansfield (n 32) 41; James C Hathaway, *The Rights of Refugees under International Law* (CUP 2005) 365.

[52] Costello and Foster (n 43) 284, disagreeing with Hathaway on that point.

[53] Lauterpacht and Bethlehem (n 27) 147.

[54] Referred to by the ICJ in *North Sea Continental Shelf* (n 2) paras 73–4.

[55] Costello and Foster (n 43) 291–7. See also views of ICJ in *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, in particular Judge Weeramantry (Dissenting Opinion) 429. For a view of how it could be harnessed to the greater good, see Kevin Jon Heller, 'Specially-Affected States and the Formation of Custom' (2018) 112 AJIL 191.

[56] Costello and Foster (n 43) 291–7; Mansfield (n 32) 46, both discrediting Hathaway's idea.

[57] Hélène Lambert, 'Temporary Refuge from War: Customary International Law and the Syrian Conflict' (2017) 66 ICLQ 723.

Finally, State practice must be generally consistent, and the rule must be generally recognized as law (*opinio juris*). Mansfield submits that the practice of 148 States parties to the Refugee Convention and/or Protocol, while not universal, nevertheless constitutes 'probative weight'.[58] Indeed, uniformity of practice is not required by the ICJ.[59] Costello and Foster argue that 'what is significant in this context is not whether there is state practice that is inconsistent with the putative norm, but rather the reaction of both the international community and the offending state in question to such action'.[60] Here, they see it as significant that

> where the UNHCR has reported instances of refoulement to the General Assembly, the General Assembly has repeatedly responded by 'deplor[ing] the refoulement and unlawful expulsion of refugees and asylum-seekers'. The UNHCR Executive Committee has reacted in a similar manner.[61]

Accordingly, occurrences of *refoulement* (including instances where a State party to the Refugee Convention deliberately legislates to restrict protection against *refoulement*)[62] should generally be treated as breaches of the rule, thereby reinforcing the existence of the rule rather than weakening it, as stated by the ICJ in Nicaragua.[63]

Furthermore, there are instances where a State opposes the existence of a customary norm from its inception and argues that it is therefore not bound by it (the persistent objector). For instance, in 2008, the High Court of the Hong Kong Special Administrative Region Court of First Instance accepted the existence of 'a universal rule of customary international law which prohibits the *refoulment* of refugees' but concluded that 'by consistent and long-standing objection', the Director of Immigration of Hong Kong was under no obligation to apply it.[64] It seems difficult to reconcile this view with the *jus cogens* character of *non-refoulement* or, if this is disputed, the *jus cogens* character of the prohibitions of torture and racial discrimination. It has also been observed that 'the actual practice of the "persistent objector" is seldom sufficient to protect a dissenting state from the compulsory effect of some rules' particularly 'when the rest of the international community is largely in agreement about the binding nature of the rule in question'.[65] With the exception of a very small number of scholars,[66] the overwhelming view is that *non-refoulement* has attained the status of customary international

[58] Mansfield (n 32) 42. [59] *Nicaragua* (n 3).

[60] Costello and Foster (n 43) 300, referring to *Nicaragua* (n 3) para 186. See also Roberts and Sivakumaran (n 5) 93–4.

[61] Costello and Foster (n 43) 300. [62] Migration Act 1958 (Cth) s 197C (Australia).

[63] *Nicaragua* (n 3) para 186.

[64] *C v Director of Immigration* (18/02/2008, HCAL132/2006) para 194. [65] Dupuy (n 13) 455.

[66] Hathaway (n 51) 363–7; James C Hathaway, 'Leveraging Asylum' (2010) 45 Texas International Law Journal 503; Kay Hailbronner, 'Non-Refoulement and "Humanitarian" Refugees: Customary International Law or Wishful Legal Thinking?' (1986) 26 Virginia Journal of International Law 857; Kay Hailbronner and Jana Gogolin, 'Asylum, Territorial', *Max Planck Encyclopedia of Public International Law* (2013) paras 33, 39.

law.[67] This is further supported by UNHCR and the Office of the High Commissioner for Human Rights, unequivocally.[68]

c. *Non-refoulement* as *Jus Cogens*?

An increasing number of courts and scholars also argue that *non-refoulement* has gained the heightened status of (or emerging) *jus cogens*[69] from which no derogation is permitted.[70] In their article, Costello and Foster explain that '[w]hile non-derogability is a defining feature of jus cogens, it is a necessary but insufficient one'.[71] The norm also needs to be universal and peremptory in character for *jus cogens* to exist. Contrary to Allain,[72] they argue that non-derogability and *jus cogens* are not 'functional equivalents'.[73]

However, not everyone agrees that *non-refoulement* is *jus cogens*.[74] Costello and Foster explain that amongst the scholars who have expressed doubt, none have really

[67] Lauterpacht and Bethlehem (n 27); Goodwin-Gill and McAdam (n 22); Costello and Foster (n 43); Chetail (n 21) 119–24; Kälin, Caroni, and Heim (n 27) 1395; Mansfield (n 32) 36; Francesco Messineo, 'Non-Refoulement Obligations in Public International Law: Towards a Protection Status?' in Satvinder S Juss (ed), *The Ashgate Research Companion to Migration Law, Theory and Policy* (Ashgate 2013); Alise Coen, 'International Order, the Rule of Law, and US Departures from Refugee Protection' (2018) 22 International Journal of Human Rights 1268, 1272; Tamara Wood and Jane McAdam, 'Australian Asylum Policy all at Sea: An Analysis of Plaintiff M70/2011 v Minister for Immigration and Citizenship and the Australia–Malaysia Arrangement' (2012) 61 ICLQ 274, 293; Aoife Duffy, 'Expulsion to Face Torture? *Non-refoulement* in International Law' (2008) 20 IJRL 373; Alice Edwards, 'Human Rights, Refugees, and the Right to "Enjoy Asylum" ' (2005) 17 IJRL 293; M Alvi Syahrin, 'The Implementation of *Non-Refoulement* Principles to the Asylum Seekers and Refugees in Indonesia' (2017) 1 Sriwijaya Law Review 168; Jerry Vang, 'Limitations of the Customary International Principle of Non-Refoulement on Non-Party States: Thailand Repatriates the Remaining Hmong-Lao Regardless of International Norms' (2012) 32 Wisconsin International Law Journal 355; Shirley Llain Arenilla, 'Violations to the Principle of Non-Refoulement Under the Asylum Policy of the United States' (2015) 15 Anuario Mexicano de Derecho Internacional 283.

[68] See text to n 45; OHCHR, 'The Principle of *Non-Refoulement* under International Human Rights Law' (2019) 1.

[69] Antonio Cassese, 'For an Enhanced Role of Jus Cogens' in Antonio Cassese (ed), *Realizing Utopia: The Future of International Law* (OUP 2012) 162–3.

[70] ILC (n 18) paras 131–3, citing the Inter-American Court of Human Rights in *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, Advisory Opinion OC-21/14, Inter-American Court of Human Rights Series A No 21 (19 August 2014) para 225. However, it is interesting to note that *non-refoulement* was not included in the 'non-exhaustive' list of *jus cogens* in the Annex to the draft conclusions on *jus cogens*, ILC 'Peremptory Norms of General International Law (*Jus Cogens*) Text of the draft Conclusions and Draft Annex Provisionally Adopted by the Drafting Committee on First Reading,' UN doc A/CN.4/L.936 (29 May 2019). See also 'The Office of the United Nations High Commissioner for Refugees', UNGA Res 51/75 (12 December 1996) para 3; Jean Allain, 'The *Jus Cogens* Nature of *Non-Refoulement*' (2001) 13 IJRL 533; Alice Farmer, 'Non-Refoulement and *Jus Cogens*: Limiting Anti-Terror Measures that Threaten Refugee Protection' (2008) 23 Georgetown Immigration Law Journal 1; Syahrin (n 67) 173; Coen (n 67) 1272.

[71] Costello and Foster (n 43) 280. [72] Allain (n 70) 540–1.

[73] Costello and Foster (n 43) 307.

[74] eg Duffy (n 67) 373. See also *Sale v Haitian Centers Council*, 509 US 155 (1993).

put the customary rule of *non-refoulement* to the test and examined in depth whether it meets the characteristics of *jus cogens*. They conclude that *non-refoulement* is universal, non-derogable (highlighting that derogations and exceptions are distinct concepts),[75] and peremptory, making it ripe for recognition as *jus cogens*.[76] Perhaps prematurely, UNHCR presented the principle of *non-refoulement* as a peremptory norm of international law (*jus cogens*) to the General Assembly in 1982.[77]

The remainder of this chapter examines two further practices of refugee protection whose character as customary law has emerged or is emerging.

3. Temporary Refuge

a. '*Non-refoulement* through Time'

The 'leap from *non-refoulement* to asylum' (to be discussed in section 4.below) is not the only way to protect refugees as a matter of obligation, there are other avenues, including temporary refuge.[78] Temporary refuge (or temporary protection) describes the State practice of admission and finding solutions in situations of large-scale cross-border displacement caused by conflict, violence, climate change, or disaster.[79] It is based on the expectation that failing prompt voluntary return, permanent resettlement in a developed country would follow.[80] It is a 'pragmatic tool for meeting the need for international protection of refugees' when necessity requires it,[81] 'particularly

[75] Refugee Convention art 33 para 2 contemplates limited exceptions to *non-refoulement* based on the individual conduct of a refugee and the danger that this conduct poses to the security of the host country or the community of that country. This provision has no effect on the *jus cogens* status of art 33 para 1; see also Chapter 39 in this volume.

[76] Costello and Foster (n 43) 309–11.

[77] UNGA, 'Addendum to the Report of the United Nations High Commissioner for Refugees,' UN doc A/37/12/Add.1 (1982) para 46.

[78] Guy S Goodwin-Gill, '*Non-Refoulement* and the New Asylum Seekers' (1986) 26 Virginia Journal of International Law 897, 913–14; Guy S Goodwin-Gill, '*Non-Refoulement*, Temporary Refuge, and the "New" Asylum Seekers' in David Cantor and Jean-François Durieux (eds), *Refuge from Inhumanity? War Refugees and International Humanitarian Law* (Brill 2014) 433, 441.

[79] GJL Coles, 'Temporary Refuge and the Large Scale Influx of Refugees' (1980) 8 Australian Year Book of International Law 189.

[80] DW Greig, 'The Protection of Refugees and Customary International Law' (1978–1980) 8 Australian Year Book of International Law 108, 125; UNHCR ExCom Conclusion No 19 (XXXI) 'Temporary Refuge' (1980); UNHCR ExCom Conclusion No 22 (XXXII) 'Protection of Asylum-Seekers in Situations of Large-Scale Influx' (1981).

[81] UNHCR, 'Note on International Protection,' UN doc A/AC.96/830 (7 September 1994) 19, para 45. See also François Crépeau and Leanne Holland, 'Temporary Protection, Continuing Insecurity: A Regime Replacing Convention Protection of Refugees in Violation of International Law' (1997) 12(1) Canadian Journal of Law and Society 243.

[where] many of the States of potential first refuge [are] not parties to th[e] Convention'.[82] Temporary refuge therefore triggers a two-pronged approach: an obligation on all States to admit large numbers of persons fleeing for their lives and grant rights commensurate with human dignity, *and* an obligation on all States and international organizations to cooperate and take concrete steps towards a durable solution.[83]

On the one hand, temporary refuge has been praised for linking admission of refugees and a durable solution. On the other hand, it has been criticized for offering 'a diluted substitute protection for Convention refugees'.[84] Since beneficiaries of temporary refuge are provided with basic rights including admission,[85] their initial treatment might be considered consistent with the Refugee Convention, which envisages progressive implementation of rights linked to attachment to the state of asylum. However, Durieux and McAdam submit that as time passes, these refugees should be given the full benefits of the Refugee Convention as a durable solution.[86] Temporary refuge has also been criticized for relying on a duty of responsibility-sharing which is still missing.[87] The Global Compact on Refugees, which arguably draws on practices of temporary refuge amongst others, 'may help to put cooperation in the search for permanent solutions to the problem of refugees on a more predictable and equitable base'.[88]

No one disputes the desirability of a treaty regime that would provide protection to refugees arriving *en masse*, with clear rights and obligations. However, most refugee emergencies continue to be seen *internationally* as a state of exception '[w]ith saving lives [as] the overriding imperative'[89] and the protection of other human rights as secondary. The increasingly prolonged feature of armed conflicts, climate change, and natural disasters means that local integration is often the only solution, 'the practical consequence of non-refoulement through time'.[90]

Temporary refuge has its roots in the protection against *refoulement* in that it entails 'an obligation of states to *permit entry*'.[91] This standard of *non-refoulement*

[82] Greig (n 80) 131. [83] Lambert (n 57) 744.

[84] Joan Fitzpatrick, 'Temporary Protection of Refugees: Elements of a Formalized Regime' (2000) 94 AJIL 279, 280.

[85] UNHCR (n 81) para 29.

[86] Jean-François Durieux and Jane McAdam, '*Non-Refoulement* through Time: The Case for a Derogation Clause to the Refugee Convention in Mass Influx Emergencies' (2004) 16 IJRL 4, 15. See also Meltem Ineli-Ciger, 'A Temporary Protection Regime in Line with International Law Utopia or Real Possibility?' (2016) 18 International Community Law Review 278.

[87] Crépeau and Holland (n 81) 245; Joanne Thorburn, 'Transcending Boundaries: Temporary Protection and Burden-Sharing in Europe' (1995) 7 IJRL 459.

[88] Goodwin-Gill (n 1) 41; Global Compact on Refugees, paras 3, 5.

[89] Durieux and McAdam (n 86) 6–7. [90] Goodwin-Gill and McAdam (n 22) 343.

[91] Roda Mushkat, 'Hong Kong as a Country of Temporary Refuge: An Interim Analysis' (1982) 12 Hong Kong Law Journal 157, 159–60. See also Goodwin-Gill 2014 (n 78) 433.

'is both peremptory *and* immediate'.[92] However, temporary refuge goes beyond *non-refoulement*; it is 'a dynamic concept'[93] that 'appears to impose additional obligations on receiving countries and is a more tangible step towards a durable solution'.[94] Consequently, scholars have begun to interrogate the origin of this legal obligation and its relationship with refugee law.

b. An International Custom of Temporary Refuge

Extensive arguments have been made in favour of a customary international norm of temporary refuge, which is independent from refugee law treaties and *non-refoulement*. For example, Perluss and Hartman argue that the rule of temporary refuge 'has emerged out of the essential principle of humanitarian law: the balance between necessity and humanity' and that it 'resides within that portion of humanitarian law which remains uncodified', that is, the humanitarian law of rescue.[95] While advantages exist in conceiving temporary refuge as part of humanitarian law (as opposed to refugee law which focuses more on legal status and integration), temporary refuge is still most often identified as 'closely integrated into the international refugee regime'.[96] For instance, Mushkat describes the 'reluctance [of States] to institutionalise the phenomenon' as 'avoidance of self-conscious choice' so as not to undermine *non-refoulement* and permanent asylum.[97]

The normative character of temporary refuge can be found in numerous instruments of international law and national law, including the OAU Convention,[98] the Cartagena Declaration,[99] the Bangkok Principles,[100] the US Temporary Protected Status of 1990,[101] and the EU Temporary Protection regime.[102] This normative character finds further evidence in UN General Assembly resolutions,[103] UNHCR

[92] Durieux and McAdam (n 86) 14. [93] ibid 14. [94] Mushkat (n 91).

[95] Deborah Perluss and Joan Fitzpatrick Hartman, 'Temporary Refuge: Emergence of a Customary Norm' (1986) 26 Virginia Journal of International Law 551, 624. See also Jean-François Durieux, 'Three Asylum Paradigms' (2013) 20 International Journal of Minority and Group Rights 147, 165.

[96] Goodwin-Gill 2014 (n 78) 458. [97] Mushkat (n 91) 161–2.

[98] OAU Convention, art II, para 5. [99] Cartagena Declaration, conclusion III, para 8.

[100] Bangkok Principles (n 44) art 1, para 2.

[101] Susan Martin, Andrew Schoenholtz and Deborah Waller Meyers, 'Temporary Protection: Towards a New Regional and Domestic Framework' (1998) 12 Georgetown Immigration Law Journal 543.

[102] Council Directive (EC) 2001/55 of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts Between Member States in Receiving Such Persons and Bearing the Consequences Thereof [2001] OJ L212/12.

[103] eg UNGA (n 44) art 3 para 3; UNGA Res 37/195 (18 December 1982) para 4; UNGA Res 49/169 (23 December 1994) para 7; UNGA Res 69/152 (18 December 2014); New York Declaration for Refugees and Migrants, paras 7, 11.

ExCom Conclusions, and the Global Compact on Refugees.[104] These rules and statements amount to an affirmation of *opinio juris*.[105] Furthermore, State practice of temporary refuge exists in most parts of the world, including Europe, Africa, Asia, the Middle East, Latin America, and North America.[106] Of course, this same practice contains instances where countries have obstructed access to protection. Examples include, amongst others, push-back policies but also States' avoidance of the term 'refugee' when faced with an influx of people; opting instead for words such as boat people, illegal immigrants or displaced persons, so as to circumvent any developing international custom towards these people.[107] However, these examples may be seen as nothing more than mere examples of States evading meeting their obligations under the rule.[108]

It is the combination of 'statements and rules' and 'long-standing State practice' of temporary refuge that makes it a rule of 'modern' customary international law.[109] Notwithstanding a small number of sceptical views,[110] the majority of scholars today agree that temporary refuge is 'firmly rooted in customary international law'.[111]

[104] UNHCR ExCom Conclusion 5 (XXVI) 'Asylum' (1977) para b; UNHCR ExCom Conclusion 11 (XXIX) 'General' (1978) para d; UNHCR ExCom Conclusion 14 (XXX) 'General' (1979) para c; UNHCR ExCom Conclusion 15 (XXX) 'Refugees without an Asylum Country' (1979) para f; UNHCR ExCom Conclusion 19 (XXXI) 'Temporary Refuge' (1980) paras c, e; UNHCR ExCom Conclusion 22 (XXXII) 'Protection of Asylum-Seekers in Situations of Large-Scale Influx' (1981); UNHCR ExCom Conclusion 23 (XXXII) 'Problems Related to the Rescue of Asylum-Seekers in Distress at Sea' (1981). See also UNHCR, 'Protection of Persons of Concern to UNHCR Who Fall outside the 1951 Convention: A Discussion Note', EC/1992/SCP.CRP.5 (2 April 1992). Post-1992, temporary refuge was re-labelled temporary protection by UNHCR ExCom Conclusion 68 (XLIII) 'General' (1992) para u; UNHCR ExCom Conclusion 71 (XLIV) 'General' (1993) para m; UNHCR ExCom Conclusion 74 (XLV) 'General' (1994) para r; UNHCR, *The State of the World's Refugees: The Challenge of Protection* (Penguin 1993) 41; UNHCR ExCom Conclusion 100 (LV) 'International Cooperation and Burden and Responsibility Sharing in Mass Influx Situations' (2004). See also UNHCR, 'Guidelines on Temporary Protection or Stay Arrangements' (2014); New York Declaration for Refugees and Migrants, para 7; Global Compact on Refugees, para 63; UNHCR ExCom Conclusion No 112 (LXVII) 'International Cooperation from a Protection and Solutions Perspective' (2016).

[105] Perluss and Hartman (n 95) 625. In contrast, see Hailbronner 1986 (n 66).

[106] Perluss and Hartman (n 95).

[107] This was the case for instance of Laos, Kampuchea, and Thailand (but not Indonesia) in the late 1970s. See Greig (n 80) 125–6.

[108] Perluss and Hartman (n 95) 557, 572–3; Greig (n 80) 128.

[109] Goodwin-Gill 2014 (n 78) 446, referring to Roberts (n 6).

[110] These are reviewed in Goodwin-Gill 2014 (n 78).

[111] ibid 458; Lambert (n 57) 725; Alice Edwards, 'Temporary Protection, Derogation and the 1951 Refugee Convention' (2012) 13 Melbourne Journal of International Law 595, 626; Joan Fitzpatrick Hartman, 'The Principle and Practice of Temporary Refuge: A Customary Norm Protecting Civilians Fleeing Internal Armed Conflict' in David A Martin (ed), *The New Asylum Seekers: Refugee Law in the 1980s* (Martinus Nijhoff 1988) 88; Perluss and Hartman (n 95) 624; Greig (n 80) 133.

4. Asylum

a. The Right to Grant Asylum as a Fettered Right of States

Asylum is a peaceful and humanitarian act with origins that can be traced to Antiquity.[112] It is a friendly act in the sense that it 'is not an internationally wrongful act against other states, including the state of nationality', so long as it is for humanitarian reasons.[113] It has been described as 'the protection which a State grants on its territory or in some other place under the control of certain of its organs, to a person who comes to seek it'.[114] Affirmation of its normative character can be found 'in its nature as a religious command' which 'subsequently found expression in the constitutional texts worldwide'.[115] Traditionally, asylum has always been a sovereign right of States.[116] This prerogative existed in favour of two groups of individuals, common criminals and freedom fighters. It was subsequently expanded to refugees thereby acquiring a new meaning: 'protection of refugees' (in a broad sense) or permanent residence as a durable solution (in a narrower sense).[117] Despite being stated as a general rule of customary international law,[118] the right of States to grant asylum is limited by the treaties they have signed (eg relating to extradition, particular alliance). Since 2001, the UN has also requested that States refrain from providing asylum (safe haven) to terrorists.[119] However, by far the most extensive limitations are contained in provisions of international human rights law which recognize a human right to seek and enjoy asylum, and which have expanded protection against *refoulement* to all individuals irrespective of conduct (or nationality).

b. Asylum and *Non-refoulement*

The interplay between asylum and *non-refoulement* is ambiguous and beyond the scope of this chapter. Suffice it to say that asylum is not included in the main text of the Refugee Convention (or Protocol), probably to 'preserv[e] the appearance of state sovereignty'.[120]

[112] Hailbronner and Gogolin (n 66) para 6.

[113] Worster (n 30) 480–1.

[114] Hailbronner and Gogolin (n 66) para 1.

[115] María-Teresa Gil-Bazo, 'Asylum as a General Principle of International Law' (2015) 27 IJRL 3, 18, 20.

[116] Paul Weis, 'Territorial Asylum' (1966) 6 Indian Journal of International Law 173.

[117] Goodwin-Gill and McAdam (n 22) 343.

[118] eg *R (European Roma Rights Centre) v Immigration Officer at Prague Airport* [2004] UKHL 55, [2005] 2 AC 1, paras 11–17 (Lord Bingham); *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1, para 42 (McHugh and Gummow JJ). See also Hailbronner and Gogolin (n 66) para 25.

[119] UNSC Resolution 1373 (28 September 2001) para 3, subpara f.

[120] Chetail (n 21) 192. But it is mentioned in the Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Final Act (25 July 1951) UN doc A/CONF.2/108/Rev.1, which adopted the Refugee Convention, and in the preamble to the Refugee Convention.

At the same time, article 33 enshrines one of the most important protections for refugees: the right to *non-refoulement*. Chetail links this 'constructive ambiguity' to article 14 UDHR, which fails to enshrine a right to receive asylum.[121]

With asylum absent from the Refugee Convention, the obligation of *non-refoulement* has played a key role in securing a 'right to asylum', in the sense that asylum seekers cannot be sent back without their application for protection (asylum) being individually assessed.[122] Whether this 'duty of inquiry'[123] includes a right to be granted asylum in a particular State 'remains one of the most controversial matters in refugee studies'.[124] Indeed, respect for *non-refoulement* in practice necessitates some kind of admission (asylum), even if only informally or on a temporary basis.[125] This has led some scholars to identify an implicit right to be granted (to receive) asylum in the Refugee Convention, derived from article 14 UDHR: 'for the right to have any meaning, a persecuted individual "would need to receive asylum, not merely the right of asylum" '.[126] Is this 'right' to receive asylum customary international law, is it law at all, or does it exist somewhere between *lex lata* and *lex ferenda*?

c. The Right to Seek, Enjoy, *and Receive* Asylum

It is generally accepted that a human right to asylum only extends to the right to seek and enjoy asylum, as per article 14 UDHR; that right is either a binding principle of customary international law[127] or an implicit treaty rule in the Refugee Convention.[128] However, the right to *receive* asylum is not as widely accepted. It is recognized in Latin America, where the right *to* asylum has been interpreted to include a subjective right of all persons to seek *and to receive* asylum based on article 22(7) of the American Convention on Human Rights; this interpretation is supported by UNHCR in this regional context.[129] It is also recognized in Africa based on article 12.3 of the African Charter on Human and Peoples Rights, and arguably in Europe based on the EU Charter.[130] The early writers of international law (Grotius, Suarez, and Wolff) too

[121] Chetail (n 21) 191.

[122] *Case of the Pacheco Tineo Family v Bolivia* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 272 (25 November 2013) para 153.

[123] UNHCR (n 35) paras 43–5.

[124] Gil-Bazo (n 115) 10.

[125] Chetail (n 21) 192–3. See also Terje Einarsen, 'The European Convention on Human Rights and the Notion of an Implied Right to *de facto* Asylum' (1990) 2 IJRL 361.

[126] Goodwin-Gill and McAdam (n 22) 360, describing the position of the French representative Mr Cassin on art 14 of UDHR.

[127] Subrata Roy Chowdhury, 'A Response to the Refugee Problems in Post-Cold War Era: Some Existing and Emerging Norms of International Law' (1995) 7 IJRL 100, 106.

[128] Edwards (n 67) 301.

[129] *Rights and Guarantees of Children* (n 70) para 73. See also *Pacheco Tineo Family* (n 123) 2, 3; UNHCR, 'Submissions to the Inter-American Court of Human Rights in the Framework of the Request for an Advisory Opinion on the Scope and Purpose of the Right to Asylum' (April 2017).

[130] Worster (n 30).

understood asylum 'as a duty of the State or a natural right of the individual', and both Weis and Grahl-Madsen believed in a subjective right to asylum based on various domestic constitutional provisions (France, Germany, Italy, Portugal, and Spain).[131] However, such reading of international law has far fewer followers in the English-speaking world. [132] For instance, Goodwin-Gill and McAdam argue that 'the individual still has no right to be granted asylum'.[133] Emphasis is put instead on the legal obligations of States under refugee law, human rights law, and humanitarian law, in particular their duty of *non-refoulement*. Hence, the character of the right to receive asylum as a source of international law has been largely overlooked.

Two scholars nevertheless examine in depth the status of the right to receive asylum as a general principle of law (Gil-Bazo) or international custom (Worster).[134] It is unclear whether the emergence of customary international law and general principles of law follow identical[135] or 'distinct processes, with *opinio juris* and state practice required only in the case of custom'.[136] Suffice it to say that both categories are 'obscure'[137] and the ICJ has tended to refer to both as 'general international law' in a generic way.[138] Hence, evidence of a general principle of law to receive asylum, although not conclusive evidence of an international custom, may nevertheless 'serve as a standard of validity for [...] custom'.[139]

Worster locates evidence in support of general practice and *opinio juris* for a right to receive asylum in extensive State practice of providing asylum as a sense of legal obligation to persons recognized as refugees. He explains how '[m]any states assimilate the application for refugee status determination into the application for asylum, granting asylum as the automatic consequence for individuals determined to be refugees', with some States even articulating asylum as a right for refugees explicitly in their municipal law.[140] He finds further supporting evidence in the frequent and widespread 'commingling' of the notions of asylum and refugees by States and non-State actors (such as UNHCR) in both international and municipal fora.[141] Thus, he argues for the recognition of a customary right to receive asylum *for refugees*. Gil-Bazo takes a wider stand, finding evidence of an individual right to be granted asylum in 'the practice of states as reflected in their constitutional traditions',[142] thus not specifically limited to

[131] Gil-Bazo (n 115) 11–12. See also Franck Moderne, 'Propos sur le "droit d'asile"' (July-December 1999) Cuestiones Constitucionales Revista Mexicana de Derecho Constitucional 177–213.

[132] Gil-Bazo (n 115) 11–14. Citing in particular the work of Goodwin-Gill and McAdam, Harvey, Hathaway, and Gilbert in the English language.

[133] eg Goodwin-Gill and McAdam (n 22) 414–15.

[134] Gil-Bazo (n 115); Worster (n 30).

[135] Dupuy (n 13) 461.

[136] As argued by Thomas Kleinlein (n 16).

[137] Hilary Charlesworth, 'Law-Making and Sources' in James Crawford (ed), *The Cambridge Companion to International Law* (CUP 2012) 190.

[138] Kleinlein (n 16) 131–58, citing *North Sea Continental Shelf* (n 2) para 37; *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (Second Phase) [1970] ICJ Rep 3, paras 34, 46, 87; *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* [1980] ICJ Rep 3, para 62.

[139] Gil-Bazo (n 115) 15.

[140] Worster (n 30) 488–92.

[141] ibid 495–8.

[142] Gil-Bazo (n 115) 7.

refugees. Similar to Worster, she explains how 'the right to asylum is enshrined in most constitutions of countries across different legal traditions' and that while the wording may differ from one country to another, reference to international law is often present.[143] She concludes that 'asylum constitutes a general principle of international law', based amongst others on the case law of the Permanent Court of International Justice and of the ICJ that 'have made express reference to general principles existing in national legal orders as sources of general principles of international law'.[144]

In sum, the right of States to grant asylum is widely recognized to be customary international law. The same may be said of the right to seek and enjoy asylum in article 14 UDHR. However, a customary right to be granted/receive asylum remains contested, despite scholars beginning to test the norm against the requirements of State practice and *opinio juris*.

5. Conclusion

For all its difficulties and contestations, customary law has the potential to play a vital role in refugee protection because major receiving countries are by and large not parties to the Refugee Convention and/or Protocol.

This chapter indicates that extensive agreement exists in favour of a rule of customary law protecting refugees against *refoulement*, binding on all States regardless of whether they are parties to refugee treaties. Arguably, this rule may also have acquired the heightened status of *jus cogens*. The customary character of temporary refuge and the right to receive asylum is more uncertain as both operate outside the scope of treaty law and the practice of States is more nuanced. However, persuasive arguments have been made to the extent that temporary refuge may be regarded as international custom and the right to receive asylum as emerging custom.

All three practices, which are concerned with access and admission to refugee protection, are centuries-old traditions that will continue to evolve within the matrix of international law. But this too is evolving. States may still be 'at the heart of the international legal system'[145] but the potential for non-State actors, such as UNHCR, to develop international custom should not be overlooked. Indeed, UNHCR ExCom Conclusions can be evidence of *opinio juris*, as discussed in the case of *non-refoulement* and temporary refuge; these are taken by consensus and express opinion broadly representative of the views of the international community. The UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the Refugee Convention*, together with UNHCR Guidelines on International Protection, further 'facilitates and enables courts to identify and validate customary law and interpretative norms'.[146] Amongst relevant non-State actors, UNHCR therefore is in a unique position of

[143] ibid 23–5. [144] ibid 28, 16. [145] Roberts and Sivakumaran (n 5) 109.
[146] Goodwin-Gill (n 1) 24.

influencer of domestic courts whose decisions constitute subsidiary means for the determination of international custom.[147]

Finally, there is a further potential consequence of identifying certain refugee law practices as international custom, aside from their application to States non-parties to the Refugee Convention/Protocol. Such obligations would have *erga omnes* effect and hence have the potential to 'result in the invocation of international responsibility'[148] before the ICJ by States other than the injured State[149] or by any State party to the Refugee Convention/Protocol (*erga omnes partes*).[150] This is an issue warranting further research.

[147] ibid 39.

[148] Erika de Wet, 'Invoking Obligations *Erga Omnes* in the Twenty-First Century: Progressive Developments since *Barcelona Traction*' (2013) 38 SAYIL 1, 9.

[149] In accordance with article 48 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts (*erga omnes*), see ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' (2001) II(2) ILC Yearbook 26, art 48.

[150] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)* (Order) 23 January 2020, para 41. See also Dupuy 'L'unité de l'ordre juridique international', *Collected Courses of the Hague Academy of International Law* (2002) 297, 382, 384.

CHAPTER 14

NATIONAL CONSTITUTIONS AND REFUGEE PROTECTION

EVE LESTER*

1. Introduction

National constitutional frameworks add a critical dimension to refugee protection. Even so, with the exception of the right to asylum,[1] where constitutionally enshrined rights apply to non-citizens, they tend not to apply explicitly to refugees.[2] Furthermore, the availability and protective value of such rights vary enormously. These variations reflect one of the key methodological challenges of comparative constitutional law. That is, they underscore the reality that, in evaluating the quality of constitutional protection for non-citizens, including refugees and others in refugee-like situations, much depends on the purpose of the comparison, a State's constitutional and colonial history,[3] and geopolitical dynamics.[4] This means that case selection as well as the nature of the rights at stake will be critical to any analysis.[5]

In view of the global diversity of constitutional frameworks, the challenge of surveying the constitutions of the 148 Contracting States to the Refugee Convention

* My sincere thanks to Yoriko Otomo for stimulating discussions that helped this chapter take shape. I am also grateful to the editors and workshop participants for their helpful suggestions.

[1] See Chapter 49 in this volume.

[2] Adèle Cassola, Amy Raub, and Jody Heymann, 'Constitutional Protections in an Era of Increased Migration: Evidence from 193 Countries' (2016) 20 The International Journal of Human Rights 298. Although the development of national constitutional frameworks in the context of post-conflict reconstruction and transitional justice is a critical element of protection for refugees *qua* returning citizens, this constitutional context is beyond the scope of the present chapter.

[3] ibid 305. [4] ibid 311.

[5] Ran Hirschl, 'The Question of Case Selection in Comparative Constitutional Law' (2005) 53 The American Journal of Comparative Law 125; on case selection see Section 4.

(or its 1967 Protocol) and those States providing refugee protection, but are yet to ratify one or other of these instruments, is immense. Impressive efforts have already been made by several scholars.[6] So, when reflecting on the value of national constitutions to refugee protection, what else might we usefully do? How might we bring a global perspective to the role that national constitutions play in ensuring or undermining refugee protection when we know that constitutions are unique and deeply complex expressions of a different relationship—that between a particular State and its citizenry?

Given that the protective value of national constitutions for refugees is so variable, it is important to understand *how* States draw strength from their constitutions in response to refugee movements and *why* they do so in particular ways. This knowledge will deepen our understanding of how national constitutions and constitutional courts can be engaged strategically as a tool to enhance refugee protection. That is, it can inform approaches by UNHCR and others to tackling pressing refugee protection questions in a particular State or region. It can help nuance litigation strategies by practitioners in the field at both national and regional levels. And it can shape research and advocacy initiatives to enhance protection and address the obstacles that refugees face in their quest for safety. If we are to do these things well, we need to be clear about the nature, scope, context, and limits of constitutional protections, the relationship between a State and its people to which its constitution gives expression, and to be attuned to the possibilities and pitfalls of constitutional comparison.

This chapter is divided into three substantive sections. Section 2 seeks to elucidate the complex nature of the relationship between constitutional law and international refugee law. As a way of assisting researchers and practitioners to unpack this relationship, Section 3 proposes a taxonomy of the relationship for differentiating its complexities. Following on from this, Section 4 applies this methodological framework to three case studies. The chapter then offers some concluding remarks reflecting on the potential and limits of this taxonomy.

2. A Complex Relationship

In this section, I begin by considering the relevance of constitutional text and context (Section 2.a). I then consider State perspectives on international law writ large and international refugee law in particular (Section 2.b). Finally, I offer some reflections on the relationship between constitutional law and international refugee law (Section 2.c).

[6] Michelle Foster and Jonathan Klaaren, 'Asylum and Refugees' in Mark Tushnet, Thomas Fleiner, and Cheryl Saunders (eds), *Routledge Handbook of Constitutional Law* (Routledge 2012) 415; Cassola, Raub, and Heymann (n 2).

a. The Text and Context of a National Constitution

Constitutions are products of the coming together of a people or peoples. Some represent profound societal turning points, the culmination of transformative ruptures (or, less dramatically, 'moments') in a State's power structures and political dynamics, and are often products of political upheaval, peace negotiations, or liberation or decolonization movements. Others perpetuate and entrench existing power dynamics.[7] Some are seen as foundational but living documents or—in the case of uncodified constitutional law—principles, adaptable rather than frozen in time. This may mean constitutions are readily and regularly amended.[8] Or it may mean procedures for doing so are theoretically possible but so cumbersome, or power structures so deeply entrenched, that constitutional amendment is almost as rare as constitutional protection.[9] Whatever the case, as its foundational document, the text and (historical and political) context of a State's national constitution provides insights into its values and its commitment to mediating the tension that inheres between State power and individual rights.

In essence, there are two separate but interrelated ways in which constitutional provisions affect refugee protection. In the first instance, people seeking international protection may enjoy status-related constitutional protection, most notably the right to/of asylum.[10] In this vein, judicial review rights enabling scrutiny of status-related administrative decisions have often been insistently impervious to legislative interference, even across some of the bleakest constitutional landscapes.[11] In the second instance, the question of rights-related constitutional protection for non-citizens covers a broader array of rights issues, which may or may not be protected. These include due process rights, the right to liberty and security of person,[12] rights to equality before the law[13] and to freedom of movement,[14] as well as other fundamental civil and political rights. It may also include economic, social, and cultural rights,[15] such as the right to work.[16] In some cases, States have exploited the absence of rights-related constitutional protections as a means to circumvent judicial review rights.[17]

b. State Perspectives on International Law

This section describes three drivers that shape State perspectives and practice in mediating their constitutional and international legal obligations: the nature of a State's

[7] See Section 4.c.

[8] Gabriel L Negretto, 'Replacing and Amending Constitutions: The Logic of Constitutional Change in Latin America' (American Political Science Association Annual Meeting, Seattle, September 1–4 2011) <https://ssrn.com/abstract=1903398> accessed 8 April 2020.

[9] See Section 4.c. [10] See Chapter 49 in this volume. [11] Foster and Klaaren (n 6) 421.

[12] See Section 4.c. [13] See Section 4.b. [14] See Section 4.a.

[15] Cassola, Raub, and Heymann (n 2) 301. [16] See Section 4.b.

[17] *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514. See further Section 4.c.

legal system; whether it has a (constitutional) bill of rights; and supranational governance and oversight. Each is critical to understanding whether and how States protect non-citizens.

i. *The Nature of Legal Systems*

A key variable in the approach States take to their obligations in international law is the nature of their legal system, particularly the legal tradition on which it is based: whether civil law, common law, or hybrid.[18] In the civil law tradition, for example, where monism is the dominant theory underpinning methodological approaches to the relationship between international law and domestic law, ratification of a treaty renders it binding under municipal law.[19] Although approaches to resolving normative conflicts in monist systems differ, the unity of the law that embodies monism aligns State practice with international law more readily because it becomes enforceable.[20] In contrast, the dualist approach of common law countries treats international law as a separate body of law; thus a second step of explicit integration into the State's domestic law is required for international law to be enforceable.[21]

ii. *Bills of Rights*

Bills of rights and judicial review safeguards have been described as 'crucial to nearly all successful transitions from authoritarian regimes to constitutional democracy' since the end of the Second World War.[22] In some common law countries, the incorporation of a bill of rights goes a considerable way to overcoming the problems of enforcement of international law created by dualism.[23] At the same time, however, the protective capacity of bills of rights, and therefore accountability of States for infractions, vary, especially with regard to non-citizens. Whether a State's constitutional framework includes a bill of rights and whether and how those rights extend to non-citizens has a significant impact on how the relationship between constitutional law and international law plays out. While some States extend constitutional protections to non-citizens,[24] of whom refugees are an important subset,[25] others accord the State plenary omnipotence to choose who it will protect and on what terms.[26]

[18] Most legal systems draw on the civil or common law tradition, or a hybrid. Many other social, religious, and chthonic legal traditions may also have a normative influence on State legal frameworks and practice: H Patrick Glenn, *Legal Traditions of the World* (5th edn, OUP 2014).

[19] Paul Gragl, *Legal Monism: Law, Philosophy, and Politics* (OUP 2018) 20.

[20] ibid 19–34.

[21] James Crawford, *Brownlie's Principles of Public International Law* (OUP 2019) 45–7; Gragl (n 19) 19–54.

[22] Alec Stone Sweet, 'Constitutional Courts' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012) 816, 826.

[23] See further Section 4.a; cf Section 4.c.

[24] Cassola, Raub, and Heymann (n 2).

[25] See Chapter 49 in this volume; Foster and Klaaren (n 6).

[26] Matthew J Lindsay, 'Immigration as Invasion: Sovereignty, Security, and the Origins of the Federal Immigration Power' (2010) 31 Immigration and Nationality Law Review 591, 606; Eve Lester, *Making Migration Law: The Foreigner, Sovereignty and the Case of Australia* (CUP 2018) 130.

iii. *Supranational Frameworks*

The existence and strength of supranational constitutions and related oversight mechanisms also unquestionably shape how States mediate the relationship between constitutional law and international obligations. That is, the constitutional law of States interacts not only with international law, but also with regional treaties,[27] supranational regulatory frameworks,[28] and the jurisprudence of their courts.[29] In the case of *intra*-regional refugee movements, constitutional frameworks that are protective of non-citizens are often given supranational expression through economically motivated free movement agreements within regional or sub-regional economic blocs such as the (extended) Mercado Comun del Sur (MERCOSUR)[30] and Economic Community of West African States (ECOWAS).[31] In practice, such agreements appear to have a greater role in creating a protection-enabling environment for intra-regional refugees than supranational human rights governance and oversight mechanisms.[32] In particular, intra-regional mobility agreements can play an important role in facilitating refugee protection.[33] Indeed, in many ways this is the drafting history of the Refugee Convention itself, which was designed to provide protection only to European refugees, and in doing so wrote out of its terms large numbers of non-European refugees.[34]

c. Constitutional Law and International Refugee Law

To describe the dynamic relationship between national constitutions and refugee protection, this section considers three distinct but interrelated issues: the foundational influence of national constitutions on the making of international refugee law, their enduring influence in the shaping of international refugee law, and the rise of constitutional exceptionalism.

i. *Foundational Influence of National Constitutions*

The influence of national constitutions as foundational to the framing of international refugee law is unquestionable and helps to explain both international refugee law's

[27] See Chapters 15, 17, and 19 in this volume.

[28] The EU is the most highly regulated regional framework.

[29] See Chapters 15, 17 and 19 in this volume.

[30] Treaty Establishing a Common Market between the Argentine Republic, the Federative Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay (adopted 26 March 1991, entered into force 1 January 1995) 2140 UNTS 257 (Asunción Treaty), art 1, establishing MERCOSUR (Mercado Comun del Sur).

[31] Economic Community of West African States (ECOWAS), Protocol relating to Free Movement of Persons, Residence and Establishment (adopted 29 May 1979) 1906 UNTS (Free Movement Protocol), art 2.

[32] See Section 4.b.

[33] See Section 4.b; see Chapter 7 in this volume.

[34] See Terje Einarsen, 'Drafting History of the 1951 Convention and the 1967 Protocol' in Andreas Zimmermann (ed), *1951 Convention relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (OUP 2011) 37.

terms, as well as its limits and silences.[35] Even in dualist systems, which insist upon the independent character of international and national legal systems, the point of departure for delegates negotiating international legal text is usually to frame and delimit its scope in a way that does not contradict their internal constitutional order; in other words, States opt to 'pasteurize' international law now rather than attracting international opprobrium later.[36] So, for example, the preference of a powerful bloc of common law countries to treat matters of immigration law and policy as if they were solely within the constitutional remit of States influenced the terms (and silences) of the Charter of the United Nations (UN Charter) and the UDHR, including the framing of the right to seek asylum.[37] This background also affected the drafting of the Refugee Convention, which omits a binding right to seek asylum.[38] Indeed, the exclusion of the right to seek asylum from the Refugee Convention was seen at the time as reflecting the view that the right to/of asylum was a State's right rather than an individual one.[39] We therefore need to be mindful of the historical reality that the transnational mobility of constitutional ideas about the rights of refugees (and migrants), and notably about excluding and/or limiting such rights, has already permeated—or 'pasteurized'—the framing of international law.[40]

ii. *The Enduring Influence of Constitutional Law*

Undoubtedly, national constitutional frameworks—and the transnational judicial conversations that ensue—have an enduring influence in the ongoing enterprise of making international refugee law, particularly in the context of judicial review rights. Indeed, there are few areas of law where jurisprudence is shared between judiciaries more readily than in the determination of refugee status.[41] This cross-fertilization arises in significant part because of the absence of a judicial or even quasi-judicial international arbiter of refugee law and it plays out in two ways. First, regarding status-related or rights-related judicial review, constitutional frameworks have a central role. This is so, particularly in dualist legal systems or in the absence of (effective) supranational enforcement mechanisms, where the judicial power vested in constitutional courts render them a prime site for mediating international refugee law's scope and content, or

[35] See eg Refugee Convention arts 19, 32(2); Ad Hoc Committee on Refugees and Stateless Persons, 'A Study of Statelessness,' UN doc E/1112; E/1112/Add.1 (1 August 1949) paras 15, 17, 19.

[36] Roberto Gargarella, *Latin American Constitutionalism, 1810–2010: The Engine Room of the Constitution* (OUP 2013) 169.

[37] Eve Lester, 'Internationalising Constitutional Law: An Inward-Looking Outlook' (2016) 42 Australian Feminist Law Journal 321. Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter).

[38] Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Thirty-first Meeting (29 November 1951) UN doc A/CONF.2/SR.31; Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Thirteenth Meeting (22 November 1951) UN doc A/CONF.2/SR.13.

[39] cf William Thomas Worster, 'The Contemporary International Law Status of the Right to Receive Asylum' (2014) 26 IJRL 477, 499.

[40] Lester (n 37).

[41] James C Hathaway and Michelle Foster, *The Law of Refugee Status* (2nd edn, CUP 2014) 4–5.

relevance. Secondly, younger constitutions are more likely to reflect—or at the very least gesture to—international legal standards, whether to safeguard specific rights, including economic, social, and cultural rights, or give constitutional authority to principles of customary international law.[42] In some States, the constitution specifically authorizes the judiciary to take account of international law,[43] even explicitly extending that obligation to principles of customary international law.[44] Thus, we can see that national constitutions are integral pieces in the international refugee law puzzle, particularly where they have embraced a rights (and indeed social and economic rights) constitutionalism.[45]

iii. *Constitutional Exceptionalism*

One of constitutional law's most damaging effects on the international refugee protection regime is the problem of constitutional exceptionalism and the authorization and normalization by constitutional courts of 'exceptional measures' affecting refugees, often as a response to (perceived) threats to national security and public order. In this situation, constitutional frameworks may be called upon as a way of resisting—or at least rendering peripheral—the central tenets of international refugee law.[46] Understanding and exploring ways to counteract this kind of constitutional exceptionalism and, in its name, failures to constrain excesses and misuses of power, is increasingly important as States 'face off' in the global protection 'crisis'. A combination of a highly racialized colonial legacy, dualism, and pervasive forms of constitutional exceptionalism has enabled some States to undermine international legal standards by gesturing to them through ratification and at the same time being unresponsive to them, or selectively so.[47] Indeed, this combination of factors has emboldened some States 'not merely to assert a difference . . . [but to] claim . . . a singular superiority or uniqueness that exempts the exceptional subject from the rules that apply to everyone else'.[48]

As the foregoing sections suggest, the relationship between constitutional law and international refugee law has many layers of complexity. However, as Hirschl has argued, despite 'intellectual interest in the international migration of constitutional ideas' having grown, 'the field of comparative constitutional law remains under-theorized and lacks a coherent methodology'.[49] This suggests that there are many possible ways of

[42] Cassola, Raub, and Heymann (n 2) 303; David Law and Mila Versteeg, 'The Evolution and Ideology of Global Constitutionalism' (2011) 99 California Law Review 1163.

[43] The Constitution of Kenya 2010 (Kenyan Constitution) art 2(5) (see Section 4.a below); Constitution of Papua New Guinea 1975 (PNG Constitution) s 39(3) (see Section 4.c below).

[44] The Constitution of the Republic of South Africa 1996 arts 232–3.

[45] Gargarella (n 36).

[46] Two of the most egregious examples are the US and Australia: *Sale v Haitian Centers Council* 509 US 155 (1993); *Al-Kateb v Godwin* (2004) 219 CLR 580; *CPCF* (n 17). See Chapter 52 in this volume.

[47] Lester (n 26) 20; Section 4.c; BS Chimni, 'The Geopolitics of Refugee Studies: A View from the South' (1998) 11 JRS 350; see Chapter 2 in this volume.

[48] Dianne Otto, 'From "Reluctance" to "Exceptionalism": The Australian Approach to Domestic Implementation of Human Rights' (2001) 26(5) Alternative Law Journal 219.

[49] Hirschl (n 5) 125.

characterizing, exploring, and unpacking the relationship between international refugee law and constitutional law. With this in mind, the following section outlines a methodology designed to assist researchers and practitioners in this endeavour.

3. A Taxonomy

The taxonomy proposed here suggests that the relationship between constitutional law and international refugee law might be understood in one of three ways: as symbiotic, ambivalent, or antagonistic.[50] This taxonomy seeks to clarify what is legally and politically possible in any given context, making visible the limits of comparative constitutional law and the inherent challenges of comparing the unique foundational documents of different States.[51] As an analytical approach it offers a method for thinking about whether and how national constitutional frameworks speak to each other and reinforce, coexist with, or undermine international refugee law's role in the global protection space. Within this framework, both constitutions and the central role played by the judiciary in navigating normative tensions between a State's international obligations and its constitutional framework are considered.

a. Symbiosis

A symbiotic relationship between constitutional law and international refugee law reinforces or strengthens both the national constitutional framework and the international refugee law on which it draws. In this instance, the national constitution will include human rights safeguards that extend to refugees (or, more likely, non-citizens more broadly), such as rights to due process, dignity, liberty, freedom of movement, and so on. In addition, it will also include provisions that authorize, indeed encourage, the judiciary to draw on international legal standards in order to inform interpretation of the constitutional framework. This relationship is mutually reinforcing, strengthening both the corpus of international refugee law jurisprudence as well as the national jurisprudence of the State in question. Each is important as we contemplate the transnational judicial dialogue that has shaped so much of international refugee law and its interpretation at a domestic level, particularly in the last three decades.[52]

This characterization does not necessarily mean that the symbiotic nature of the relationship will be favoured by a State's legislature or executive.[53] Nevertheless, structurally it is a relationship that functions symbiotically because the constitutional framework is

[50] ibid 125.

[51] Mark Tushnet, 'Comparative Constitutional Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2006) 1225.

[52] Hathaway and Foster (n 41).

[53] See Section 4.a.

responsive to international refugee (and human rights) law and the international protection framework is enriched by the State-level jurisprudence.

b. Ambivalence

An ambivalent relationship between international refugee law and a national constitution accepts or tolerates, even respects, the other body of law. However, neither body of law necessarily finds a greater strength in the sum of their parts. Instead, they coexist in the protection space, compatible and to that extent useful to each other. At the same time, in line with their characterization as ambivalent, they tend to operate in parallel to each other, differently motivated but able to live with each other rather than being either synergetic or quarrelsome. Reasons for this ambivalence may be historical, political-economic, or geographical.

Ambivalence in the relationship between international refugee law and constitutional law is noticeable in the context of refugee movements within economic blocs, such as MERCOSUR[54] and ECOWAS,[55] the terms of which reflect in many instances a constitutional recognition of the rights of non-citizens amongst Member States. In these contexts, where regional cooperation is required, regional or sub-regional commitments to economic cooperation, and with them human mobility, operate as a buffer between the national framework and international refugee law. As discussed, States negotiate international agreements based on what they see as constitutionally possible (or desirable), but the strength and dominance of the relationship between constitutional law and the economic drivers behind regional mobility agreements reveal an ambivalence that positions international refugee law as relevant but peripheral. This positioning is suggestive of a pattern in which two legal systems operate compatibly but in tandem or parallel rather than symbiotically. In practical terms, therefore, this means that the non-citizen may benefit from constitutional protections without having to assert them and, equally, may not need to call on her rights under international refugee or human rights law.[56]

c. Antagonism

The factors that make the relationship between international refugee law and a national constitution antagonistic arise when the underlying interests of each body of law cannot—or cannot readily—be reconciled. An antagonistic relationship between these two bodies of law undermines refugee protection and can weaken both international refugee law and constitutional protection. Above all, it is inward-looking and

[54] Asunción Treaty (n 30) art 1. [55] Free Movement Protocol (n 31). [56] See Section 4.b.

isolationist,[57] even hostile towards international law. This damages refugee protection as international refugee law's overarching normative objective by disregarding the principle that human beings are entitled to fundamental rights and freedoms without discrimination.

An antagonistic relationship tends to be—or at the very least risks being—selective, exploitative, competitive, and even resentful. Proponents of a nativist, exceptionalist, unilateralist, or isolationist constitutional position can be aggressively resistant to the objectives of refugee protection.[58] Moreover, in an antagonistic relationship between international refugee law and constitutional law there is a high risk that the voice of resistance (whether of the outspoken refugee, the international refugee lawyer, or UNHCR) will become portrayed and pathologized as the antagonist. This pattern of engagement may be characterized as a form of 'structural gaslighting' in the sense that such critique functions to obscure the non-accidental connections between constitutional structures of oppression and exclusion and the refugee protection deficit that they generate and authorize.[59] Indeed, in this model those seeking to expose and remediate this type of relationship can be assigned responsibility for the injustices that it produces.[60] It may even seek to invert the power relation by constructing the State as victim.[61] This is particularly the case where this area of public policy bears an 'authoritarian rule of law' character.[62]

4. Applying the Taxonomy

Drawing on the foregoing methodology, this section considers three case studies. The 'symbiotic' case study in Section 4.a considers an appeal to the High Court of Kenya by the Kenyan Attorney-General in 2014, relating to a government policy curtailing refugees' right to freedom of movement.[63] The 'ambivalent' case study in Section 4.b considers constitutional protection of the right to work of non-citizens in Latin America, discussed in relation to the Venezuelan refugee crisis. Rather than examining a single constitution, this particular case study considers a situation where the main drivers behind protection of the right to work have been multiple constitutional frameworks and the interests of sub-regional economic blocs. The 'antagonistic' case study in Section 4.c considers Australia's policy of extraterritorial detention and processing,

[57] Lester (n 37).

[58] *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1; *Sale* (n 46).

[59] Kate Abramson, 'Turning up the Lights on Gaslighting' (2014) 28 Philosophical Perspectives 1; Nora Berenstain, 'White Feminist Gaslighting' (2020) 35(4) Hypatia 733.

[60] Lester (n 26) 177–8, 297–8.

[61] ibid 171.

[62] Jothie Rajah, *Authoritarian Rule of Law: Legislation, Discourse and Legitimacy in Singapore* (CUP, 2012); Lester (n 26) 287.

[63] *Kituo Cha Sheria v The Attorney General* [2013] eKLR.

focusing on Manus Island, Papua New Guinea (PNG), which was the subject of challenge in two constitutional courts.

The selection of these case studies is intended to offer 'prototypical' examples in the sense of being illustrative rather than perfect.[64] They provide a starting point for identifying pertinent characteristics that are reflective or symptomatic of the relationship between international refugee law and constitutional law as symbiotic, ambivalent, or antagonistic. In this sense, the methodology offers a framework of analysis or lens rather than an answer or solution to constitutionally relevant refugee protection challenges.

I have selected the case studies for their currency and enduring relevance. They span a new constitution with a bill of rights (Kenya), an old constitution with no bill of rights (Australia), and a regional constitutional dynamic that has implications for how refugee protection is practised, if not always adjudicated (Latin America). Each case study considers one of three rights widely regarded as central features of the refugee protection framework: the right to freedom of movement (Kenya);[65] the right to liberty (Australia);[66] and the right to work (Latin America).[67]

a. Symbiosis: Kenya and the Right to Freedom of Movement

The Kenyan Constitution, adopted in August 2010, is the country's third constitution since independence in 1963. It strengthens rights protections, relevantly the rights to freedom of movement and to dignity,[68] and also underscores the significance of general rules of international law.[69]

Kenya has long hosted a significant population of refugees in camps, notably Kakuma and Dadaab camps, as well as in urban areas, including Eldoret, Mombasa, Nairobi, and Nakuru. In December 2012, the government of Kenya's Department of Refugee Affairs issued a directive to stop reception and registration of refugees in urban areas, to close all urban registration centres, and to require all refugees and asylum seekers to be registered and hosted in refugee camps: Somalis in Dadaab; and all others in Kakuma. It requested UNHCR and others providing direct services in urban areas to cease doing so.[70] The government signalled its intention to move all refugees living in urban areas to the designated camps 'and ultimately, to their home countries after the necessary arrangements are put in place'.[71] It issued a further directive that some 18,000 refugees be rounded up and transported to Thika Municipal Stadium outside Nairobi as a holding ground before encampment.[72] The background to these announcements was a series of grenade attacks in urban areas, which led to an instruction to issue 'movement

[64] Hirschl (n 5) 142–4; Martin Shapiro, *Courts: A Comparative and Political Analysis* (University of Chicago Press 1981).

[65] Refugee Convention art 26.

[66] Refugee Convention art 31; see Chapters 51 and 52 in this volume.

[67] Refugee Convention arts 17–19; see Chapter 53 in this volume.

[68] Kenyan Constitution (n 43) art 28.

[69] ibid art 2(5).

[70] *Kituo Cha Sheria* (n 63) 2.

[71] ibid 3.

[72] ibid 9, 36.

passes' to refugees not already approved for resettlement to third countries,[73] even though there was no evidence that the attacks bore the imprimatur of refugees or asylum seekers.[74]

i. *Constitutional Rights and Freedom of Movement*

The directive was the subject of two challenges brought against the Attorney-General in the Kenyan High Court, one brought by Kenyan NGO, Kituo Cha Sheria, and the other by seven refugees and asylum seekers from Somalia, Ethiopia, Rwanda, and the Democratic Republic of Congo, who had been resident in Nairobi for up to 20 years.[75] UNHCR and the Katiba Institute, an independent institute helping to promote implementation of the Kenyan Constitution, were admitted to the case as *amici curiae*. In July 2015, Majanga J, hearing the case at first instance, held that the government directive was a violation of the constitutional rights to freedom of movement (article 39), dignity (article 28), and fair administrative action (article 47(1)). It was also found to violate the State's responsibility towards persons in vulnerable situations (article 21(3)), even though refugees were not expressly named as a vulnerable group. In addition, it was found to threaten the principle of *non-refoulement* provided for in Kenya's Refugee Act 2006.[76] On appeal against the decision, the Court of Appeal upheld the decision of Majanga J on substantially the same grounds.

Signalling a symbiotic disposition, the Court of Appeal observed that international law applies to Kenya, and, specifically in this instance, the right to freedom of movement in Refugee Convention article 26, ICCPR article 12, and General Comment No 27 of the UN Human Rights Committee.[77] Further, it emphasized that under Kenyan Constitution article 2(5), the general rules of international law are part of Kenyan law, including the principle of *non-refoulement*,[78] highlighted also that it is a principle of customary international law, and recognized its broader application in international human rights law.[79] It noted that restrictions on the right to freedom of movement and residence can only be limited by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom.[80] Finally, the court observed that considerations of national security still import requirements that there be both proportionality and a rational connection between the purpose of the policy and the rights limitation, concluding that there was neither proportionality nor rational connection in the instant case.[81]

[73] ibid 4. [74] ibid 10, 32. [75] ibid 9.

[76] Refugee Act 2006 s 18 (Kenya).

[77] Human Rights Committee, 'General Comment No 27: Article 12 (Freedom of Movement),' UN doc CCPR/C/21/Rev.1/Add.9 (2 November 1999).

[78] Refugee Act (n 76) s 18; the court also referred to OAU Convention art 2(3) and several other regional instruments: *Kituo Cha Sheria* (n 63) 24.

[79] *Kituo Cha Sheria* (n 63) 25.

[80] ibid 28–30; the court also cited jurisprudence of South Africa's Constitutional Court: *S v Manamela (Director-General of Justice Intervening)* [2002] ZACC 5, 2000 (3) SA 1 (CC).

[81] *Kituo Cha Sheria* (n 63) 33–4.

b. Ambivalence: The Venezuelan Crisis and the Right Work

Latin America has a long history of immigration as well as emigration and latterly a generous tradition of asylum.[82] In the first part of the twentieth century, it was European migrants who were welcome as labourers, merchants, and entrepreneurs, with Arabs and Asians—and sometimes Jewish migrants—discriminated against, many of them remaining undocumented.[83] More recently, despite hosting refugees and asylum seekers from other regions,[84] Latin America has seen—and tolerated—higher levels of intra-regional movement and accorded attendant rights protection.[85] An integral part of this history is that many States in the region have included protections for non-citizens in their constitutions, including work rights.[86] Indeed, of the 100 national constitutions that protect rights to work, or rights at work, many are Latin American.[87]

In Latin America, most States are party to both the Refugee Convention and 1967 Protocol. The Cartagena Declaration of 1984, which focused on refugees in Central America, Mexico, and Panama,[88] is commonly cited for its expansive refugee definition. In 2004, the Mexico Plan of Action (MPA) was developed in the context of the Colombian refugee crisis.[89] Work rights provisions in the Refugee Convention notwithstanding,[90] we can see that these two region-specific instruments say little about such rights.[91] Thus the strength of work rights and other protections for those displaced in the region lies in national constitutional protections for non-citizens.

Latin America's long and complex constitutional history, with some States in the region having had more than 20 new constitutions,[92] has had a significant impact on how Latin American States have mediated and given constitutional expression to, the rights of non-citizens. Multiple historical, political-economic and geopolitical factors have impacted the development of such protections for non-citizens, making possible constitutional protection of important non-citizen rights, including work rights. Non-citizen suffrage has also been a significant constitutional feature, which means that the

[82] See Chapter 49 in this volume.

[83] Cristina Escobar, 'Immigrant Enfranchisement in Latin America: From Strongmen to Universal Citizenship' (2015) 22 Democratization 927, 933, 942.

[84] See eg 'Asylum Applications and Refugees in Brazil' (*WorldData.Info*, 2019) <https://www.worlddata.info/america/brazil/asylum.php> accessed 8 April 2020.

[85] David James Cantor, Luisa Feline Freier, and Jean-Pierre Gauci (eds), *A Liberal Tide? Immigration and Asylum Law and Policy in Latin America* (Institute of Latin American Studies, School of Advanced Study, University of London 2015).

[86] Penelope Mathew, *Reworking the Relationship between Asylum and Employment* (Routledge 2012) 57–9.

[87] ibid 57.

[88] Cartagena Declaration, conclusion III; see also 'International Conference on Central American Refugees (CIREFCA)' (1989) 1 IJRL 582.

[89] Mexico Declaration and Plan of Action to Strengthen the International Protection of Refugees in Latin America (adopted 16 November 2004) (MPA).

[90] Refugee Convention arts 17–19.

[91] Cartagena Declaration, conclusion 11; MPA (n 91) 10–11.

[92] See eg the Dominican Republic, Venezuela, Haiti, and Ecuador.

voices of non-citizens, including refugees, can have political traction in ways that they rarely do elsewhere.[93] In practice, the experience in this region suggests that together constitutional protections and sub-regional common markets facilitating intra-regional commerce and mobility can be more influential than international refugee protection standards, or indeed refugee-specific regional agreements.[94]

i. *The Venezuelan Refugee Crisis*

Since 2015, more than 4.7 million Venezuelans have fled political persecution, repression, and an imploding economy, most since 2018.[95] It is currently the world's second largest refugee crisis, second only to Syria,[96] and the largest in Latin American history.[97] The vast majority of Venezuelans have moved intra-regionally, where they have been accorded access to basic social and economic rights, and importantly work rights. The crisis prompted 11 countries in the region to come together in a non-binding regional forum known as the Quito Process, through which they agreed to keep their borders as open as possible and to enable access to labour market opportunities and other social and economic rights (such as public health and education).[98] This reflected rather than expanded the scope of constitutional provisions safeguarding non-citizens' right to work.[99] As the departure point for this process, they signed a joint declaration agreeing, strikingly, to accept expired travel documents from Venezuelans as a form of identification, to the extent their domestic laws allowed it, in order to facilitate safe forced migration pathways.[100]

As a result, and protection challenges notwithstanding, at the time of writing most Venezuelan adults residing in other countries in the region reportedly enjoy work rights, are working, and enjoy fundamental rights such as freedom of movement. Although in some countries Venezuelans have been granted refugee status, protection of most Venezuelan refugees in the region has derived from more flexible approaches that provide temporary status and work rights and view them first and foremost as migrants. In the realm of work rights for refugees,[101] therefore, national constitutions can be more expansive than international law. Thus, the contribution of such constitutions to the

[93] Escobar (n 83).

[94] ibid 928; *Juridical Condition and Rights of the Undocumented Migrants*, Inter American Court of Human Rights, Advisory Opinion OC-18 Series A No 18 (17 September 2003), dealing with rights of unauthorized migrants *at* work rather than *to* work; Mathew (n 86) 149.

[95] Andrew Selee and Jessica Bolter, 'An Uneven Welcome: Latin American and Caribbean Responses to Venezuelan and Nicaraguan Migration' (Migration Policy Institute 2020) 8 <https://www.migrationpolicy.org/research/latam-caribbean-responses-venezuelan-nicaraguan-migration> accessed 8 April 2020.

[96] UNHCR, 'Global Trends: Forced Displacement in 2019' (2020) 8.

[97] ibid 24. [98] Selee and Bolter (n 95).

[99] All participants in the Quito Process constitutionally protect the right to work and/or rights at work of non-citizens.

[100] Declaration of Quito on Human Mobility of Venezuelan Citizens in the Region (adopted 4 September 2018) para 6 <https://www.cancilleria.gob.ec/wp-content/uploads/2018/09/declaracion_de_quito_en.pdf> accessed 8 April 2020.

[101] cf *Minister of Home Affairs and Others v Watchenuka* [2003] ZASCA 142, [2004] 1 All SA 21 (SCA).

interpretation of international law may be seen as playing a secondary role,[102] as 'either negative . . . or merely neutral';[103] in other words, reflecting ambivalence.

Explanations for how and why Venezuelan refugees have been received in neighbouring countries vary. Some have described their reception as a gesture of solidarity not only as against Venezuela's current authoritarian regime, but also reflecting the protection Venezuela provided to other Latin American migrants and refugees in the past.[104] There also appears to be some evidence that responses to refugee movements are shaped by geopolitical and colonial legacies, and that the racial homogeneity of intra-regional refugee movements diminishes the likelihood that States will resort to measures that obstruct access to protection.[105]

c. Antagonism: Australia and the Rights to Liberty and Due Process

The Australian Constitution, which came into force in 1901, does not include a bill of rights and its drafters conspicuously excluded the right to liberty or due process.[106] Indeed, rejection of the right to due process was primarily motivated by a desire to be able to discriminate on the basis of race,[107] some delegates arguing that constitutional protection of the right to due process was superfluous in a civilized society.[108] It was a foundational element of the White Australia immigration policy empowering the Australian State to discriminate against and exclude foreigners, and specifically non-European foreigners. The absence of these rights, and conferral of the broadest possible powers to make laws with respect to aliens and naturalization, and immigration and emigration, constitutionally entrenched the highly racialized claim that there is an absolute sovereign right to exclude and condition the entry and stay of aliens.[109]

The Australian narrative of generosity and humanitarianism in the protection of refugees is underpinned by political and diplomatic priorities and interests rather than law, much less constitutional law. Indeed, it is a narrative that has been complicated by both utilitarian undertones[110] and a nativist antagonism that has long regarded international law as an intrusion on the nation's domestic affairs.[111] However, since the

[102] David James Cantor, 'The End of Refugee Law?' (2017) 9 Journal of Human Rights Practice 203, 207–9.

[103] Mathew (n 86) 59.

[104] Selee and Bolter (n 95).

[105] Cassola, Raub, and Heymann (n 2) 303, 305.

[106] Lester (n 26) 118–19. Commonwealth of Australia Constitution Act 1901 (Australian Constitution).

[107] John M Williams, 'Race, Citizenship and the Formation of the Australian Constitution: Andrew Inglis Clark and the "14th Amendment"' (1996) 42(1) Australian Journal of Politics and History 10.

[108] ibid 15.

[109] Australian Constitution (n 106) ss 51(xix), (xxvii); Lester (n 26) 112–58.

[110] Eve Lester, 'Australian Responses to Refugee Journeys: Matters of Perspective and Context' in Rachel Stevens and Jordana Silverstein (eds), *Refugee Journeys: Histories of Resettlement, Representation and Resistance* (ANU Press 2021) 23, 23–24.

[111] Lester (n 37) 322 fn 5, 333, 337.

introduction of legislation providing for the mandatory detention of unlawful non-citizens to which no (meaningful) judicial review rights attach, and which was first validated by the High Court in 1992,[112] Australia's High Court has continued to uphold the constitutional validity of increasingly brazen instruments of exclusion,[113] with only occasional (partial and 'curable') judicial admonition.[114] Openly contemptuous of international legal standards, such legislative measures have, for example, explicitly absolved officers of the Australian Commonwealth of the responsibility to comply with international human rights and refugee law obligations, including the principle of *non-refoulement*.[115] This has fuelled an authoritarianism that has long characterized this area of public policy, emboldening the Parliament to test the limits of what is constitutionally possible with policies widely condemned as being in violation of fundamental human rights standards.[116] Most controversially, the increasingly extreme patterns in this trajectory have included incommunicado detention on the high seas and extraterritorial detention and processing in Nauru and PNG; measures designed to thwart attempts to seek safe haven in Australia.

i. *Manus Island: A Tale of Two Constitutions*

Although not the first time Australia has used PNG as an extraterritorial place of detention,[117] in 2012 Australia revitalized its 'Pacific Solution' detention and processing policy after it attempted unsuccessfully to establish an offshore processing and resettlement refugee swap arrangement with Malaysia.[118] The 'Malaysia solution' was thwarted when the High Court of Australia held that the statutory power to make transfers of asylum seekers to 'a specified country' (here, Malaysia) required the Minister for Immigration first to declare in writing that that country would meet relevant human rights and refugee protection standards.[119] A majority of the court found the Minister had failed to do so.[120] Reflecting Australia's long-standing antagonism towards any

[112] *Chu Kheng Lim* (n 58).

[113] *Al-Kateb* (n 46) (detention for life); *Behrooz v Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486 (inhumane conditions); *Re Woolley; Ex parte M276/2003* (2004) 225 CLR 1 (detention of children); *CPCF* (n 17) (incommunicado detention).

[114] *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 (Malaysian Declaration Case); *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 (Privative Clause Case); *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 (Offshore Processing Case).

[115] *CPCF* (n 17); Maritime Powers Act 2013 (Cth) s 75A; see Chapter 50 in this volume.

[116] Most recently, the International Criminal Court's Office of the Prosecutor expressed the view that conditions of detention on Nauru and Manus Island qualified as the 'underlying act' of the crime against humanity of imprisonment or other severe deprivation of physical liberty, Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (Rome Statute) art 7(1)(e): Letter from the Office of the Prosecutor of the International Criminal Court to Office of Andrew Wilke MP (12 February 2020).

[117] Tara Magner, 'A Less Than "Pacific Solution" for Asylum Seekers in Australia' (2004) 16 IJRL 53.

[118] Malaysian Declaration Case (n 114); Michelle Foster, 'The Implications of the Failed Malaysian Solution: The Australian High Court and Refugee Responsibility Sharing at International Law' (2012) 13 Melbourne Journal of International Law 395.

[119] Migration Act 1958 (Cth) s 198A.

[120] Malaysian Declaration Case (n 114).

requirement to comply with international human rights and refugee protection standards, and in keeping with a now predictable pattern of legislative behaviour, the Parliament's response was to pass 'curative' amendments designed to insulate all offshore detention and processing from judicial scrutiny.[121] Under these amendments, all statutory requirements of rigour in the exercise of the Minister's powers were erased. No longer is the Minister required to make and table in Parliament a properly articulated, reasoned, and therefore scrutinizable decision. Instead, the Minister is required only to 'think' that it is in the 'national interest' to designate a country a 'regional processing country';[122] a power that is effectively unconstrained.[123]

Although the Minister is also required to have regard to assurances given by the proposed regional processing country as to compliance with refugee protection standards, the requirement is only one of consideration; assurances given need not be legally binding, and the rules of natural justice do not apply to designation decisions.[124] A constitutional challenge by an Iranian asylum seeker to the validity of the designation of PNG under the legislation was given short shrift by the High Court. The court unanimously dismissed the challenge as being without foundation on the basis that the 'national interest' was largely a question of politics rather than law.[125] The court held that, in designating a 'regional processing country' there was no requirement to take any other matter into account, including the international legal obligations of both PNG and Australia.[126] Thus, the constitutional validity of the Minister's power to pay lip service to basic principles of refugee protection was upheld.[127] Legal developments in PNG provide further insight into the antagonistic relationship between international refugee and human rights law on the one hand and Australian constitutional law on the other.

Prior to PNG's independence, Papua and New Guinea were Australian-administered territories. Unlike the Australian Constitution, the PNG Constitution, adopted at PNG's independence in 1975, includes a bill of rights.[128] It safeguards the right to liberty and security of person,[129] with the relevant exception of detention for the purpose of preventing unlawful entry or effecting expulsion, extradition, or removal.[130] It also provides that, in determining whether a law or act that seeks to limit a right protected under the PNG Constitution is 'reasonably justifiable in a democratic society having a proper regard for the rights and dignity of mankind', the Supreme Court may have regard to a range of international standards, including the UN Charter, the UDHR, and even the ECHR.[131]

In 2013, the leader of the Opposition in PNG, Belden Norman Namah, brought an action in the original interpretative jurisdiction of the PNG Supreme Court.[132] The case

[121] Migration Act (n 119) s 198AB(1). [122] ibid s 198AB(2).

[123] Lester (n 26) 174–5 on the 'national interest' as a metaphor for the claim of 'absolute sovereignty'.

[124] Migration Act (n 119) ss 198AB(3), (4), (7).

[125] *Plaintiff S156/2013 v Minister for Immigration and Border Protection* (2014) 254 CLR 28, para 40.

[126] ibid para 41. [127] ibid. [128] PNG Constitution (n 43) s 42. [129] ibid s 42(1).

[130] ibid s 42(1)(g). This provision is similar to ECHR, art 5(f).

[131] PNG Constitution (n 43) s 39(3). [132] ibid s 18.

concerned a group of asylum seekers who had arrived by boat in Australia and were subsequently transferred against their will to PNG, pursuant to two Memoranda of Understanding (MoUs), signed in September 2012 and August 2013. Although lawfully admitted to PNG,[133] the asylum seekers were detained, pending processing of their claims, on Manus Island in a guarded location secured by razor wire and bearing all the hallmarks of detention.[134] In 2014, the two governments (of PNG and Australia) sought to validate the arrangements under the MoUs by amending s 42 of the PNG Constitution to include an additional paragraph.[135] In a manner redolent of patterns of amendment in Australia by legislators accustomed to 'naked and uninhibited' power,[136] and antagonistic resistance to any requirement to comply with international human rights and refugee law standards, the constitutional amendment purported to accord PNG's Immigration Minister 'absolute discretion' to hold a foreign national 'under arrangements made . . . with another country'.[137] However, in an emphatic decision, consistent with fundamental principles of international law, the PNG Supreme Court unanimously held that the asylum seekers were detained on Manus Island in violation of their right to liberty and that the amendment to s 42 conferring 'absolute discretion' was unconstitutional. Attesting to the symbiotic nature of the relationship between international law and PNG constitutional law, the court also held that even if the amendment had been made validly, it would still need to be explicit about the right or freedom it was seeking to restrict (s 38(2)); be shown to be in the public interest and reasonably justifiable in a democratic society (s 38); and comply with the right to freedom from inhuman treatment (s 36). Indeed, in a stinging avowal of postcolonial independence, Kandakasi J intimated that Australia was a 'suppressive regime' that did not protect human rights or place on those rights only such limits as would be 'reasonably justifiable in a democratic society having a proper respect for the rights and duty of mankind' because it was yet to evolve from the 'stone ages' to a more modern democracy.[138]

In 2017, buoyed by the case in the PNG Supreme Court, a further attempt to challenge the constitutional validity of offshore detention on Manus Island was brought in the High Court of Australia.[139] The plaintiff argued that the Australian Constitution constrained the Commonwealth legislature and executive from authorizing an activity in another country that was unlawful as a matter of that country's domestic law; in other words, that the Australian legislature and executive could not lawfully enter into an agreement to detain asylum seekers when such detention was a constitutionally

[133] Migration Act 1978 (Papua New Guinea) s 20. Note, in this connection, Refugee Convention arts 26, 31.

[134] Behrouz Boochani, *No Friend but the Mountains: Writing from Manus Prison* (Picador 2018).

[135] *Namah v Pato* [2016] PGSC 13 (26 April 2016) para 5.

[136] Lester (n 26) 131, 157, 302; *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42.

[137] PNG Constitution (n 43) s 42(ga), as amended by Constitution Amendment (No 37) (Citizenship) Law 2014 s 1.

[138] *Namah v Pato* (n 135) para 52.

[139] *Plaintiff S195/2016 v Minister for Immigration and Border Protection* (2017) 261 CLR 622.

prohibited violation of human rights in PNG. The case failed, the court again having no difficulty rejecting the plaintiff's argument. Reflecting the antagonism embedded in the Australian Constitution and that the court is yet to dislodge, it held that the relevant legislative powers could validly authorize Australia to engage in and procure activities in other countries that did not conform to international law or even that country's domestic law.[140]

5. Conclusion

As we have seen, the complexity of the relationship between constitutional law and international refugee and human rights law is multifaceted. The taxonomy and case studies presented in this chapter offer a way of critically engaging with the relationship between constitutional frameworks and international refugee law from a new angle. Technical, political-economic, historical, and geographical dimensions to, and dynamics in, the relationship all shape the extent to which it may be understood as symbiotic, ambivalent, or antagonistic. Although this taxonomy is not imagined as one promising watertight expression of the relationship between international refugee law and constitutional law, it may nevertheless enable us to reflect more deeply on how, why, when, and where the relationship works in a particular way.

This knowledge may help us to think more strategically about how to harness the protective possibilities of constitutional law and wrestle more productively with constitutional law's limitations. It may help UNHCR and others to shape strategic engagement when meeting refugee protection challenges in particular States or regions. It also reminds us that litigation strategies must be mindful of a constitution's text and context, and its possibilities and pitfalls. Finally, research and advocacy bringing comparative perspectives to nuances in the interaction of constitutional law and international human rights and refugee law is vital to charting a way forward for the refugee protection regime.

[140] ibid para 20.

PART III

REGIONAL REGIMES

CHAPTER 15

REGIONAL REFUGEE REGIMES

Africa

MARINA SHARPE

1. Introduction

African States are both the source of, and hosts for, millions of the world's refugees. In 2018, there were almost 7.4 million refugees and asylum seekers in Africa, amounting to almost one-third of the world's 23.6 million refugees and asylum seekers.[1] Two of the five principal refugee-producing countries in the world are in Africa (South Sudan and Somalia) as are two of the five main countries of asylum (Uganda and Sudan).[2] Moreover, for decades, solidarity and hospitality were hallmarks of the African approach to refugees,[3] in East and the Horn of Africa, where the continent's top refugee-producing and hosting States are concentrated, and continent-wide, as evidenced by the adoption in 1969 of the world's first regional refugee instrument, the OAU Convention.

This chapter critically analyses the regional legal framework anchored by this treaty, as well as recent developments in the regional approach to refugees. It begins in Section 2 by articulating how the notion of Africa as a region is understood here. The regional legal regime for refugees includes treaty and institutional components. Section 3 covers the treaty framework, comprising the Refugee and Organization of African Unity (OAU) conventions and international and regional human rights law, including but not limited to the two covenants, the African Charter on Human and Peoples' Rights (the

[1] UNHCR, 'Global Trends: Forced Displacement in 2018' (2019) 68 <https://www.unhcr.org/statistics/unhcrstats/5d08d7ee7/unhcr-global-trends-2018.html> accessed 23 June 2019.

[2] ibid 3. The other main refugee-producing States are Syria, Afghanistan, and Myanmar, while the other main host States are Turkey, Pakistan, and Germany.

[3] Bonaventure Rutinwa, 'The End of Asylum? The Changing Nature of Refugee Policies in Africa' (2002) 21(1)–(2) RSQ 12.

African Charter)[4] and African instruments on the rights of women and children; however, only the regional instruments are addressed here. Section 4 addresses regional organizations with relevant mandates: African Union (AU) bodies and judicial organs including the AU Commission (AUC), the African Commission on Human and Peoples' Rights (African Commission or the Commission), the African Court on Human and Peoples' Rights (African Court) and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC). Section 4 also addresses the role of civil society. Section 5 covers contemporary refugee protection achievements and challenges. These include the implementation, in terms of both refugee status determination (RSD) and rights, of the regional legal framework in national jurisdictions; the rise of displacement in the context of climate change and disasters; and the relationship between European Union (EU) policy responses to the so-called migration crisis and refugee protection in Africa.

International lawmaking on the continent occurs at the level of the AU, a political union of all 55 States on the African continent plus several island nations,[5] and at the level of Africa's regional economic (and political) communities (RECs), eight of which are officially recognized by the AU. While certain RECs have promulgated laws relevant to human rights generally and to refugees in particular,[6] due to constraints on length, RECs are not covered. Whether and how REC laws, policies, and mechanisms can contribute to refugee protection on the continent is an important avenue for further study.

2. Africa as a Region

How Africa is conceptualized as a region varies according to the geographical perspective of the observer. To observers outside of Africa, the continent is itself a region of the world, often divided into five sub-regions (North, East, Central, West, and Southern Africa). The AU, by contrast, has no concept of 'sub-region'. What are viewed internationally as 'sub-regions' are from the AU perspective 'regions', and these are typically defined in terms of the eight AU RECs mentioned above. By implication, from the AU perspective, Africa itself is not viewed as a 'region'. As this chapter is written from the international perspective, Africa is viewed here as a region, and its sub-regions are understood in the geographic—rather than the economic or political—sense.

Africa's conceptualization as a region is also often a function of the observer's disciplinary or professional perspective. Treaties promulgated by the AU are open to all AU Member States spanning the continent's geography. To a black-letter international

[4] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 21 ILM 58 (African Charter).

[5] The Saharawi Arab Democratic Republic (SADR) is recognized as a State by the AU but does not enjoy this recognition internationally.

[6] See generally, Frans Viljoen, *International Human Rights Law in Africa* (2nd edn, OUP 2012) ch 11; Aderanti Adepoju, Alistair Boulton, and Mariah Levin, 'Promoting Integration through Mobility: Free Movement under ECOWAS' (2010) 29(3) RSQ 120.

lawyer, there is thus no reason to distinguish between, for example, North Africa and sub-Saharan Africa. A political scientist, socio-legal scholar, journalist, or refugee practitioner, by contrast, will likely focus on how different sub-regions of the continent are marked by different histories and politics and will thus make logical distinctions between sub-regions. For example, until recently, UNHCR addressed Africa across two bureaux: one for Africa, focused on sub-Saharan Africa, and another for the Middle East and North Africa. The analysis here focuses on the regional legal regime established by treaties that have been adopted continent-wide.[7] Thus, for the most part, the region as analysed here aligns with the continent.

3. The Treaty Framework

The regional law of refugee protection in Africa is derived from two refugee treaties, the Refugee and OAU conventions,[8] and from five principal human rights instruments: the ICCPR, the ICESCR, the African Charter,[9] the Protocol to the African Charter on the Rights of Women in Africa (Women's Protocol)[10] and the African Charter on the Rights and Welfare of the Child (Children's Charter).[11] The refugee treaties are addressed first, beginning with the history of the OAU Convention. Because the Refugee Convention and international human rights law are analysed elsewhere,[12] the former is addressed only in terms of its relationship with the OAU Convention and the latter is not covered.

a. The History of the OAU Convention

This section draws on various sources to explain the OAU's impetus for a regional instrument and how this evolved in response to political and legal developments on the continent and beyond, in particular the five drafts of the OAU Convention produced

[7] The Refugee Convention has been ratified by 51 of the AU's 55 Member States. The OAU Convention has been ratified by 48 States. The African Charter is almost universal, having been ratified by 54 States.

[8] Most States in Africa are party to both the Refugee and OAU conventions. Eritrea, Madagascar, Mauritius, Namibia, SADR, São Tomé and Príncipe, and Somalia are not party to the OAU Convention. The Comoros, Eritrea, Libya, and Mauritius are not party to the Refugee Convention or its 1967 Protocol; Cape Verde is not party to the Refugee Convention but has ratified the 1967 Protocol. The States that are party to the Refugee Convention and its 1967 Protocol but not the OAU Convention are Namibia, São Tomé and Príncipe, and Somalia; Madagascar is party to the Refugee Convention only and recognizes its geographical limitation to Europe, while the Republic of the Congo is party to both the Refugee Convention and its 1967 Protocol but recognizes the European geographical limitation. The States that are party to the OAU Convention but not the Refugee Convention or its 1967 Protocol are the Comoros and Libya.

[9] African Charter (n 4).

[10] Protocol to the African Charter on the Rights of Women in Africa (adopted 11 July 2003, entered into force 25 November 2005) OAU doc CAB/LEG/66.6 (Women's Protocol).

[11] African Charter on the Rights and Welfare of the Child (adopted 11 July 1990, entered into force 29 November 1999) OAU doc CAB/LEG/24.9/49 (Children's Charter).

[12] See Chapters 9 and 11 in this volume.

prior to its adoption,[13] and contemporaneous OAU Council of Ministers (CM) resolutions (discussed below), read in light of the political situation in Africa during the 1960s. In the early 1960s, many African States had only recently gained their independence, while others—particularly in Southern Africa— remained under colonial or minority rule, with freedom fighters waging decolonization campaigns. These struggles, continued oppression, and tensions or civil war in certain newly independent countries—notably Burundi, Congo-Léopoldville, and Rwanda—forced many to flee. This political situation gave rise to two principal issues. First, exiled individuals did not fall within the ambit of the Refugee Convention, as it then only applied to events before 1 January 1951. Secondly, newly independent regimes were concerned that their rule and international relations might be undermined by refugees using countries of asylum as bases from which to overthrow countries of origin. In response, in 1964 the CM formed a commission. It recommended that the OAU 'draft a special convention on the status of African refugees'.[14] The CM invited the commission to draft the instrument.[15]

The first draft was similar to the Refugee Convention, however it omitted the dateline and was less protective.[16] The CM established a committee of legal experts to revise it.[17] The OAU's Assistant Secretary-General suggested that the second draft should be 'much more concise and much more specifically relevant to Africa',[18] the first suggestion that the African convention should not duplicate its international counterpart. The second draft, however, still largely followed the Refugee Convention.[19] The OAU's Assembly of Heads of State and Government (the Assembly) sent the expert committee back to work and called on Member States to ratify the Refugee Convention,[20] 'the first clear indication that the African refugee convention should not cover the same ground as the Refugee Convention, the overriding character of which was implicitly recognised'.[21]

The expert committee's third draft remained like the Refugee Convention, though it was more liberal and contained provisions relating to Africa. This draft was not, however, adopted. In 1966, the CM handed drafting to the OAU Secretariat,[22] highlighting 'that the African instrument should govern the specifically African aspects

[13] See Marina Sharpe, *The Regional Law of Refugee Protection in Africa* (OUP 2018) ch 2.

[14] Louise W Holborn, *Refugees: A Problem of Our Time: The Work of the United Nations High Commissioner for Refugees, 1951–1972* (Scarecrow Press 1974) 185.

[15] OAU, 'Resolution on the Commission on the Problem of Refugees in Africa', CM/Res 36 (III) (Cairo, 13–17 July 1964) para 6.

[16] Eberhard Jahn, 'Development in Refugee Law in the Framework of Regional Organizations Outside Europe' (1966) 4 Association for the Study of the World Refugee Problem Bulletin 77, 82.

[17] OAU, 'Resolution on the Problem of Refugees', CM/Res 52 (IV) (Nairobi, 26 February to 9 March 1965) para 3.

[18] Memo by Eberhard Jahn, Deputy Director of UNHCR's legal division, dated 15 May 1965, UNHCR archives, fonds 1/5/11/1.

[19] Léopoldville draft, UNHCR archives, fonds 1/5/11/1.

[20] OAU, 'Resolution on the Problem of Refugees in Africa', AHG/Res 26 (II) (Accra, 21–25 October 1965) paras 1–3, 6.

[21] Ivor Jackson, *The Refugee Concept in Group Situations* (Martinus Nijhoff 1999) 182.

[22] OAU, 'Resolution on the Adoption of a Draft Convention on the Status of Refugees in Africa', CM/Res 88 (VII) (Addis Ababa, 31 October to 4 November 1966) para 2.

of the refugee problem and ... should ... be the effective regional complement of' the Refugee Convention.[23] This turning point was due in large part to impending adoption of the 1967 Protocol. The OAU Secretariat presented the fourth draft convention to the CM in September 1967, by which time the 1967 Protocol's entry into force was imminent. This led States to discuss whether a regional instrument remained necessary. The CM decided that it indeed was and asked the expert committee to produce a fifth draft.

The committee's work at this stage was informed by the October 1967 'Conference on the Legal, Economic and Social Aspects of African Refugee Problems'.[24] Delegates were concerned that freedom fighters combatting persistent colonialism might not qualify as refugees under the Refugee Convention. The conference's second recommendation thus advised African States to adopt a new refugee definition reflecting the continent's refugee situations. The expert committee met in June 1968 and worked with a second OAU Secretariat draft. Reflecting recommendation II, it included flight from 'external aggression and occupation, foreign domination or internal subversion' as an additional basis of refugee status; the committee viewed 'subversion' as 'ambiguous' so replaced it with 'disorder'.[25] It also replaced a conflict clause, which would have made the regional instrument hierarchically superior to the Refugee Convention, with article VIII(2)'s language of characterizing the OAU Convention as the Refugee Convention's 'effective regional complement', discussed at sub-section b below. This fifth draft won unanimous CM support and was adopted on 10 September 1969. It entered into force on 20 June 1974, which the OAU designated 'Africa Refugee Day'.[26] In 2001, this became World Refugee Day.[27]

This history demonstrates how the objectives of the OAU Convention evolved from making international refugee law *applicable in* Africa and addressing subversion into, following the 1967 Protocol, addressing refugee issues *specific to* Africa. Subversion in general remained amongst these specific issues, but around 1967 another concern about subversion emerged: States wanted to ensure that individuals actively resisting colonialism would qualify for refugee status.

b. The OAU Convention

The OAU Convention aims both to protect those displaced by wars of decolonization and address potential unrest and subversion by refugees. Recital 3 notes that 'refugee problems are a source of friction among many Member States' and highlights their desire to eliminate

[23] ibid para 6.

[24] TF Betts, 'Conference on the Legal, Economic, and Social Aspects of African Refugee Problems' (Addis Ababa, Ethiopia, 9–18 October 1967)' (1967) 5(4) The Journal of Modern African Studies 561. See Sharpe (n 13) 30.

[25] Jackson (n 21) 190.

[26] OAU, 'Resolution on Africa Refugee Day', CM/Res 398 (XXIV) (Addis Ababa, 13–21 February 1975).

[27] UNGA res 55/76 (12 February 2001) para 8.

'the source of such discord'. Article II(2) thus provides that the 'grant of asylum...is a peaceful and humanitarian act and shall not be regarded as an unfriendly act'. Recital 4 highlights a desire to 'make a distinction between a refugee who seeks a peaceful and normal life and a person fleeing his country for the sole purpose of fomenting subversion', while recital 5 goes on to note that 'the activities of such subversive elements should be discouraged'. In this connection, article III(1) prohibits refugees from 'any subversive activities', and under article III(2), States parties 'undertake to prohibit refugees...from attacking any State Member of the OAU'. Today, the article III prohibition of subversive activities must be read in light of international and regional human rights law, particularly their protections of expression, association, and assembly.[28]

Regarding freedom fighters, following a provision replicating the Refugee Convention definition without the dateline,[29] article I(2) provides that the 'term "refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality'.[30] The 'every person' language ensures that the article I(2) refugee definition is applicable to all refugees in Africa, whether from within or beyond the continent. While colonialism and minority rule no longer prevail, the definition remains relevant, in particular the 'events seriously disturbing public order' clause, which is used to recognize the refugee status of individuals in flight from conflict or violence,[31] often within the *prima facie* approach to RSD.[32] For example, in 2010–11, Ghana, Guinea, Liberia, and Togo each used the *prima facie* approach to recognize individuals in flight from post-election violence in Côte d'Ivoire. Kenya did the same in 2014 regarding people fleeing the civil war in South Sudan.

The African refugee definition is an emerging area of scholarship, due in no small part to the work of Tamara Wood, who has explored its interpretation,[33] implementation,[34]

[28] See Sharpe (n 13) 145–8. [29] Art I(1).

[30] Article I(2) is addressed in Chapter 34 in this volume and, regarding climate change and disasters, in Section 5; see also Sharpe (n 13) 38–62.

[31] Marina Sharpe, 'The 1969 OAU Refugee Convention in the Context of Individual Refugee Status Determination' in Volker Türk, Alice Edwards, and Cornelis Wouters (eds) *In Flight from Conflict and Violence: UNHCR's Consultations on Refugee Status and Other Forms of International Protection* (CUP 2017).

[32] See Chapter 31 in this volume; Bonaventure Rutinwa, 'Prima Facie Status and Refugee Protection', UNHCR New Issues in Refugee Research Working Paper No 69 (2002); Jean-François Durieux, 'The Many Faces of "Prima Facie": Group-Based Evidence in Refugee Status Determination' (2008) 25 Refuge 151; UNHCR, 'Guidelines on International Protection No. 11: Prima Facie Recognition of Refugee Status' (2015) <https://www.unhcr.org/publications/legal/558a62299/guidelines-international-protection-11-prima-facie-recognition-refugee.html> accessed 5 June 2019; Sharpe (n 13) 65–7.

[33] Tamara Wood, 'Who is a Refugee in Africa? A Principled Framework for Interpreting and Applying Africa's Expanded Refugee Definition' (2019) 31 IJRL 290.

[34] Tamara Wood, 'Expanding Protection in Africa? Case Studies of the Implementation of the 1969 African Refugee Convention's Expended Refugee Definition' (2015) 26 IJRL 555.

and application to climate-induced displacement.[35] Previous scholarship, in contrast, tended to analyse the regional refugee definition in isolation from its legal context as an instrument of public international law.[36] With some notable exceptions, in particular on South Africa,[37] the regional refugee definition and modalities of refugee recognition in Africa remain under-researched. Its implementation in particular is in need of deeper legal analysis, especially in light of the diversity of modes of refugee recognition in Africa.[38]

The OAU Convention, as its title indicates, addresses specific aspects of refugee problems in Africa. Recital 9 recognizes the Refugee Convention as 'the basic and universal instrument relating to the status of refugees' and article VIII(2) provides that the OAU Convention is 'the effective regional complement in Africa' of the Refugee Convention. Recital 10 thus calls on States to accede to the Refugee Convention and its 1967 Protocol. That the drafters envisaged that the two conventions would apply in parallel explains the omission of a rights framework from the OAU Convention, as this is contained in articles 3 to 34 of the Refugee Convention.[39] Refugees under the regional instrument can derive these from the Refugee Convention (as well as from human rights law). The OAU Convention thus supplements the Refugee Convention. Taken together, the effect of the article I(2) refugee definition and the OAU Convention's status as the Refugee Convention's 'effective regional complement' is to extend Refugee Convention protection to a broader class of individuals.[40]

The OAU Convention also includes provisions on exclusion and cessation,[41] which largely mirror the Refugee Convention.[42] They were presumably replicated within the OAU Convention to ensure their applicability to article I(2) refugees and to allow for minor regional variations. The OAU Convention includes a cessation clause similar to the Refugee Convention's article 1F(b) exclusion clause for serious non-political crimes

[35] Tamara Wood, 'Protection and Disasters in the Horn of Africa: Norms and Practice for Addressing Cross-Border Displacement in Disaster Contexts' (2015) The Nansen Initiative <http://www.nanseninitiative.org/wp-content/uploads/2015/03/190215_Technical_Paper_Tamara_Wood.pdf> accessed 23 June 2019; see also Sanjula Weerasinghe, 'In Harm's Way: International Protection in the Context of Nexus Dynamics Between Conflict or Violence and Disaster or Climate Change', UNHCR Legal and Protection Policy Research Series (2018).

[36] Wood (n 33) 305–19; see eg Micah Bond Rankin, 'Extending the Limits or Narrowing the Scope? Deconstructing the OAU Refugee Definition Thirty Years On' (2005) 21 South African Journal on Human Rights 406.

[37] Tal Schreier, 'An Evaluation of South Africa's Application of the OAU Refugee Definition' (2008) 25 Refuge 53; Roni Amit, 'No Refuge: Flawed Status Determination and the Failures of South Africa's Refugee System to Provide Protection' (2011) 23 IJRL 458; Fatima Khan and Tal Schreier, *Refugee Law in South Africa* (Juta 2014).

[38] An unpublished review based on UNHCR's 2018 data on 47 AU Member States showed that RSD was conducted by governments in 31 States, by UNHCR in 11, and jointly in 5. The author is grateful for assistance from Elise Currie-Roberts of UNHCR. The data is publicly available at https://www.unhcr.org/search?comid=56b079c44&&cid=49aea93aba&tags=globaltrends.

[39] See Chapter 9 in this volume.

[40] See Sharpe (n 13) ch 4.

[41] Art I(4)–(5).

[42] See Chapters 39 and 57 in this volume.

committed *after* admission to the host country.[43] It also provides for cessation in relation to refugees who have 'seriously infringed' the OAU Convention's purposes and objectives,[44] which effectively operationalizes its prohibition of subversive activities. Further, the OAU Convention excludes an individual from refugee status if 'the country of asylum has serious reasons for considering that…(c) he has been guilty of acts contrary to the purposes and principles of the' OAU.

The OAU Convention includes several provisions that were highly innovative for their time, the international regime having only recently caught up, and then only in certain respects. Article I(4)(g) mandates the 'contracting State of asylum' to determine refugee status. This allocation of responsibility for RSD is without parallel in the Refugee Convention and is relevant in the current global context, in which some States are going to extraordinary lengths to avoid responsibility in this regard. Article II, titled 'Asylum', requires that States parties 'use their best endeavours consistent with their respective legislations to receive refugees and to secure' their settlement.[45] This represents an incremental advance towards an individual right to asylum,[46] especially when read with the African Charter's guarantee of the right 'to seek and *obtain* asylum in other countries in accordance with the law of those countries and international conventions'.[47] Article II also contains the OAU Convention's *non-refoulement* provision, which explicitly forbids rejection at the frontier.[48] Article V provides that repatriation must be voluntary, which overlaps with—but is broader than—the *non-refoulement* guarantee. Finally, the article IV accessory non-discrimination provision overlaps with the Refugee Convention's article 4 and adds 'membership of a particular social group' and 'political opinion' as additional prohibited grounds of discrimination.

The OAU Convention also addresses international responsibility-sharing, something the broader international community has only addressed in non-binding terms, including in the preamble to the Refugee Convention and generally in the Global Compact on Refugees. Article II(4) provides that where 'a Member State finds difficulty in continuing to grant asylum to refugees', it 'may appeal directly to other Member States and through the OAU, and such other Member States shall in the spirit of African solidarity and international co-operation take appropriate measures to lighten the burden of the Member State granting asylum'. This is given a measure of operationalization by article II(5), which provides for 'temporary residence' in the host State requesting assistance until resettlement can be arranged in line with article II(4). These provisions have rarely been used in practice, the only known instance being during the 1970s and 1980s, when, under pressure from South Africa, Botswana, Lesotho, and Swaziland (now Eswatini) relied on article II(4) to resettle refugees to Tanzania, Zambia, and

[43] Art I(4)(f). [44] Art I(4)(g).
[45] Art II(1). [46] See Sharpe (n 13) 71–2.
[47] African Charter (n 4) art 12(3) (emphasis added).
[48] Art II(3); the Refugee Convention's article 33 is now understood as prohibiting rejection borders—see Chapter 50 in this volume.

Zimbabwe.[49] However, in September 2019, Rwanda, the AU and UNHCR signed a memorandum of understanding pursuant to which vulnerable refugees and asylum seekers are being evacuated from detention centres in Libya to Rwanda.[50] While not explicitly linked to article II(4), this arrangement is in line with its spirit.

In contrast to these innovative and progressive provisions, article II(6) provides that for 'reasons of security, countries of asylum shall, as far as possible, settle refugees at a reasonable distance from the frontier of their country of origin'. This suggests that enforced settlement, or refugee camps, are permissible, and State practice suggests the same. Some of the world's largest refugee camps are in Africa, including Ethiopia's Dollo Ado, Kenya's Dadaab and Kakuma and Uganda's Bidi Bidi. Nevertheless, article II(6) must be read in light of international and regional human rights law's free movement guarantees, as well as considering article 26 of the Refugee Convention.[51]

The OAU Convention does not create any supervisory regime like that established by article 35 of the Refugee Convention and UNHCR's Statute.[52] However, article VII does require States to provide the OAU Secretariat (now the AUC) with 'information and statistical data' concerning '(a) the condition of refugees; (b) the implementation of this Convention, and (c) laws, regulations and decrees which are, or may hereafter be, in force relating to refugees'. This provision's Refugee Convention analogue—article 35(2)—forms part of the article that endows UNHCR with supervisory responsibility over the Refugee Convention. Yet article VII of the OAU Convention is a stand-alone provision; it does not follow on from any paragraph endowing the OAU/AU with a supervisory duty in relation to the OAU Convention. Article VII gives the AUC the tools to conduct supervision but does not endow the regional organization with supervisory responsibility as such. This and the supervision of the OAU Convention more generally is an emerging area of research.[53]

c. Human Rights Law

In addition to the Refugee and OAU conventions, refugees in Africa also enjoy the protection of international and regional human rights law.[54] The most broadly applicable regional instrument is the African Charter, applying to '[e]very individual . . . without

[49] Tsion Abebe, Allehone Abebe, and Marina Sharpe, 'The 1969 OAU Refugee Convention at 50: History, Implementation and Future' (22 October 2019) Africa Report No 19 <https://issafrica.org/research/africa-report/the-1969-oau-refugee-convention-at-50> accessed 30 March 2020.

[50] UNHCR, Rwanda, and AU, 'Joint Statement: Government of Rwanda, UNHCR and African Union agree to evacuate refugees out of Libya' (10 September 2019) <https://www.unhcr.org/news/press/2019/9/5d5d1c9a4/joint-Statement-government-rwanda-unhcr-african-union-agree-evacuate-refugees.html> accessed 18 September 2019.

[51] See Sharpe (n 13) 116–18.

[52] See Chapter 10 in this volume.

[53] See Marina Sharpe, 'The Supervision (or Not) of the 1969 OAU Refugee Convention' (2019) 31 IJRL 261.

[54] See further Chapters 11 and 36 in this volume.

distinction of any kind such as . . . national . . . origin . . . or any status'.[55] The African Commission has confirmed that refugees enjoy Charter rights.[56] Women refugees also enjoy the rights guaranteed by the Women's Protocol[57] and child refugees benefit from the Children's Charter.[58]

Focusing on *non-refoulement*, the African Charter prohibits torture and 'cruel, inhuman or degrading punishment and treatment',[59] as well as return to such treatment.[60] The African Charter's article 18 protection of family life, considered alongside the articles 18–19 of the Children's Charter provisions requiring States to protect and support families and guarantee the right of every child to reside with her parents, also prevents *refoulement* when this would separate families.[61] These guarantees establish a regional complementary protection regime.[62] However, article I(2) of the OAU Convention means that individuals in Africa rarely if ever resort to complementary protection; the protection gap filled elsewhere by complementary protection is in Africa addressed by the regional refugee definition.

Regarding asylum,[63] article 12(3) of the African Charter protects the right to 'seek and obtain' asylum,[64] subject to the domestic laws of the State where protection is sought, while article 12(4) prohibits the arbitrary expulsion of non-nationals and article 12(5) forbids their mass expulsion. Article 12(4) has been invoked in favour of refugees,[65] while article 12(5) has been applied to groups that likely included refugees.

On rights in exile, it is noteworthy that both the Children's Charter and the Women's Protocol include refugee-specific provisions. Article 23 of the former is very similar to the CRC's article 22,[66] requiring, amongst other things, that States provide refugee children with 'appropriate protection and humanitarian assistance in the enjoyment of the rights set out in this Charter and other international human rights and humanitarian instruments' and addresses the protection of separated children. The Women's Protocol speaks specifically to refugees in its article 4 on the right to life, integrity, and security of the person; article 10 on the right to peace; and article 11 on the protection of women in armed conflict.[67]

[55] African Charter (n 4) art 2.

[56] *African Institute for Human Rights and Development (on behalf of Sierra Leonean Refugees in Guinea) v Guinea*, Comm No 249/2002, 20th Annual Activity Report of the African Commission on Human and People's Rights (2005–6) (*African Institute*) para 68.

[57] Women's Protocol (n 10).

[58] Children's Charter (n 11).

[59] African Charter (n 4) art 5.

[60] *John K Modise v Botswana* Comm No 97/93, 10th Annual Activity Report of the Af Cm HPR (2000) para 92; *Institute for Human Rights and Development in Africa v Republic of Angola*, Comm No 292/2004, 24th Annual Activity Report of the Af Cm HPR (2008) para 84.

[61] Wood (n 35) 33–4.

[62] See Chapter 36 in this volume.

[63] See Chapter 48 in this volume.

[64] cf UDHR, art 14(1), which guarantees the right 'to seek and to enjoy' asylum; see further Chapter 48 in this volume. Regarding article 12(3) of the African Charter, see *Oganisation mondiale contre la torture and Others v Rwanda*, Comm Nos 27/89, 46/91, 49/91, 99/93, 10th Annual Activity Report of the Af Cm HRP (1996) (*OMT*) para 31, in which the African Commission interpreted the provision narrowly.

[65] *OMT* (n 64) and *African Institute* (n 56).

[66] Children's Charter (n 11) art 23. See Chapter 41 in this volume.

[67] Women's Protocol (n 10) arts 4, 10, 11.

4. The Institutional Framework

The institutional architecture for refugee protection in Africa consists of a patchwork of AU bodies, as well as three AU judicial organs: the African Commission, the African Court, and the ACERWC.

The African Commission became operational in 1987, as the supervisory treaty body under the African Charter to 'promote human and peoples' rights and ensure their protection in Africa', with jurisdiction to hear individual and interstate complaints.[68] It thus has both promotional and protective mandates. Its sources of law are broadly construed as 'the provisions of various African instruments on Human and Peoples' Rights', the UN Charter, the AU's Constitutive Act, the Universal Declaration of Human Rights, other instruments adopted by the AU and African States in the field of human rights, and 'the provisions of various instruments adopted within the Specialised Agencies of the United Nations, of which the Parties to the present Charter are members'.[69] In addition to the African Charter and its Women's Protocol, the African Commission thus clearly also has jurisdiction in relation to the OAU and Refugee Conventions, making it a potentially important source of refugee norms. However, in practice, it primarily adjudicates the African Charter, and has invoked each of the OAU and Refugee Conventions only once,[70] in each case in little depth. While it has issued a limited number of decisions in complaints alleging violations of refugees' Charter rights—refugees clearly face significant financial and logistical barriers in accessing the Commission—its reasoning in these cases has been similarly superficial and has related for the most part to non-nationals in general rather than to refugees in particular.[71] The African Commission has thus done little within its protective mandate to elucidate how the African Charter protects refugees or to bolster protection in practice. Furthermore, its decisions are often viewed as not legally binding, an issue the African Court was created in part to address. However, States parties to the African Charter are, pursuant to article 1, bound to 'give effect' to the treaty, which has been interpreted as including an obligation to implement Commission decisions.[72] Yet, in practice, this often does not occur, with empirical studies finding low levels of compliance.[73]

[68] African Charter (n 4) art 30. [69] ibid art 60.

[70] The African Commission invoked the OAU Convention in *African Institute* (n 56). It applied the Refugee Convention in *Curtis Francis Doebbler v Sudan*, Comm No 235/00, 27th Annual Activity Report of the Af Cm HPR (2009).

[71] See eg *Rencontre Africaine pour la defence des droits de l'homme (RADDHO) v Zambia* Comm No 71/92, 10th Annual Activity Report of the Af Cm HPR (2000) and *Union interafricaine des droits de l'homme and others v Angola*, Comm No 159/96, 11th Annual Activity Report of the Af Cm HPR (1997). Refugee-related cases adjudicated by the African Commission are surveyed in Sharpe (n 13) ch 7.

[72] *Civil Liberties Organisation v Nigeria*, Comm No 129/94, 9th Annual Activity Report of the Af Cm HPR (1995) para 16.

[73] Frans Viljoen and Lirette Louw, 'State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights 1994–2004' (2007) 101 AJIL 1, finding that only 14 per cent of the rulings examined were implemented.

Given the challenges of access and implementation, the African Commission's promotional mandate holds more promise of having a systemic refugee protection effect. This mandate consists primarily of examining biennial States party reports. This procedure has included refugee issues since 2004, however this has been of limited effect, since States' compliance with their reporting obligation is poor and the Commission's concluding observations are typically not made public.

Within the Commission, the Special Rapporteur on Refugees, Asylum Seekers, Internally Displaced Persons and Migrants in Africa (the Special Rapporteur) has significant potential for refugee protection. The previous four Special Rapporteurs have undertaken fact-finding missions, issued statements and reports, communicated with governments, and participated in relevant conferences. The current Special Rapporteur, Algerian Commissioner Sahli Fadel, has focused her mandate on nationality and statelessness, culminating in the drafting of the Protocol to the African Charter on Human and Peoples' Rights on the Specific Aspects of the Right to a Nationality and the Eradication of Statelessness in Africa (AU Nationality Protocol). It is likely to be adopted in 2021. This is a significant achievement and while refugees are particularly affected by statelessness,[74] it is noteworthy that nationality and statelessness are not mentioned in the resolution establishing the Special Rapporteur. Her work on statelessness may have been at the expense of core activities under the mandate, such as to 'raise awareness and promote the implementation of' the Refugee and OAU conventions.[75]

The African Court was created by a 1998 protocol to the African Charter (1998 Protocol)[76] and became operational in 2006. It has jurisdiction to hear contentious cases and issue advisory opinions concerning the African Charter, as well as any human rights instrument ratified by the States concerned.[77] While this jurisdiction is broad and includes the OAU Convention, direct access to the African Court in contentious cases is limited to the African Commission, States parties to the 1998 Protocol and African intergovernmental organizations.[78] Individuals and non-governmental organizations (NGOs) can only sue those few AU States that have accepted this jurisdiction.[79] Furthermore, a potential avenue for NGOs to request advisory opinions from the African Court was recently closed.[80] These access rules severely limit the African Court's

[74] See Chapter 44 in this volume; Michelle Foster and Hélène Lambert, *International Refugee Law and the Protection of Stateless Persons* (OUP 2019).

[75] African Commission, 'Resolution on the Mandate of the Special Rapporteur on Refugees, Asylum Seekers and Internally Displaced Persons in Africa', ACHPR/Res 72 (36th Ordinary Session, 23 November to 7 December 2004) para g.

[76] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (adopted 10 June 1998, entered into force 25 January 2004) OAU doc OAU/LEG/EXP/AFCHPR/PROT.

[77] ibid arts 3(1), 4, 7.

[78] ibid arts 5(3), 34(6).

[79] Article 34(6) of the 1998 Protocol. As of 1 September 2019, only nine States had filed such declarations: Benin, Burkina Faso, Côte d'Ivoire, Gambia, Ghana, Malawi, Mali, Tanzania, and Tunisia; Rwanda withdrew its art 34(6) declaration in 2016.

[80] *Request for Advisory Opinion by the Centre for Human Rights of the University of Pretoria and the Coalition of African Lesbians*, App No 002/2015 Af Ct HPR (2017) paras 52–7.

refugee protection role. Indeed, the only refugee issue to ever come before the African Court was ruled inadmissible because the defendant State had not filed an article 34(6) declaration.[81]

The ACERWC, which supervises the Children's Charter, is similarly unengaged with refugee issues. Its promotional activities do not touch on refugees and none of its decisions or general comments have related to refugees, however these have addressed the related issues of internal displacement[82] and nationality and statelessness.[83]

Besides the judicial organs discussed above, there are three AU bodies with distinct technical, bureaucratic, and political roles relating to refugees. The AU Constitutive Act created seven specialized technical committees composed of Member State ministers and senior officials charged with the technical aspects of AU projects and programmes.[84] In 2009, the Assembly created seven new specialized technical committees, including one on Migration, Refugees, and Internally Displaced Persons. This specialized technical committee was not, however, operationalized until 2015, when it met for the first time in a session aimed at adopting the AU's Disaster Management Guidelines, Humanitarian Policy Framework, and Common African Position on Humanitarian Effectiveness. The specialized technical committee's second meeting in 2017 focused on ongoing work to draft the Protocol to the Treaty Establishing the African Economic Community relating to the Free Movement of Persons, Right of Residence and Right of Establishment (Free Movement Protocol).[85] At its most recent meeting in 2018, the specialized technical committee addressed the AU Nationality Protocol, technical issues related to the African passport contemplated by the Free Movement Protocol, and the operationalization of the African Humanitarian Agency (AHA), which the Assembly had in 2016 resolved to create.[86]

The themes of these three meetings mirror the main issues addressed over the same period by the bureaucratic AUC Department of Political Affairs' (DPA) Division of Humanitarian Affairs, Refugees, and Displaced Persons (HARDP), as well as by the political Permanent Representatives' Committee Sub-Committee on Refugees, Returnees and Internally Displaced Persons (PRC Sub-Committee). The latter is a committee of all Member States' permanent representatives to the AU. It has a mandate

[81] *Michelot Yogogombaye v Senegal*, App No 001/08 Af Ct HPR (2008).

[82] *Michelo Hunsungule and others (on behalf of children in northern Uganda) v The Government of Uganda*, No 001/com/001.2005 (2013).

[83] *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on behalf of children of Nubian descent in Kenya v The Government of Kenya*, No 002/com/002.2009 (2011); *African Centre of Justice and Peace Studies (ACJPS) and People's Legal Aid Centre (PLACE) v The Government of the Republic of Sudan*, No 005/com/001/2015 (2018); ACERWC, 'General Comment on Article 6: Right to Birth Registration, Name and Nationality', ACERWC/GC/02 (16 April 2014).

[84] Constitutive Act of the African Union (adopted 11 July 2000, entered into force 26 May 2001) 2158 UNTS 3, art 15.

[85] Protocol to the Treaty Establishing the African Economic Community relating to the Free Movement of Persons, Right of Residence and Right of Establishment (Adopted 29 January 2018, not yet in force) (Free Movement Protocol).

[86] AU, 'Decision on the Common African Position on Humanitarian Effectiveness' Assembly/AU/Dec 604 (XXVI) (AU Addis Ababa 30–31 January 2016) para 9.

to develop and coordinate AU policy on forced displacement. However, as its ambassador members are not refugee experts, the PRC Sub-Committee largely defers to HARDP, which serves as its secretariat.

Overall, there has been little focus by the AU's technical, political, and bureaucratic bodies on refugee issues. Rather, they have prioritized broader humanitarian issues and other matters: the creation of the AHA, disaster response, nationality and statelessness, and regional integration under the Free Movement Protocol. The latter is sometimes raised as a possible substitute for refugee protection. However, while an individual at risk can relocate under a free movement arrangement, such arrangements do not necessarily protect from *refoulement*. Furthermore, the Free Movement Protocol allows States to 'establish specific procedures for the movement of specific vulnerable groups including refugees, victims of human trafficking and smuggled migrants, asylum seekers and pastoralists'.[87] While such procedures must be 'consistent with' the Refugee and OAU conventions,[88] the possibility of specific procedures for refugees in the context of Free Movement Protocol implementation at least raises the spectre of divergent practice. Any specific procedures should clearly address *sur place* refugees, as the phenomenon of a need for refugee protection arising while away from home may increase as regional free movement leads to more people living outside their countries of citizenship.

A measure of focus on refugees returned in 2019, which the AU Assembly declared the 'Year of Refugees, Returnees and IDPs: Towards Durable Solutions to Forced Displacement in Africa'.[89] Activities for the theme of the year exhibit a clear concern with root causes, as evidenced by two launch events focused on this topic. However, the ongoing reform of the AU may preclude meaningful engagement of refugee professionals with prevention. Most forced displacement in Africa is caused primarily by conflict, which falls under the AU's Peace and Security Council (PSC) and under the DPA. As mentioned above, the DPA also covers refugees. However, when the mandate of the current Commissioner for Political Affairs expires, the humanitarian matters within her portfolio will move to the Department of Social Affairs, which will be renamed Department of Health, Humanitarian Affairs and Social Development (DHHS), while conflict prevention will be centralized under the PSC; the DPA will cease to exist. The AU reforms are thus institutionally separating prevention from protection, just as the wider international community is beginning to work towards more integrated approaches under the Global Compact on Refugees. Moreover, refugee issues may get ever more lost under DHHS, which will work on a gamut of issues.[90]

[87] Free Movement Protocol (n 85) art 24(1).
[88] ibid art 24(2).
[89] AU, 'Decision on the 2019 Theme of the Year', Assembly/AU/Dec 707 (XXXI) (AU Nouakchott 1–2 July 2018).
[90] See Marina Sharpe, 'Preventing Conflict-Induced Forced Displacement in Africa: UNHCR, the AU and the Rhetoric and Realities of "Root Causes" ' in Bruno Charbonneau (ed), *The Routledge Handbook of Peacebuilding in Africa* (forthcoming).

Civil society makes an important contribution to refugee protection in Africa. Humanitarian organizations, such as Médecins sans Frontières and the Norwegian Refugee Council, provide lifesaving and life-sustaining assistance in camp and out-of-camp contexts, often as UNHCR implementing partners. Legal organizations, such as the Katiba Institute, Kituo Cha Sheria, and the Refugee Consortium of Kenya, all in Kenya, as well as university-based legal clinics such as the Refugee Rights Unit at the University of Cape Town and Makerere University's Refugee Law Project in Uganda, provide individual representation and undertake strategic litigation.[91] Finally, scholarly doctrine promotes the progressive development of the law. As mentioned above, scholarship on refugee protection in Africa is currently developing at a rate unseen since the years immediately following the OAU Convention's adoption. This work is particularly important given the paucity of RSD decision reporting in Africa and the lack of an OAU Convention supervisory body. The law of refugee status typically develops through jurisprudence, as well as through guidance issued by a supervisory body, such as UNHCR in the case of the Refugee Convention. In the absence of these, scholarship is of even greater importance.

5. Contemporary Achievements and Challenges

Of the AU's 55 Member States, at least 47 have domestic refugee legislation. Thirty-one of these 47 acts, or 66 per cent, are largely in line with the Refugee and OAU conventions. Of the 16 States without domestic law compliant with international refugee law, law reform is ongoing in at least one, Morocco.[92] The international and regional refugee treaties are thus largely domesticated across Africa, including in innovative ways.[93] There is, however, a significant implementation gap between domestic law and national practice, in relation to both RSD and refugee rights.

While studies of RSD in Africa are limited, the research that does exist has found significant shortcomings in the refugee definitions' implementation, in particular in relation to how decision-makers apply, or rather fail to apply, article I(2) of the OAU Convention.[94] There are also major shortcomings regarding the extent to which refugees enjoy their rights,[95] particularly in relation to freedom of movement and livelihoods. Refugees' freedom of movement is protected by article 26 of the Refugee Convention,

[91] See eg *Attorney General v Kituo Cha Sheria & 7 Others* [2017] eKLR (*Kituo Cha Sheria*).

[92] Sharpe (n 13) 101–4.

[93] See generally David James Cantor and Farai Chikwanha, 'Reconsidering African Refugee Law' (2019) 31 IJRL 182.

[94] See n 37; Sharpe (n 31); Wood (n 34).

[95] See eg Guglielmo Verdirame and Barbara Harrell-Bond, *Rights in Exile: Janus-Faced Humanitarianism* (Berghahn Books 2005).

which, like all Refugee Convention rights, applies equally to refugees recognized under the regional definition,[96] and by article 12(1) common to both the African Charter and the ICCPR, as well as by cognate provisions in domestic laws, including national constitutions.[97] In practice, however, refugees in Africa are often confined to camps,[98] especially as they are increasingly viewed as threatening national security.[99] Refugees' rights to work, guaranteed by articles 17–19 of the Refugee Convention and by article 6 of the ICESCR, are often also not respected. There has, however, been recent progress. Kenya's Court of Appeal found in favour of refugees' freedom of movement,[100] and Ethiopia recently adopted a new refugee law that allows refugees to work and protects their freedom of movement.[101]

Displacement in the context of climate change and disasters is on the rise in Africa. Those forced to flee in such contexts are not generally refugees under the Refugee Convention, unless there is a nexus to a ground in the Refugee Convention.[102] Whether individuals displaced in the context of climate change and disasters can be recognized as refugees under article I(2) of the OAU Convention is contested.[103] If climate change and disasters bring about 'events seriously disturbing public order', then it would seem the OAU definition should be applied.[104] However, State practice on this issue is inconsistent. For example, Kenya recognized Somalis fleeing drought in 2011 as refugees under article I(2), but Uganda did not give refugee status to individuals who fled a volcano eruption in DRC in 2002. The issue of whether article I(2) can provide refugee protection to individuals fleeing climate change and disasters is in need of further doctrinal and empirical research, in particular by surveying State practice, building on Weerasinghe's work for UNHCR.[105]

Europe's abysmal response to the 'migration crisis' has had a significant impact on refugee protection in Africa. Rich European countries and the EU have gone to great lengths to keep refugees out,[106] in part as a result of rising populism, while much less well-off African States have kept their borders open. For example, Uganda welcomed more refugees on each day in 2016 than many European countries received all year.[107]

[96] Sharpe (n 13) 90–112.

[97] There is a nascent trend of courts applying constitutional provisions in favour of refugees. See eg *Kituo Cha Sheria* (n 91), which relied on the Kenyan constitution to protect refugees' freedom of movement.

[98] See Nicholas Maple, 'Rights at Risk: A Thematic Investigation into How States Restrict the Freedom of Movement of Refugees on the African Continent', UNHCR New Issues in Refugee Research Paper No 281 (2016).

[99] For example, refugees have been blamed for terrorist attacks in Kenya.

[100] *Kituo Cha Sheria* (n 91).

[101] Refugees Proclamation No 1110/2019, arts 26, 28.

[102] See Chapter 46 in this volume.

[103] Wood and Viljoen find that article I(2) is applicable (Wood (n 35); Viljoen (n 6) 243). cf Alice Edwards, 'Refugee Status Determination in Africa' (2006) 14 African Journal of International and Comparative Law 204, 225–7; James C Hathaway, *The Law of Refugee Status* (Butterworths 1991) 19.

[104] Wood (n 35); Sharpe (n 13) 50–1.

[105] Weerasinghe (n 35).

[106] See Chapters 26 and 27 in this volume.

[107] Reuters, 'Uganda Welcomes More Refugees Daily than Some in Europe Annually, Charity Says' (*Voa News*, 25 January 2017) <https://www.voanews.com/africa/uganda-welcomes-more-refugees-daily-some-europe-annually-charity-says> accessed 27 June 2019.

This imbalance—which the Global Compact on Refugees aims to redress—may be contributing to recent moves by governments in Africa to limit their generosity to refugees, such as Kenya's attempt in 2016 to close its Dadaab camp. And tied EU aid to Niger has certainly influenced how that country responds to refugees in and transiting through its territory;[108] the same is almost certainly true of other African countries on the so-called route to Europe. Furthermore, EU and particularly Italian collaboration with Libya to prevent refugees there from reaching Europe is fuelling one of the most serious human rights crises today, which includes abuses in Libya such as arbitrary detention in inhuman conditions, severe sexual and gender-based violence, and even modern-day slave trading.[109]

6. Conclusion

This chapter has analysed the regional legal framework for refugee protection in Africa, including both treaty and institutional components, and recent achievements and challenges in protecting refugees. This revealed strong laws, regionally and in national jurisdictions, where the OAU Convention has been domesticated and sometimes even developed. However, domestication is not the same as implementation. The relatively limited literature on refugee protection in Africa has demonstrated poor implementation of article I(2) in RSD and violations of refugees' rights, including systemic violations in the areas of freedom of movement and livelihoods. Other challenges include a lack of clarity around the meaning of the regional definition, including uncertainty regarding whether individuals displaced by climate change and disasters can be refugees under article I(2), the modalities of RSD in Africa, and the role of EU policy in severe abuses in Africa, particularly in Libya. Relevant regional bodies have done little to resolve these challenges. Refugees do not receive specific attention within the AUC's more general humanitarian initiatives. The African Commission and African Court are often practically inaccessible to refugees and the NGOs that advocate on their behalf, and the current Special Rapporteur has focused her mandate on other matters. Regional institutions should lead States to deliver the practical benefits of a positive and protective regional legal framework. Refugee protection in Africa is in need of greater attention from legal scholars, in support of these institutional endeavours.

[108] Daniel Howden and Giacomo Zandonini, 'Niger: Europe's Migration Laboratory' (*Refugees Deeply*, 22 May 2018) <https://www.newsdeeply.com/refugees/articles/2018/05/22/niger-europes-migration-laboratory> accessed 23 June 2019.

[109] See Carla Ferstman, 'Human Rights Due Diligence Policies Applied to Extraterritorial Cooperation to Prevent "Irregular" Migration: European Union and United Kingdom Support to Libya' (2020) 21 German Law Journal 459.

CHAPTER 16

REGIONAL REFUGEE REGIMES

North America

DEBORAH ANKER*

1. Introduction

This chapter analyses refugee protection in the North American region, which for the purposes of this chapter is treated as including Canada, the United States, and Mexico. The dynamics of the region, in particular the hegemonic role of the US, have often led to restrictive policies, reflecting the US's objective of keeping asylum seekers away from its borders. Such policies can be traced back to the US's support of violent regimes in the Northern Triangle of Central America during the 1980s and 1990s. US foreign policy contributed to the conflict and instability that generated a significant portion of the very refugees that it has since sought to keep away. But the dynamics in the region are complex, with Canada and Mexico not always aligning their policies to US interests. Canada in particular has at times played a leadership role in developing and exporting norms, adopting an international human rights-based approach, for instance with respect to gender-based claims to protection.

The chapter begins by discussing the various international and regional refugee and human rights regimes to which Canada, the US, and Mexico are parties (Section 2). Next, the chapter outlines the origin and evolution of specific refugee policies and practices in each of these three States (Canada in Section 3, the US in Section 4, and Mexico in Section 5). The chapter then outlines some of the most pressing current challenges facing the North American region in a time of sharply increasing refugee migrations (Section 6) and concludes by reflecting on the role of legal advocates,

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activists, and non-governmental organizations (NGOs) in holding governments accountable and ensuring that international and constitutional refugee protections are realized (Section 7).

2. The North American Refugee Regime: Legal Framework

The US, Mexico, and Canada are Contracting States to the Refugee Convention and/or to the 1967 Protocol.[1] Each of these States has incorporated the key provisions into domestic legislation, providing both *non-refoulement* protection and procedures for the recognition of refugee or asylum status.[2] In addition, all three States have ratified the CAT, providing 'complementary' *non-refoulement* protection for those who can establish a reasonable possibility of return to torture.[3]

In terms of other human rights treaties, the US has been the most reluctant of the three States to ratify them,[4] having ratified only five of the 18 key human rights treaties.[5] In contrast, Mexico has ratified 16 treaties, Canada 13. Notably, the US is the only UN-member State that has not ratified the CRC.

Regional instruments and processes for the protection of refugees and other displaced persons in the Americas include (1) the Inter-American human rights system, which is organized under the auspices of the Organization of American States (OAS) and both its founding Charter, the American Declaration of the Rights and Duties of Man, as well as the American Convention on Human Rights (ACHR), and which is monitored by the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights; and (2) the Cartagena Declaration and the subsequent Declarations issuing from Latin American States' decennial colloquia on refugee protection in the region.[6] In addition to these rights-based instruments and fora, other regional processes have been established to facilitate migration control, including the Regional Conference on Migration (also known as the Puebla Process), a Regional

[1] Canada and Mexico have ratified both the Refugee Convention and the Protocol. The US has ratified the Protocol.

[2] See Immigration and Nationality Act of 1952, 8 USC ss 1231(b)(3), 1158 (1996). See generally, Immigration and Refugee Protection Act 2001 (Canada) <https://laws.justice.gc.ca/eng/acts/i-2.5/fulltext.html> accessed 28 June 2020; Law on Refugees and Complementary Protection 2011 (Mexico) <https://www.global-regulation.com/translation/mexico/560381/law-on-refugees%252c-complementary-protection-and-political-asylum.html> accessed 28 June 2020.

[3] United Nations Treaty Collection, 'Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-9&chapter=4&clang=_en> accessed 30 June 2020.

[4] Michael Ignatieff, 'Introduction: American Exceptionalism and Human Rights' in Michael Ignatieff (ed), *American Exceptionalism and Human Rights* (Princeton University Press 2005) 6.

[5] OHCHR, 'Status of Ratifications' <https://indicators.ohchr.org/> accessed 30 May 2020.

[6] See Chapters 17 and 34 in this volume.

Consultative Process managed by the International Organization for Migration. The Puebla Process convened for the first time in 1996, bringing together Canada, Mexico, the US, and several Central American countries. But although its meetings initially touted lofty goals, ultimately its decisions reflected the interests of specific northern States, particularly the US.[7] The Puebla Process thus reflects the general problem of such regional migration programmes' susceptibility to US influence, making them liable to co-optation, ie being used as a vehicle for sharing restrictive border control practices throughout the region.[8]

The three States' commitments to regional instruments vary. Neither Canada nor the US has ratified the ACHR, and while the IACHR has interpreted the Declaration as imposing legal obligations,[9] this interpretation has been flatly rejected by the US.[10] The US also has repeatedly rejected the mandate of the IACHR, in particular ignoring judgments that its immigration policies violated the ACHR.[11] Mexico, for its part, has wavered between embracing the more expansive Cartagena refugee definition, incorporating it into domestic law, and, in other contexts, rejecting this same document as 'soft law'.[12] Cartagena was developed as a framework for Latin American and Caribbean countries, and neither the US nor Canada has adopted its expanded refugee definition and related principles into domestic law.

3. Canada

In the early twentieth century, Canada and the US had similar immigration policies. Both countries prioritized the immigration of northern and western Europeans, while restricting 'undesirable' or 'unsuitable' peoples, including those of Asian, Jewish, and

[7] Melanie Nezer, 'The Puebla Process: Migration Controls Move South of the Border' (*World Refugee Survey* 1999) <https://web.archive.org/web/20040222100547/www.refugees.org/world/articles/wrs99_migrationcontrols.htm> accessed 30 June 2020.

[8] See eg Cameron Doig and Asher Hirsch, 'Why Indonesia Shows the IOM Isn't Necessarily Helping Migrants', *Refugees Deeply* (26 October 2017) <https://www.newsdeeply.com/refugees/community/2017/10/26/why-indonesia-shows-the-iom-isnt-necessarily-helping-migrants> accessed 4 June 2019.

[9] *White and Potter 'Baby Boy' v US*, Inter-American Commission on Human Rights Report No 23/81, Case No 2141 (6 March 1981) para 16.

[10] *Roach v US*, Inter-American Commission on Human Rights Report No 3/87, Case No 9647 (22 September 1987) para 38(d). See also Christina M Cerna, 'Reflections on the Normative Status of the American Declaration of the Rights and Duties of Man Anniversary Contributions—International Human Rights' (2009) 30 University of Pennsylvania Journal of International Law 1211, 1220.

[11] See eg *Mortlock v United States*, Inter-American Commission on Human Rights Report No 63/08, Case No 12.534 (25 July 2008).

[12] Diego Acosta and Monica Oehler, 'The Global Compact for Refugees as a Soft Law Instrument: Lessons from the application of the Cartagena Declaration on Refugees in Mexico' (Global Compact on Refugees, 1 March 2019) <https://rli.blogs.sas.ac.uk/2019/03/01/the-global-compact-for-refugees-as-a-soft-law-instrument-lessons-from-the-application-of-the-cartagena-declaration-on-refugees-in-mexico/> accessed 16 June 2020.

African origin. Such formal biases lasted until the 1960s, when they were largely eliminated and replaced by immigration regimes with preference based on family reunification and economic utility. It was not until after the Second World War that Canada, like the US, first developed the legal category of 'refugee', admitting discrete groups of post-war and Cold War refugees fleeing communism.[13]

In the post-war period, Canada distinguished itself from its hegemonic neighbour, carving out an identity as an internationalist middle power and assuming a leadership role in the international human rights community.[14] Canada broke with the US over the assessment of asylum claims of Central Americans and, however tentatively, stood as a critic of US foreign policy regarding Central America. Over time, Canada developed a refugee determination system and a body of refugee law jurisprudence explicitly grounded in international human rights, a system considered by many as an international model. But in recent years, Canada has also retreated behind, and reinforced, the protectionist advantages conferred by its geography, seemingly abdicating its role as a leader in asylum policy, arguably just at a time when its leadership was most needed.

a. Birth of the Canadian Refugee System

The modernization of the Canadian migration and refugee regime commenced with the enactment of the 1976 Immigration Act, which officially recognized refugees as a special class, incorporating into Canadian law the Refugee Convention definition (Canada having ratified the Convention in 1969).[15] The Act created the Refugee Status Advisory Committee to undertake refugee status determinations (RSD), subject to an administrative appeal. The legislation was enacted in the year following the end of the Vietnam War, after which more than 1 million persons fled Southeast Asia. The refugees' plight was such that Canadians pressured their government to admit some of these refugees to Canada.[16] Consequently, Canada admitted 77,000 Southeast Asian refugees from 1978 to 1981, almost half of whom were resettled through a new private sponsorship programme.[17] Ultimately, Canada admitted more Southeast Asian refugees per capita than any other country in the world. In recognition of Canada's outstanding service to refugees—particularly through this private sponsorship programme—the United Nations awarded Canada the prestigious Nansen Medal in 1986, the first and only time a country has received that honour.[18]

[13] Marlene Epp, *Refugees in Canada: A Brief History* (The Canadian Historical Association 2017) 16 <https://cha-shc.ca/_uploads/5c374fb005cf0.pdf> accessed 1 June 2020.

[14] James C Hathaway, 'Selective Concern: An Overview of Refugee Law in Canada' (1988) 33 McGill Law Journal 676, 682–3.

[15] See Suzanne Huot, Andrea Bobadilla, Antoine Bailliard, and Debbie L Rudman, 'Constructing Undesirables: A Critical Discourse Analysis of "Othering" within the Protecting Canada's Immigration System Act' (2016) 54(2) International Migration 131, 133.

[16] Harold Troper, 'Canada's Immigration Policy since 1945' (1993) 48 International Journal 255, 274.

[17] Epp (n 13) 18.

[18] ibid 20.

b. Canada Forges Its Own Path: Central America and the *Singh* Decision

In the 1980s, as Canada continued to welcome refugees from Southeast Asia, escalating civil wars in Central America were displacing millions from their homes. Between 1981 and 1984, Canada nearly tripled its refugee resettlement quota for Latin America. Also in this period, the Canadian government established a moratorium on deportations of Salvadorans and, later, of Guatemalans, admitting 15,877 refugees from Central America between 1982 and 1987.[19]

Beginning with the election of Pierre Trudeau in 1968, Canada became increasingly involved in Latin America, though in doing so Canada walked a tightrope between criticizing US foreign policy towards Central America on the one hand, and, for fear of retaliation, refraining from outright condemnation.[20] Despite this political ambivalence, Canada diverged markedly from the US in its adjudication of asylum claims. As Hamlin explains, while foreign policy, domestic politics, and ideology strongly influenced the assessment of asylum claims in the US, Canadian law and practice developed on the basis of human rights-grounded criteria that were more detached from perceived foreign policy interests. Over time, Canada established a centralized administrative system formally insulated from politics, emphasizing expertise and institutional research support in the asylum adjudication process.[21] Consequently, while prior to 1990 the US granted asylum in fewer than 3 per cent of Salvadoran and Guatemalan cases, Canada accepted up to 80 per cent of similar applications.[22] During this period, Canada also began to recognize NGOs as stakeholders in the country's asylum system.

During its period of leadership in the treatment of Central American refugees, Canada also advanced a distinctive rights-based interpretation of refugee law. Most notably, in its landmark 1985 decision, *Singh v Minister of Employment and Immigration*, the Canadian Supreme Court held that the basic requirements of procedural justice enumerated in the newly adopted Charter of Rights and Freedoms applied to all persons

[19] Maria Cristina Garcia, *Seeking Refuge: Central American Migration to Mexico, the United States, and Canada* (University of California Press 2006) 130.

[20] ibid 126.

[21] Rebecca Hamlin, *Let Me Be a Refugee: Administrative Justice and the Politics of Asylum in the United States, Canada, and Australia* (OUP 2014) ch 5. Hamlin argues that it is in part the resources and independence given to the administrative process that distinguishes the Canadian system from the American one. Whereas the Canadians created one administrative process, with a great deal of resources and generally insulated from political interference, the American system is fragmented, with different actors and agencies involved in the determination process, including the Attorney General, a cabinet member and political appointee of the President. The result, in the American context, has been a lack of consistency in decision-making, resulting in individual cases often turning on the happenstance of the individual immigration adjudicator. See further Banks Miller, Linda Camp Keith, and Jennifer S Holmes, *Immigration Judges and US Asylum Policy* (University of Pennsylvania Press 2014); Jaya Ramji-Nogales, Andrew I Schoenholtz, and Philip G Schrag (eds), *Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform* (New York University Press 2009).

[22] Epp (n 13) 19.

physically present in Canada, including foreign nationals. In the case of asylum seekers, procedural fairness mandated an oral hearing in which a claimant could present her case and meet the case against her.[23] The *Singh* court explicitly referenced human rights principles, an interpretation made possible in part because the Charter was so new and therefore not yet encrusted in domestic norms. Importantly, Canada took the lead internationally in the development of refugee and asylum jurisprudence, which, since *Singh*, is 'constituted as a complex web of refugee law and human rights law that is of both domestic and international origin'.[24] As Macklin notes, Canada's human rights approach to the interpretation of refugee law 'brings refugee law more explicitly into a discursive relationship with other developing loci of domestic and international human rights'.[25]

In the wake of *Singh*, and through the early 1990s, Canada served as a model and 'norm exporter', especially with respect to the US. In 1993, for example, Canada's Immigration and Refugee Board published its 'Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution'.[26] Following advocacy by American NGOs, the US Immigration and Naturalization Service followed suit, adopting the 'Considerations for Asylum Officers Adjudicating Asylum Claims from Women' in 1995.[27]

c. A Retreat to Protectionism

In the second half of the 1980s, Canada's immigration system was restructured. In 1986, the US enacted the Immigration Reform and Control Act, which restricted employment opportunities for, and provided measures to reduce the entry of, undocumented immigrants.[28] Thereafter, many migrants—particularly Central Americans—started crossing the border into Canada. In January 1987 alone, for example, as many Salvadorans arrived in Canada as had claimed refugee status in the entire preceding year.[29] The new appeals procedures mandated by *Singh* contributed to the backlog of asylum cases, which increased from 8,300 in 1985 to 121,000 by the end of the decade.[30]

[23] *Singh v Minister of Employment and Immigration* [1985] 1 SCR 177.

[24] James Simeon, 'The Human Rights Bases of Refugee Protection in Canada' in Bruce Burson and David James Cantor (eds), *Human Rights and the Refugee Definition: Comparative Legal Practice and Theory* (Brill 2016) 108.

[25] Audrey Macklin, '*Canada* (*Attorney-General*) *v Ward*: A Review' (1994) 6 (3) IJRL 380.

[26] Immigration and Refugee Board of Canada, 'Chairperson Guidelines 4: Women Refugee Claimants Fearing Gender-Related Persecution' (13 November 1996).

[27] United States Bureau of Citizenship and Immigration Services, 'Considerations for Asylum Officers Adjudicating Asylum Claims from Women' (26 May 1995).

[28] See Cecelia M Espenoza, 'The Illlusory Provisions of Sanctions: The Immigration Reform and Control Act of 1986' (1994) 8 Georgetown Immigration Law Journal 343.

[29] Garcia (n 19) 131.

[30] Maria Cristina Garcia, 'Canada: A Northern Refuge for Central Americans' (*Migration Policy Institute*, 1 April 2006) <https://www.migrationpolicy.org/article/canada-northern-refuge-central-americans> accessed 1 June 2020.

In the early 1980s, the Conservative government led by Brian Mulroney undertook to amend what it painted as a fragile asylum system being taken advantage of by 'illegitimate' immigrants. In February 1987, the Mulroney government implemented restrictive measures, including the elimination of employment authorization and various social services formerly provided to refugee claimants with pending applications, and it enabled Canadian officials to return refugee claimants travelling from the US until their Canadian hearing date approached.[31] Despite these setbacks, however, Canada's refugee acceptance rate continued to hover around 50 per cent through the late 1980s.[32]

In the summer of 1987, the arrival irregularly by boat of 174 Indian nationals in Nova Scotia prompted an emergency session of the Canadian Parliament to address 'abuses of Canada's refugee system'.[33] In that session—which, ironically, opened less than a year after Canada had received the Nansen Medal—two bills, C-84 and C-55, were introduced that would dramatically restructure the Canadian RSD process.[34] They contained several controversial provisions: for example, C-55 authorized the Canadian government to deny claims from 'safe third countries'.[35] Despite strong and broad-based opposition, the bills passed. Years later, in the aftermath of the 11 September 2001 attacks, Canada and the US signed a formal Safe Third Country (STC) Agreement.[36] In addition to Canada's STC Agreement with the US, Canada implemented a series of border measures under the rubric of the 'Multiple Borders Strategy' (MBS), erecting significant legal barriers for asylum seekers.[37] Through the institution of various screening measures at checkpoints along a potential asylum seeker's travel route, the MBS sought to 'push … the border out' and make it more difficult for asylum seekers to reach Canadian territory.[38]

One of these border measures has been Canada's imposition of strict visa requirements.[39] For example, in 2009, Canada imposed visa restrictions on Mexico and the Czech Republic which, as intended, precipitated a sharp decline in asylum claims from those two countries.[40] When the visa requirement for Mexican travellers was lifted in December 2016, Canada experienced a 2,500 per cent rise in monthly asylum claims in February 2017 as compared to February of the previous year.[41] From 2012 to 2018, the

[31] Garcia (n 19) 131. [32] ibid 132. [33] ibid 133.

[34] Scott D Watson, *The Securitization of Humanitarian Migration: Digging Moats and Sinking Boats* (Routledge 2009) 66–7.

[35] See also Chapter 28 in this volume. [36] Garcia (n 19) 143–4.

[37] Efrat Arbel and Alletta Brenner, 'Bordering on Failure: Canada–US Border Policy and the Politics of Refugee Exclusion' (Harvard Immigration and Refugee Law Clinical Program 2013) 24–7 <https://commons.allard.ubc.ca/cgi/viewcontent.cgi?article=1013&context=fac_pubs> accessed 2 June 2020.

[38] Efrat Arbel, 'Bordering the Constitution, Constituting the Border' (2016) 53 Osgoode Hall Law Journal 824, 836.

[39] World Economic Forum, 'The Travel & Tourism Competitiveness Report 2017' (2017) 120 <http://www3.weforum.org/docs/WEF_TTCR_2017_web_0401.pdf> accessed 3 June 2020.

[40] Arbel and Brenner (n 38) 6.

[41] Candice Malcolm, 'Mexican Asylum Seekers Flock to Canada', *Toronto Sun* (17 March 2017) <https://Torontosun.com//2017/03/17/asylum-seekers-from-Mexico-flock-to-Canada/wcm/54b0a65f-d61d-49ea-b320-0e943c5ac445> accessed 1 June 2020.

rate of Canadian visa rejection nearly doubled (from 18 to 30 per cent), with the rejection rate for applications from refugee-producing countries such as Somalia, Yemen, Afghanistan, and Syria reaching nearly 75 per cent.[42]

In sum, when compared with the US or a number of other Western countries, Canada seemingly boasts an impressive asylum system. However, when measured in terms of its own evolution, Canada's asylum policies have become more restrictive over time.

4. United States

After the Second World War, the US was instrumental in the drafting of the Refugee Convention but did not ratify it. This abstention with respect to the Refugee Convention (as well as to other human rights treaties) reflects a deep tension in the US's national identity, waivering between cosmopolitan ideals and its own brand of populism or nativism.[43] Nevertheless, in the decades after the war, the US admitted hundreds of thousands of refugees, particularly those fleeing communist governments in Hungary, Cuba, Czechoslovakia, the Soviet Union, and later Indochina. Most were admitted through the executive's exercise of an open-ended 'parole' authority, which became part of domestic US law in 1952.[44]

a. 1965 Amendments and Ratification of the Protocol

The 1960s witnessed two significant developments in US immigration and refugee law. First, in 1965, Congress ended the national origins system for establishing general immigration quotas and substituted for it a system based largely on principles of family reunification.[45] Secondly, in 1968, the US joined UNHCR's efforts to universalize the Refugee Convention by ratifying the 1967 Protocol, which eliminated formal temporal and geographic restrictions. Ratification of the Protocol came at a critical time when many States were leaning towards exclusively regional approaches to refugee protection, rather than joining an international regime.[46] At the time that

[42] Tony Keller, 'Canada Has Its Own Ways of Keeping Out Unwanted Immigrants', *The Atlantic* (12 July 2018) <https://www.theatlantic.com/ideas/archive/2018/07/canada-immigration-success/564944/> accessed 15 June 2019.

[43] See Deborah Anker, 'US Immigration and Asylum Policy: A Brief Historical Perspective' (1990) 13 In Defense of the Alien 74.

[44] Deborah Anker and Michael H Posner, 'Forty Year Crisis: A Legislative History of the Refugee Act of 1980' (1981) 19(1) San Diego Law Review 9, 19.

[45] ibid 18.

[46] See Robert F Barsky, 'The 1967 Refugee Protocol and the Challenges of a Regional Agreement in Latin America' (*Yale Journal on Regulation and the ABA Section of Administrative Law & Regulatory Practice*, 30 April 2019) <https://www.yalejreg.com/nc/the-1967-refugee-protocol-and-the-challenges-of-a-regional-agreement-in-latin-america-by-robert-f-barsky/> accessed 23 May 2020.

the US ratified the Protocol, however, Congress did not also enact legislation implementing it domestically. Rather, the 1965 legislation established a quota for refugees and defined the term 'refugee' ideologically as a person fleeing a communist or communist-dominated country, or a country in the Middle East.[47] This definition created tensions between the legislative and executive branches, with the executive advancing more generous refugee admissions in support of broader foreign policy goals. During this period, the US was competing with the Soviet Union for worldwide influence, and the appearance of a fair and non-discriminatory refugee policy was part of its geopolitical strategy to win over the sympathies of newly emerging States in particular.

b. Refugee Act of 1980 and Subsequent Legislation

The Refugee Act of 1980 formally incorporated the Convention definition into US domestic law.[48] However, RSD continued to be based largely on Cold War politics. Throughout the 1980s, many refugees fled both communist Cuba and the pro-US Duvalier regime in Haiti. In this same period, hundreds of thousands of persons fled violent civil wars in Guatemala, El Salvador, and Nicaragua. The US played an active role in these conflicts, supporting highly repressive governments in both Guatemala and El Salvador. In Nicaragua, the US aided the Contra paramilitaries, who committed myriad human rights violations in the course of their rebellion against the Sandinista government. The US's response to refugees fleeing these conflicts reflected its ideological commitments in the region; thus, it accepted just 1.8 per cent of asylum applications by Guatemalans and 2.6 per cent of asylum applications by Salvadorans between June 1983 and September 1990.[49]

The disparate treatment of asylum seekers in the US and Canada prompted civil society actors in the US—including lawyers, NGOs, and a vigorous faith-based 'sanctuary' movement—to mobilize in opposition to the US's restrictive, politicized approach. In legal challenges, they argued that, with the Refugee Act, Congress had excised ideological criteria from the refugee definition. In these challenges, lawyers and advocates were sometimes successful in convincing the federal judiciary to depart from its stance of exceptional deference to the political branches in immigration matters. In the 1987 *Cardoza-Fonseca* decision,[50] for example, the US Supreme Court overruled the executive branch policy imposing a 'clear probability' standard of proof on people seeking asylum, establishing instead that the 'well-founded fear' standard, rooted in the

[47] Meital Waibsnaider, 'How National Self-Interest and Foreign Policy Continue to Influence the US Refugee Admissions Program' (2006) 75 Fordham Law School 391, 398, referencing the Immigration and Nationality Act 1965 (US).

[48] See generally Deborah Anker, *Law of Asylum in the US* (Thomson Reuters 2020) ch 1.

[49] Garcia (n 19) 90.

[50] *INS v Cardoza-Fonseca*, 480 US 421 (1987).

Refugee Convention, should be applied in asylum adjudications.[51] In *American Baptist Churches v Thornburgh*, a federal district court approved the settlement in a nationwide class action lawsuit that had challenged systemic discrimination against Salvadoran and Guatemalan asylum seekers.[52] In that settlement, the federal government acknowledged it had engaged in impermissibly politicized asylum decision-making and agreed to re-adjudicate the applications of a large class of Salvadoran and Guatemalan asylum seekers under a uniform, non-ideological standard, as required by international law.[53]

The Refugee Act of 1980 remains the US legislative framework. Asylum adjudications take place through two processes: an informal interview conducted by an asylum officer and a more formal hearing before an administrative judge. Through the separate overseas refugee resettlement programme, the US has since 1980 admitted more than three million people—in its initial years, mainly persons coming from the former Soviet Union or Indochinese refugees fleeing communist rule in the wake of wars in Vietnam, Laos, and Cambodia.[54]

While refugee advocates achieved important victories in the early to mid-1990s, for instance the adoption of the 1995 gender guidelines referenced above,[55] asylum still became a highly controversial issue in American politics. As Republican politicians embraced 'tough on crime' policies, they also framed unauthorized entrants as 'criminal aliens'.[56] Later, the Clinton administration and congressional Democrats increasingly appropriated such rhetoric, leading to the enactment of highly restrictive legislation, most notably the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA). IIRAIRA instituted fast-track deportation procedures, repealed various mechanisms providing relief from deportation, curtailed judicial review of immigration decisions, expanded the number of crimes making an immigrant eligible for deportation, and overhauled immigration enforcement and detention.[57] In short, IIRAIRA laid the groundwork for the vastly expanded deportation and detention bureaucracy existing in the US today.[58]

[51] See also *Bolanos-Hernandez v INS*, 767 F 2d 1277 (9th Cir, 1984); see also *Orantes-Hernandez v Thornburgh*, 919 F 2d 549 (9th Cir, 1990), which established important procedural protections for detained Salvadoran asylum seekers, recognizing that the 1967 Protocol 'binds parties to comply with the substantive provisions of Articles 2 through 34 of the [Refugee Convention]'.

[52] *American Baptist Churches v Thornburgh*, 760 F Supp 796 (ND Cal 1991).

[53] ibid.

[54] Garcia (n 19) 124.

[55] McKinnon analyses gender- and sexuality-related cases against the backdrop of national and transnational politics and concludes that the US still fails to recognize gender as an established category. See Sarah L McKinnon, *Gendered Asylum: Race and Violence in US Law and Politics* (University of Illinois Press 2016). Progress has been made, for example with individual immigration judges and US courts increasingly recognizing gender itself as a defining element in the 'particular social group' basis for refugee protection. See Anker (n 48) ch 5:45. See also Chapter 3 in this volume.

[56] See eg Patrisia Macías-Rojas, 'Immigration and the War on Crime: Law and Order Politics and the Illegal Immigration Reform and Responsibility Act of 1996' (2018) 6 Journal on Migration and Human Security 1, 7.

[57] See Anker (n 48) ch 5:55.

[58] See eg Donald Kerwin, 'From IIRIRA to Trump: Connecting the Dots to the Current Immigration Policy Crisis' (2018) 66 Journal on Migration and Human Security 192, 192–3.

c. IIRAIRA: The Immigration Enforcement Model

IIRAIRA's effects on American immigration and asylum law and practice were immediate and dramatic. Combined federal legislative appropriations for immigration detention and removal operations increased immediately and significantly,[59] and annual deportations steadily increased from 69,680 in 1996 to 188,467 in 2000.[60] Post-IIRAIRA deportees included a large number of Central Americans (over 200,000 between 1998 and 2005), some of whom were members of organizations like MS-13 and Barrio 18, which had originally been founded in the US.[61] Fledgling criminal justice systems in El Salvador and Guatemala were unable to cope with such large-scale arrivals, and the gangs began rapidly to expand membership and activities, accumulating political and territorial control and increasingly exercising a form of de facto sovereignty.[62]

Following the 11 September 2001 terrorist attacks, immigration enforcement escalated further, a trend that continues today. Federal funding for immigration enforcement and the number of immigrants detained in prison-like conditions significantly increased under Presidents Bush and Obama, and daily detention rates continued to rise under the Trump administration.[63] In 2005, Congress enacted legislation significantly increasing the evidentiary burden asylum seekers must satisfy in order to qualify for protection.[64] Moreover, the executive branch has increasingly and unilaterally enacted both substantive and procedural changes to the asylum system. In what was seen by many as a highly politicized move, for example, Attorney General John Ashcroft removed one-third of the Board of Immigration Appeals members in 2002.[65]

[59] Migration Policy Institute, 'Immigration Enforcement Spending since IRCA' (November 2015) 2 <https://www.migrationpolicy.org/sites/default/files/publications/FactSheet_Spending.pdf> accessed 2 June 2020.

[60] Douglas S. Massey and Karen A. Pren, 'Unintended Consequences of US Immigration Policy: Explaining the Post-1965 Surge from Latin America' (2012) 38(1) Population and Development Review 1, 27.

[61] Anker (n 48) ch 5:55.

[62] Dennis Rodgers, Robert Muggah, and Chris Stevenson, 'Gangs of Central America: Causes, Costs, and Interventions' (Small Arms Survey 2009) 7–8.

[63] Katharina Buchholz, 'Number of Immigrant Detainees Rises Quickly', *Statistica* (3 January 2020) <https://www.statista.com/chart/17977/number-of-detainees-in-facilities-of-dhs-immigration/> accessed 10 June 2020; see also Emily Kassie, 'Detained: How the US Built the World's Largest Immigrant Detention System', *The Guardian* (24 September 2019) <https://www.theguardian.com/us-news/2019/sep/24/detained-us-largest-immigrant-detention-trump> accessed 6 June 2020.

[64] Michael John Garcia, Margaret Mikyung Lee, and Todd Tatelman, 'Immigration: Analysis of the Major Provisions of the REAL ID Act of 2005' (25 May 2005) CRC Report for Congress <https://fas.org/sgp/crs/homesec/RL32754.pdf> accessed 30 June 2020; The Association of the Bar of the City of New York, 'Statement in Opposition to the REAL ID Act (HR 418)' (9 February 2005) <https://www.nycbar.org/pdf/report/REAL_ID.pdf> accessed 30 June 2020.

[65] Michael B Mushlin, 'The Surge in Immigration Appeals and Its Impact on the Second Circuit Court of Appeals' (2005) 60 Record of the Association of the Bar of the City of New York 243, 245.

Attorneys General in the Trump administration have been even more aggressive, frequently issuing precedential decisions that bind the quasi-judicial administrators deciding asylum cases and impose strict timelines that interfere with judicial independence.[66] The Trump administration also attempted to restrict asylum seekers' access to the protection regime entirely.[67] However, the American judiciary has shown willingness to limit the executive, in many cases finding its policies inconsistent with the language and purpose behind the Refugee Act and the Protocol on which the Act is based.[68]

5. Mexico

a. The Guatemalan Refugee Migration: Mexico Ratifies the Convention and Protocol

Mexico has a long history of receptivity to refugees, from accepting persons fleeing the Spanish Civil War in the 1930s to welcoming survivors of South American military dictatorships in the 1970s. Through the 1980s and 1990s, Mexico served both as a country of transit and, in some cases, a country of first asylum for Central Americans fleeing civil wars in their region.[69] By 1990, there were approximately half a million Salvadorans and 200,000 Guatemalans in Mexico, largely without any secure status.[70] As the number of Central Americans coming to Mexico rose, NGOs and others accused the Mexican government of perpetrating and countenancing human rights violations (including large-scale *refoulement*) against this refugee population.

Mexico was the last country in the Americas to ratify either the Refugee Convention or the 1967 Protocol, except for Cuba and Guyana, which are still abstaining. Mexico's delay is attributable, to a significant extent, to the challenges it faced accepting indigenous Guatemalan refugees who fled *en masse* to Mexico following the Guatemalan genocide and civil war.[71] Throughout this period, Mexico had no asylum determination system,

[66] Innovation Law Lab and Southern Poverty Law Center, 'The Attorney General's Judges: How the US Immigration Courts Became a Deportation Tool' (25 June 2019) 24 <https://www.splcenter.org/sites/default/files/com_policyreport_the_attorney_generals_judges_final.pdf> accessed 6 June 2020.

[67] Joel Rose, 'Immigration Grinds to a Halt as President Trump Shuts Borders', *NPR* (18 March 2020) <https://www.npr.org/2020/03/18/817965714/immigration-grinds-to-a-halt-as-president-trump-shuts-borders> accessed 19 June 2020.

[68] See eg *East Bay Sanctuary Covenant v Trump*, 909 F 3d 1232 (9th Cir, 2018) (Holding, notwithstanding the plenary power doctrine, that federal courts 'may review the political branches' actions to determine whether they exceed the constitutional or statutory scope of their authority'). See also *I.N.S. v. Cardoza-Fonseca*, 480 US 481 (1987) (Emphasizing primary purpose of Refugee Act was to bring US law into conformity with the UN Protocol, to which it is a party).

[69] Garcia (n 19) 43. [70] ibid 59. [71] ibid 47.

relying instead on its restrictive General Law of Population of 1974, which criminalized undocumented immigration. Like the Immigration Act of 1924 in the US and the Immigration Acts of 1906 and 1910 in Canada, Mexico's early immigration enactments emphasized a preference for racial homogeneity. Mexico, however, held on to such restrictive provisions longer than its northern neighbours, with consequences for its treatment of Central American migrants throughout the second half of the twentieth century.

In order to respond to the large number of Guatemalans who were then arriving at Mexico's southern border, in July 1980, President José López Portillo created the *Comisión Mexicana de Ayuda a Refugiados* (Mexican Committee for Refugee Assistance, or COMAR).[72] COMAR was charged with providing Guatemalans who were fleeing to Mexico emergency assistance and possibilities of employment. COMAR also oversaw the refugee camps that had sprung up, primarily in the southern border State of Chiapas, resulting in the creation of 92 camps housing 46,000 refugees by 1984.[73] Mexico did not, however, provide these Guatemalans with long-term protection, but rather issued them 90-day renewable 'border visitor' visas, subject to their not leaving a 150-kilometre-wide 'refugee zone'. Eventually, the Mexican government adopted a policy of expulsion, deporting 2,000 Guatemalans in 1981 and up to 1,000 per week by 1984.

Explaining its reluctance to ratify the Refugee Convention, Mexico took the position that its Constitution already protected refugee rights, but, in fact, neither the Mexican Constitution nor the country's General Law of Population provided for any formal refugee status. Mexico's reluctance was based mainly on the government's desire to retain the flexibility of relying on article 33 of its Constitution, which it viewed as affording it the power of expulsion without judicial oversight. The Mexican government feared that the concentration of Guatemalan refugees in Chiapas might disrupt the economy of that State, which, notwithstanding the general poverty of its residents, contributed critically to Mexico's broader agricultural and petrochemical sectors. Nevertheless, in 1982, Mexico permitted the opening of a UNHCR office in Mexico City, and UNHCR commenced mandated RSD. Mexico remained ambivalent about UNHCR's role, however.[74]

Responding to pressure from the US, Mexico in the late 1980s began to cooperate with the Guatemalan government to establish a repatriation programme for the thousands of Guatemalans living in Mexico. After years of negotiations, the first organized repatriation commenced in 1993,[75] running until 2000. It was after the official ending of this programme that Mexico finally ratified the Refugee Convention, but with a sweeping reservation, asserting Mexico's right to act under the authority of article 33 of its Constitution, a reservation maintained until 2014.[76]

[72] ibid 45. [73] ibid 47. [74] ibid 35, 78. [75] ibid 67.

[76] United Nations Treaty Collection, 'Convention relating to the Status of Refugees' <https://treaties.un.org/Pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-2&chapter=5&Temp=mtdsg2&clang=_en#EndDec> accessed 7 June 2020.

b. Mexico's Asylum System: Weak Processes, Lack of Resources, and Escalating Violence

In 2000, Vincente Fox became president of Mexico, ending 71 years of one-party rule by the *Partido Revolucionario Institucional*. Fox's election enabled a series of significant political reforms and opened a political space for revisiting issues related to immigration and asylum. From the outset of his tenure, Fox began expressing concern for the protection of the rights of Mexican migrants living in the US.[77] One perhaps unintended consequence was an increased focus in the media and amonst stakeholders on Mexico's own restrictive laws, with many pointing to inconsistencies between Mexico's demands for the protection of its migrants abroad and its own treatment of migrants at home. Renewed pressure from US officials was, according to some Mexican congresspersons, motivation to reform Mexico's immigration system.[78] In April 2008, the Mexican Congress unanimously approved legislation to reform specific articles of the General Law of Population, eliminating the felony criminal penalty for entering Mexico without travel documents. In parliamentary debates, members of Congress emphasized the importance of protecting 'the human rights of immigrants entering our country'.[79]

In 2011, Mexico passed the *Ley sobre Refugiados, Protección Complementaria y Asilo Politico*,[80] embracing the Refugee Convention and Cartagena definitions of 'refugee', complementary protection based on the principle of *non-refoulement*, and a form of discretionary asylum grounded in Latin American legal tradition. Mexico also amended article 11 of its Constitution to include the right to asylum. In 2016, article 11 was again revised to require that this right to asylum be interpreted according to Mexico's obligations under international law.[81] Following these changes, the number of asylum petitions filed annually in Mexico increased significantly, from just 752 in 2011, to over 14,500 in 2017.[82] This increase corresponds to deteriorating conditions in the Northern Triangle region and Venezuela, as well as to an increase in the number of asylum seekers arriving in Mexico from outside of the Americas.[83]

But despite Mexico's constitutionalization of international obligations to protect refugees and its human rights-based asylum legislation, Mexico's practices have included increased immigration enforcement, militarization, detention, and deportation.[84] While COMAR functions as an administrative agency adjudicating

[77] Laura V González-Murphy and Rey Koslowski, 'Understanding Mexico's Changing Immigration Laws' (Woodrow Wilson International Center for Scholars 2011) 10 <http://legacy.wilsoncenter.org/sites/default/files/GONZALEZ%20%2526%20KOSLOWSKI.pdf> accessed 6 June 2020.

[78] ibid. [79] ibid.

[80] Ley sobre Refugiados, Protección Complementaria y Asilo Politico 2011 (Mexico).

[81] Stephen Meili, 'Constitutionalized Human Rights Law in Mexico: Hope for Central American Refugees?' (2019) 32 Harvard Human Rights Journal 103, 116–17.

[82] Helen Kerwin, 'The Mexican Asylum System in Regional Context' (2018) 33 Maryland Journal of International Law 290, 290–1.

[83] ibid 291. [84] ibid 298–311.

asylum claims in a non-adversarial manner, migrants are often left to contend with the Instituto Nacional de Migración (INM), Mexico's immigration law enforcement agency, which primarily apprehends, detains, and deports non-citizens and rarely advises detainees of their asylum rights or refers asylum claims to COMAR, as is required.[85] Even when asylum seekers are referred to COMAR, they face a range of structural and procedural challenges. Many migrants are detained in poor conditions while awaiting decisions.[86] COMAR is also severely understaffed and under-resourced, contributing to observably inadequate hearing and appeals processes.[87]

Over the past several years, there have been extensive reports of violence perpetrated against asylum seekers in Mexico.[88] The IACHR has documented crimes committed against asylum seekers and migrants by criminal organizations,[89] who appear to enjoy impunity.[90] Moreover, the intensification of infighting amongst cartels, resulting in part from Mexico's US-supported war on drugs, has produced high levels of out-migration from Mexico.[91] Overall since 2007, the number of asylum applications filed in the US by Mexican citizens has increased almost 18-fold.

In recent decades, Mexico's increased cooperation with the US to secure Mexico's northern and southern borders has undermined Mexico's commitment on paper to vanguard principles like an expanded refugee definition and the constitutionalization of refugee protection.[92] In 2004, the same year that Mexico and 19 other Latin American countries signed the Mexico Declaration (as part of the Cartagena process) to strengthen the protection of refugees throughout the region, Mexico also signed a cooperative 'security' agreement with the US called the Mérida Initiative, or Plan Mexico. Plan Mexico supplied US$400 million to Mexico, with millions going 'directly to providing police and military weapons and training' and to 'an immigration institute responsible for tightening Mexico's southern borders through monitoring, bio-data collection and a Guatemalan guest-worker program'.[93] In 2014, just a few years after the enactment of Mexico's landmark immigration and refugee law reforms, President Enrique Peña Nieto, responding to pressure from the US, announced the *Programa Frontera Sur*

[85] ibid 297–8. [86] ibid 292.

[87] Maureen Meyer, 'Q&A: Analyzing Mexico's Current Migration and Asylum Policies' (*Washington Office on Latin America*, 2019) <https://www.wola.org/analysis/qa-analyzing-mexicos-current-migration-and-asylum-policies/> accessed 16 May 2019.

[88] State Department, 'Mexico 2017 Human Rights Report' (2017) 11 <https://www.state.gov/wp-content/uploads/2019/01/Mexico.pdf> accessed 13 April 2019.

[89] IACHR, 'Annex to Press Release 82/11. Preliminary Observations of the Rapporteurship on the Rights of Migrant Workers of the IACHR to Mexico' (2 August 2011) <https://www.oas.org/en/iachr/migrants/docs/pdf/Mexico2011.pdf> accessed 6 June 2020.

[90] Stephanie Leutert, 'Dispatches from Mexico's Southern Border: Mexico: A Migrant Graveyard' (*Lawfare*, 20 July 2018) <https://www.lawfareblog.com/dispatches-mexicos-southern-border-mexico-migrant-graveyard> accessed 1 June 2019.

[91] J Anna Cabot, 'Problems Faced by Mexican Asylum Seekers in the US' (2014) 2 Journal on Migration and Human Security 361, 361.

[92] Meili (n 81).

[93] Susan Fitzpatrick Behrens, 'Plan Mexico and Central American Migration' (*NACLA*, 12 January 2009) <https://nacla.org/news/plan-mexico-and-central-american-migration> accessed 20 June 2019.

(Southern Border Program), a border plan aimed at increasing security along 12 points of entry with Guatemala and Belize and along several popular migration routes running across Mexico to the US.[94] In the years immediately following the implementation of *Programa Frontera Sur*, apprehensions and deportations skyrocketed, contributing to many of the negative consequences previously discussed.

6. Contemporary Challenges in the Region

a. Externalization of Borders and Containment Practices

Amongst the challenges refugees in North America currently face is States' reliance on restrictive 'externalization' migration control policies. FitzGerald characterizes such actions as comprising a kind of 'remote control', whereby States effectively push borders out in order 'to keep the unwanted'—in this case, asylum seekers—'at arm's length'.[95] An overview of such externalization measures, which range from high-seas interdiction to the enactment of STC Agreements, reveals both their prevalence across North America and their common aim of containing asylum seekers outside of the country implementing them.

US externalization programmes date back at least to the early 1980s with the inception of its policy interdicting Haitian asylum seekers.[96] While it was apparent that this policy violated *non-refoulement* obligations, the US Supreme Court ruled that international and domestic protections did not apply extraterritorially.[97] The US and Canada also employ various overseas screening systems (eg Canada's 'Multiple Borders Strategy', previously discussed), including carrier sanctions and restrictive visa requirements, as a means of controlling migration.[98]

In an effort to prevent refugees from reaching its border, the US has, over the years, funded States' containment of asylum seekers and refugees to its south. Through programmes like Operation Coyote, *Programa Frontera Sur*, and the Mérida Initiative,

[94] Christopher Wilson and Pedro Valenzuela, 'Mexico's Southern Border Strategy: *Programa Frontera Sur*' (Mexico Institute 11 July 2014) 1 <https://www.wilsoncenter.org/sites/default/files/media/documents/publication/Mexico_Southern_Border_Strategy.pdf> accessed 6 June 2020.

[95] David FitzGerald, *Refuge Beyond Reach: How Rich Democracies Repel Asylum Seekers* (OUP 2019) 5; see generally, Sabrineh Ardalan, 'EU and US Border Policy: Externalisation of Migration Control and Violation of the Right to Asylum' in Valsamis Mitsilegas, Violeta Moreno-Lax, and Niovi Vavoula (eds), *Securitising Asylum Flows: Deflection, Criminalisation and Challenges for Human Rights* (Brill 2020) 282–318.

[96] Jeffrey Kahn, *Islands of Sovereignty: Haitian Migration and the Borders of Empire* (University of Chicago Press 2019).

[97] *Sale v Haitian Refugee Council*, 509 SC 155 (1993).

[98] ibid 5–6.

the US has provided money, equipment, and intelligence services in an effort to induce Mexico to secure its southern and northern borders. This exchange has included hundreds of millions of dollars of funding to support the deportation of fleeing Central Americans back to their home countries.[99] Similarly, the US has provided funds to refugee-producing Northern Triangle States in order to enlist their aid in keeping potential asylum seekers from fleeing in the first place.[100]

Asylum seekers in Mexico are often exposed to squalid conditions and extreme violence, including documented instances of kidnapping, murder, and *refoulement*. Nonetheless, the US has adopted policies designed to keep refugees waiting in Mexico, unable to cross into the US to pursue their claims. For example, US authorities have engaged in 'metering', that is, limiting the number of asylum seekers who may present themselves at southern border crossings, leaving many thousands waiting.[101] In 2018, the Trump administration began to implement the Migration Protection Protocol, popularly known as 'Remain in Mexico', further increasing waiting periods in Mexico and restricting asylum seekers' access to legal counsel and evidence.[102] Subsequently, the Trump administration attempted to close the border altogether, leaving even more refugees stranded in Mexico.[103]

STC practices, including the Safe Third Country Agreement between the US and Canada, as well as US treatment of Mexico and even Guatemala as 'safe countries', also contribute to the containment of asylum seekers and refugees, as is discussed extensively elsewhere.[104] These externalization measures generally reflect what Kahn, in his analysis of Haitian interdiction, described as 'a modular paradigm for extraterritorial migration control', whereby States craft policies that extend their sovereignty beyond their physical borders so as to control refugee migrations.[105] The more prevalent use of such measures threatens to undermine a core principle of the refugee protection scheme—by forestalling the arrival of refugees at a State's physical border, externalization policies seek to prevent refugees from making a protection claim altogether.

[99] Fitzpatrick Behrens (n 93).

[100] Cited in Bill Frelick, Ian M Kysel, and Jennifer Podkul, 'The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants' (2016) 4(4) Journal on Migration and Human Security 190, 203.

[101] Savitri Arvey and Steph Leutert, 'Thousands of Asylum-Seekers Left Waiting at the US–Mexico Border', *The World* (17 June 2019) <https://www.pri.org/stories/2019-06-17/thousands-asylum-seekers-left-waiting-us-mexico-border> accessed 6 June 2020.

[102] Camilo Montoya-Galvez, '"Leave Me in a Cell": The Desperate Pleas of Asylum Seekers Inside El Paso's Immigration Court', *CBS News* (11 August 2019) <https://www.cbsnews.com/news/remain-in-mexico-the-desperate-pleas-of-asylum-seekers-in-el-paso-who-are-subject-to-trumps-policy/> accessed 5 April 2019.

[103] Nicole Narea, 'The US has Abandoned Asylum Seekers in Mexico During the Pandemics', *Vox* (13 May 2020) <https://www.vox.com/2020/4/27/21232808/asylum-seekers-mexico-coronavirus-trump> accessed 19 June 2020.

[104] See Chapter 28 in this volume.

[105] Jeffrey S. Kahn, above (n 96) 5.

b. Procedural Erosions

As described above, in spite of its impressive legal commitments, Mexico's asylum system is weak and underfunded. In Canada, the protection of asylum seekers' right to an oral hearing, a foundational feature of the Canadian asylum determination system since the 1985 *Singh* decision, has come under attack.[106] In 2019, new Canadian legislation limited access to the ordinary asylum process,[107] instead only affording some applicants access to so-called Pre-Removal Risk Assessment (PRRA), a highly limited process. PRRA proceedings differ starkly from the normal asylum process, which was designed to comply with *Singh*, and have lower recognition rates.[108] There are similar developments in the US, where the right to a hearing is less firmly grounded than it is in Canada. A 2013 US Board of Immigration Appeals decision, *Matter of E-F-H-L-*, affirmed an asylum claimant's right to an oral hearing,[109] but this precedent was withdrawn by the US Attorney General in 2018.[110] Since that ruling, there have been reports of immigration judges denying claims without an oral hearing, based entirely on written records, in some cases without any warning to the asylum applicant.[111]

The erosion of procedural protections, in conjunction with the externalization practices discussed above, has resulted in an increasingly fragile protection regime in North America. Even asylum seekers who are able to circumvent the numerous externalization measures must still navigate a procedural framework that seems less and less likely to ensure a fair hearing on protection claims.

7. Conclusion

The regional dynamics explored in this chapter reflect continent-wide practices to contain and deflect refugees from States with 'rights-sensitive standards and procedures for assessing protection claims'[112] to those less willing and able to protect them. As the northern terminus of today's expanded refugee migrations, Canada deflects migrants to the US, the US deflects them to Mexico, and the US and Mexico both deflect them to the countries of the Northern Triangle. In signing onto the STC Agreement, Canada partici-

[106] *Singh* (n 23).

[107] Bill C-97, An Act to Implement Certain Provisions of the Budget Tabled in Parliament on March 19, 2019 and Other Measures 1st Sess, 44th Leg 2019 (assented to 21 June 2019) (Canada).

[108] Canadian Council for Refugees, 'Anti-Refugee Provisions in Bill C-97' (2019) <https://s3.amazonaws.com/tld-documents.llnassets.com/0014000/14058/anti-refugee%20provisions%20in%20bill%20c-97.pdf> accessed 3 August 2019.

[109] *Matter of E-F-H-L-*, 26 I&N Dec 319 (BIA 2014).

[110] *Matter of E-F-H-L-*, 27 I&N Dec 226 (AG 2018).

[111] Jeffrey Chase, 'The Immigration Court: Issues and Solutions' (*Opinions/Analysis on Immigration Law*, 28 March 2019) <https://www.jeffreyschase.com/blog/2019/3/28/i6el1do6l5p443u1nkf8vwr28dv9qi> accessed 6 April 2019.

[112] Frelick, Kysel, and Podkul (n 100) 191.

pates in a 'race to the bottom', a position that sits uneasily with its role as 'norm exporter'. The US treatment of Mexico as a 'safe country' is dubious, given the high levels of violence against migrants and refugees in Mexico, along with Mexico's underfunded and inaccessible asylum system. However, Mexico's development of an asylum system has provided justification for US policies of turnbacks and returns at the US–Mexico border.

As commentators have noted, and as is evident in the development of gender asylum law, it may at times fall on legal advocates as well as low-level bureaucrats and decision-makers to pressure States to bring refugee protection in line with international and regional refugee protection regimes.[113] Those who challenge these policies include lawyers, law clinics, and NGOs representing individual clients and those bringing systemic challenges in an effort to hold governments accountable.[114] NGOs generally have been growing in number and strength—in all three countries.[115] In this hostile political climate, ensuring refugee protection may increasingly depend on activists, lawyers, and federal judges to ensure that international and constitutional protections are realized.

[113] Hamlin (n 21) 189.

[114] For example, NGOs have twice challenged the safe third country agreement between the US and Canada, arguing that the US's treatment of refugees disqualifies it from designation as a safe country of asylum.

[115] FitzGerald (n 95) 153 notes that in Mexico '[a]n increasingly robust group of national organizations monitors buffering policies [. . .]'. Further, these organizations work closely with UNHCR in Mexico, and receive support from civil society foundations based in the US, such as Ford, MacArthur, and Open Society which 'help fund national and transnational rights organizations and boost their reports up to an international level'. 'Within government, autonomous agencies, such as the *Comisión Nacional de los Derechos Humanos*, uncover information about abuses of people in transit. The work of these networks and the publicity they have generated about how the buffer works in practice make it more difficult for states to operate with a free hand and for their publics to pretend that they do not know what happens in their name'. In Canada, the eight-year-old Canadian Association of Refugee Lawyers has been increasingly active, as is the older Canadian Council for Refugees, the Canadian Council of Churches, and Amnesty International. In the US, a plethora of national and local NGOs provide individual representation, issue reports, and engage in systemic challenges. See eg Justine Coleman 'Lawsuit Challenges Trump Administration Policy Deporting Asylum-Seekers to Central American Countries', *The Hill* (15 January 2020) <https://thehill.com/regulation/court-battles/478504-lawsuit-challenges-trump-administration-policy-deporting-asylum> accessed 28 June 2020.

CHAPTER 17

REGIONAL REFUGEE REGIMES

Latin America

JOSÉ H FISCHEL DE ANDRADE*

1. Introduction

At the end of 2019, there were 20,444,819 refugees and 4,148,010 asylum seekers worldwide, but just 255,361 (1.25 per cent) and 935,251 (22.55 per cent), respectively, were in Latin American countries.[1] Despite its relatively small number of refugees, and inefficient refugee status determination (RSD) procedures, Latin America has played a rather innovative and creative role in the development of regional political asylum and refugee sub-regimes, and faces momentous challenges.

This chapter reviews both the historical contribution of Latin America's political asylee and refugee sub-regimes, and the region's protection situation and key challenges. It aims to answer the following questions: what is the concept of the prevailing asylum regime in Latin America and what are its sub-regimes? What is the current protection legal framework in the region? What is the institutional framework and its contribution to the protection of asylum seekers, political asylees, and refugees in Latin America? What are the major protection challenges currently faced by the region?

In terms of its regional coverage, the chapter considers that, of the 35 independent States of the Americas that are members of the Organization of American States (OAS), 20 may be regarded as Latin American States—that is, bearers of Spanish, Portuguese, or French cultural and linguistic heritage. These encompass three Caribbean States (Cuba, the Dominican Republic, and Haiti); seven Central American States (Costa Rica, El

* The views expressed in this chapter are those of the author and do not necessarily reflect those of UNHCR.

[1] See UNHCR Population Statistics Database <http://popstats.unhcr.org> accessed 15 October 2020.

Salvador, Guatemala, Honduras, Mexico, Nicaragua, and Panama); and 10 South American States (Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Paraguay, Peru, Uruguay, and Venezuela). Thus, the chapter excludes one Caribbean unincorporated territory of the United States (Puerto Rico), one non-Latin Central American State (Belize), one non-Latin South American State (Suriname), the overseas department of France in South America (French Guyana), and the remaining Caribbean States and British, Dutch, and French territories.

2. The Asylum Regime and Sub-regimes in Latin America

The concept of 'asylum regime' may—and indeed does—vary. This chapter adopts the following working definition of 'asylum regime':

> the ensemble of norms and practices that States and other relevant actors use when coordinating and/or cooperating in the adoption and/or implementation of the international and/or national actions aimed at regulating the protection which a State grants on its territory, or in some other place under the control of its organs, in the exercise of its sovereignty, to a person who seeks it.[2]

The asylum regime embraces sub-regimes—regarded by some experts as exotic and highly specialized[3]—and is wider than their sum. Its sub-regimes encompass not only the protection of those with refugee status,[4] but also of those who enjoy another sort of protective status, such as political asylee status, humanitarian protection, subsidiary or complementary protection, temporary protection, or any other legal status accorded by a State intended to protect the person from *refoulement* and accompanied by a set of rights and duties. The asylum regime is accordingly both a genus of which there are several species (sub-regimes) and a special regime, in the sense that it is a special branch of international law with its own principles, institutions, teleology, and set of rules.[5]

[2] See also Stephen D Krasner, 'Structural Causes and Regimes Consequences: Regimes as Intervening Variables' in Stephen D Krasner (ed), *International Regimes* (Cornell University Press 1983) 2; Institute of International Law, 'Résolutions adoptées par l'Institut à la Session de Bath, septembre 1950—I. L'asile en droit international public (à l'exclusion de l'asile neutre)' (1950) 43 (II) *Annuaire de l'Institut de droit international* 376 (author's translation).

[3] International Law Commission, 'Report of the Study Group of the International Law Commission on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', UN doc A/CN.4/L.682 (13 April 2006) (ILC Report) 11.

[4] In other words, those persons whose 'refugeehood' (*la qualité de réfugié* or *la condición de refugiado*) has been recognized through a declaratory act by a State's authorities and a corresponding legal status has been granted through a constitutive act.

[5] ILC Report (n 3) 252.

In Latin America,[6] the asylum regime has two main sub-regimes, which are analysed in this chapter—political asylee (*asilado político*) and refugee (*refugiado*).[7] The central difference between these sub-regimes lies in the fundamentally distinct 'ensemble of norms and practices' they use, through the available legal and institutional frameworks, to define and protect those seeking asylum. The choice of the sub-regime to be used determines whether the asylum seeker is eligible for political asylee status or refugee status. The norms and practices regulating the political asylee sub-regime derive from the long-standing Latin American practice of both diplomatic and territorial political asylum, and have been codified in various legally binding regional instruments (discussed below). In turn, the norms and practices regulating the refugee sub-regime derive mostly from the Refugee Convention, its Protocol, and UNHCR's protection advocacy work (such as its guidelines, statements, and so on). Human rights legal instruments,[8] institutions, and practice also play a role, though limited, in both the political asylum and refugee sub-regimes.

3. The Legal Framework for the Protection of Political Asylees and Refugees in Latin America

a. Differences and Similarities between Political Asylees and Refugees

As defined by the Institute of International Law in 1950, asylum may be granted by a State on its territory. This form of protection is known as territorial asylum. The other variant, diplomatic asylum, is granted by a State in some other place under the control of its organs: 'outside its territory, particularly in its diplomatic missions (diplomatic asylum in the strict sense), in its consulates, on board its ships . . . and also on board its aircraft and of its military or para-military installations in foreign territory'.[9]

Those persons who seek protection against extradition, prosecution, or the consequences of prosecution by a State in which they are wanted for political reasons,

[6] In Europe, for instance, in addition to the refugee sub-regime there is the subsidiary protection sub-regime and the temporary protection sub-regime (see Chapter 19 in this volume).

[7] This author prefers 'regime' and 'sub-regime' to the use of 'institute' or 'institution', which is sometimes to be found in the Latin American literature ('*instituto del refugio*', '*instituto del asilo político*'). A legal institute or institution is a juridical notion that misses important constitutive elements of the definition of 'regime', such as the practices (in addition to the norms), the role of non-State relevant actors, and the means used (cooperation and/or coordination, as opposed to law-enforcement).

[8] See further Chapter 36 in this volume.

[9] UNGA, 'Question of Diplomatic Asylum: Report of the Secretary-General', UN doc A/10139 (Part II) (22 September 1975) para 1.1.

offences, or crimes, are 'political asylees'. Political asylees may also be refugees if the reasons for the protection satisfy the refugee definition. Notwithstanding the possibilities of overlap between the definitions of political asylee and refugee,[10] there are a number of conceptual differences. For instance:

- Refugees find themselves outside the territory of their country of nationality. This is not always the case for political asylees, who may enjoy diplomatic asylum in a consulate or embassy within the territory of his or her own country;
- For a person to be recognized as a refugee and granted refugee status, he or she must demonstrate a well-founded fear of persecution. This persecution may not have materialized at the time the refugee claim is lodged. By contrast, political asylees base their need for protection upon actual persecution, hot pursuit, and thus upon a sense of 'urgency';
- Refugees must demonstrate a fear of persecution for at least one of five grounds: race, religion, nationality, membership of a particular social group, or political opinion (although definitions in regional refugee instruments, and in UNHCR practice, are broader). The grounds for protecting political asylees, in contrast, are limited to political offences, political reasons, or political crimes;
- Refugees' enjoyment of their legal status may be supervised by UNHCR, which is the central institutional component of the global refugee regime. By contrast, political asylees do not benefit from an institutional supervisory mechanism (and the role of the Inter-American human rights mechanisms is rather limited);
- The procedure to protect a refugee is comprised of two parts (even though in most cases these occur simultaneously). First, a declaratory act by a State authority recognizes the asylum seeker's 'refugeehood' (namely, the fact that the person is a refugee because he or she satisfies the criteria of a refugee definition). This declaratory act, which recognizes a *de facto* situation, is then followed by a constitutive act, which grants refugee status (namely, the rights and duties that allow refugees to enjoy protection in the country of asylum). The procedure to protect a political asylee has, in turn, only one, constitutive part: the asylum seeker is granted protection by being given political asylee status.

Notwithstanding the differences between refugees and political asylees, the concepts are nonetheless complementary and share the common purpose of protecting them. However, the global refugee regime is generally regarded as being much more precise and progressive than the regional political asylee regime, which is narrower and inadequate to respond to the major forced migration challenges today.

[10] See further José H Fischel de Andrade, 'Regional Policy Approaches and Harmonization: A Latin American Perspective' (1998) 10 IJRL 389, 399; José H Fischel de Andrade, 'Forced Migration in South America' in Elena Fiddian-Qasmiyeh, Gil Loescher, Katy Long, and Nando Sigona (eds), *The Oxford Handbook of Refugee and Forced Migration Studies* (OUP 2014) 654–5.

b. Political Asylees

The political asylee sub-regime in Latin America is based on seven regional treaties that date from the late nineteenth to the mid-twentieth centuries. A first (and unsuccessful) attempt to regulate and define the concept of asylum in South America was made during a congress in 1867.[11] But the initial codification of the practice that progressively developed in Latin America—to grant territorial and diplomatic asylum to those politically persecuted in the region—only came to fruition during the 1889 First South American Congress on Private International Law. One of the treaties adopted in the congress, the 1889 Montevideo Treaty on International Penal Law,[12] deals with both territorial asylum (articles 15 and 16) and diplomatic asylum (article 17), and includes an exclusion clause for navy deserters (article 18). Only five South American States are parties to the 1889 Montevideo Treaty, namely Argentina, Bolivia, Paraguay, Peru, and Uruguay.

The ensuing treaty codifying regional practice was the 1928 Havana Convention on Asylum.[13] It also regulates matters pertaining both to territorial and diplomatic asylum, including the granting of asylum to political offenders in legations, warships, military camps, or military aircraft; and the exclusion of persons accused or convicted of common crimes, as well as deserters from the army or navy. Given that Haiti and the Dominican Republic denounced the 1928 Havana Convention, there are currently 14 parties to it: Brazil, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, and Uruguay.

Subsequently, in 1933, the Montevideo Convention on Political Asylum was adopted, containing only three substantive articles on asylum.[14] Article 1 replaced its counterpart in the 1928 Havana Convention with regard to the exclusion of asylum seekers accused of common crimes who seek asylum in legations, warships, military camps, or airships, and withdrew the reference to territorial asylum. Article 2 provides that the State competent to decide on the non-political nature of crimes that may have been committed prior to the asylum request is the State that offers asylum. Article 3, for the first time, notes the humanitarian character of political asylum and that it is not subject to reciprocity. The 14 States parties to the 1933 Montevideo Convention are those of the 1928 Havana Convention, with the exception of Uruguay, which is only party to the latter, and Chile, which is party only to the former.

In 1939, the Montevideo Treaty on Asylum and Political Refuge was adopted.[15] Once again, it dealt with both territorial and diplomatic asylum, but for the first time the

[11] See discussion in Keith Yundt, *Latin American States and Political Refugees* (Praeger 1988) 69.

[12] Treaty on International Penal Law (adopted 23 January 1889) OAS Official Records, OEA/Ser.X/7, Treaty Series 34.

[13] Convention on Asylum (adopted 20 February 1928, entered into force 21 May 1929) OAS Official Records, OEA/Ser.X/I, Treaty Series 34.

[14] Convention on Political Asylum (adopted 26 December 1933, entered into force 28 March 1935) OAS Official Records, OEA/Ser.X/I, Treaty Series 34.

[15] Treaty on Political Asylum and Refuge (adopted 4 August 1939) OAS Official Records, OEA/Ser.X/1, Treaty Series 34.

provisions (15 substantive articles) comprehensively codified most aspects of political asylum. However, only Paraguay became a party to it and the treaty therefore never entered into force.

A year later, during the Second South American Congress on Private International Law, the 1940 Montevideo Treaty on International Penal Law was adopted.[16] Unlike its 1889 predecessor, it does not make any direct reference to asylum. Nevertheless, several provisions of Title II (On Extradition) are relevant to asylum and may, therefore, guide its seven States parties (Argentina, Bolivia, Brazil, Colombia, Paraguay, Peru, and Uruguay).

Of the five then extant treaties, only two, the 1928 Havana and 1933 Montevideo Conventions, were entirely devoted to regulating asylum—and in force. Their provisions, however, were not comprehensive either in codifying the region's longstanding practice, or in their application to a variety of potential scenarios. For instance, in January 1949 the Colombian Ambassador in Lima granted diplomatic asylum to Victor Raúl Haya de la Torre, head of a political party in Peru. The ensuing dispute between Colombia and Peru was brought to the International Court of Justice (ICJ). When the ICJ delivered its decisions on the *Asylum* case in 1950 and the *Haya de la Torre* case in 1951, it was clear that the legal framework for the protection of political asylees in Latin America was unsatisfactory. In fact, in analysing the 1928 and 1933 conventions and the region's customary law, the ICJ stated that the existence, either regionally or locally, of a constant and uniform practice on various asylum-related issues had not been proven; that an obligation upon the territorial State to issue a *sauf-conduit*[17] existed only in certain conditions; that the facts disclosed too much uncertainty, contradiction, and fluctuation to make it possible to discern a usage of diplomatic asylum peculiar to Latin America and accepted as law; and that asylum in Latin America was an institution that owed its development largely to extra-legal factors.[18]

Following these cases, the Latin American States decided to codify, and to a certain extent, progressively develop the regional norms pertaining to political asylum. They did so by adopting the 1954 Caracas Conventions on Diplomatic Asylum and on Territorial Asylum,[19] both of which are more concerned with States' rights than with an asylum seeker's right to apply for asylum. The latter has 11 States parties (Brazil, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Mexico, Panama, Paraguay, Uruguay, and Venezuela), while the former has 13 (as above, apart from Colombia, plus Argentina, Peru, and the Dominican Republic).

[16] Treaty on International Penal Law (adopted 19 March 1940) OAS Official Records, OEA/Ser.X/1, Treaty Series 34.

[17] A *sauf-conduit* is a pass or document that an authority issues to a person allow them to traverse the territory under its jurisdiction without harassment, bodily harm, or detention.

[18] *Colombian-Peruvian Asylum Case* (Merits) [1950] ICJ Rep 266, 277–9, 286.

[19] Convention on Diplomatic Asylum (adopted 28 March 1954, entered into force 29 December 1954) 1438 UNTS 101; Convention on Territorial Asylum (adopted 28 March 1954, entered into force 29 December 1954) 1438 UNTS 129.

Notwithstanding the existence of various regional treaties regulating distinct aspects of territorial and diplomatic political asylum, Latin America's most comprehensive legal framework on the subject today is the 1954 Caracas Conventions.

c. Refugees

With respect to the global refugee regime, 18 of the 20 Latin American States are parties to both the Refugee Convention and its Protocol. Venezuela is a party only to the Protocol; Cuba is not a party to either. Although the global refugee regime is virtually the same for all States that are parties to the Refugee Convention and/or its Protocol, the refugee definitions that are to be found in domestic legislation vary considerably between Latin American States. This is a result of a decades-long and uncoordinated process whereby Latin American States have broadened the definition of a 'refugee', as explained below. In so doing, they changed the normative structure of the refugee regime, producing a change *of*—as opposed merely to *within* a—regime.[20]

The change of regime began in the 1960s in Africa and continued into the 1980s as millions of people sought asylum across Africa, Asia, and the Americas. At the global level there were attempts to recognize that those in need of protection as refugees went beyond those who met the 'refugee' definition of the 1951 Convention, and this was captured in expanded 'refugee' definitions.[21]

Within Latin America, the need for a broader refugee definition stemmed from the development and diversification of conflict in Nicaragua, El Salvador, Guatemala, and Honduras, which resulted in the displacement of large sections of populations (particularly between 1981 and 1985).[22] Those in need of protection were forcibly displaced *en masse*, mostly by the consequences of civil war and foreign aggression, and fled in their hundreds of thousands to neighbouring States.[23] Expanded regional refugee definitions were drafted at a UNHCR-sponsored 1981 Mexico Colloquium[24] and subsequent 1983 La Paz seminar[25] to address the challenges affecting the region. A third

[20] Friedrich Kratochwil and John G Ruggie, 'International Organization: A State of the Art on an Art of the State' (1986) 40 International Organization 753, 767.

[21] UNHCR, 'Note on International Protection', UN doc A/AC.96/609/Rev.1 (26 August 1982) paras 17–18; International Institute of Humanitarian Law, 'Report: Round Table on the Problems Arising from Large Numbers of Asylum Seekers' (Sanremo, 22–25 June 1981) para 8; UNHCR Executive Committee Conclusion No 22 (XXXII), 'The Protection of Asylum-Seekers in Situations of Large-Scale Influx' (1981) para 1.1.

[22] Ivor Jackson, *The Refugee Concept in Group Situations* (Martinus Nijhoff 1999) 347–95.

[23] Hector Gros Espiell, Sonia Picado, and Leo Valladares Lanza, 'Principles and Criteria for the Protection of and Assistance to Central American Refugees, Returnees and Displaced Persons in Latin America' (1990) 2 IJRL 83, 87.

[24] *Asilo y Protección Internacional de Refugiados en América Latina* (Memorias del Coloquio de Ciudad de México, 11–15 May 1981) (Universidad Nacional Autónoma de México 1982) 206.

[25] *Asilo Político y Situación del Refugiado* (Memorias del Seminario de La Paz, 19–22 April 1983) (Ministerio de Relaciones Exteriores y Culto/ACNUR 1983) 116.

regional event, also sponsored by UNHCR, was held in 1984 in Cartagena de Indias, Colombia.[26] The 1984 Cartagena colloquium aimed at 'studying the legal and humanitarian aspects of the refugee situation in Central America'[27] and never intended to create binding law, attended as it was by a combination of State and unofficial delegations from the region and UNHCR. Nevertheless, like the previous colloquia,[28] it adopted a conclusion concerning the definition of 'refugee', namely:

> the definition or concept of a refugee *recommended* for use in the region is one that, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, also considers refugees persons who have fled their country because their lives, safety or freedom have been threatened by *generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order*.[29]

The early 1980s' need of a regime change in Latin America was not missed by UNHCR. It was in those days that it started playing a significant and decisive role in the region as a norm entrepreneur,[30] acknowledging both the factual need of a change of regime that would allow for the protection of forced migrants who would otherwise not be protected as refugees, and Central American States' self-serving interests in addressing the geopolitical situation linked to thousands of forced migrants on their territories. As a norm entrepreneur, UNHCR directly contributed to the creation, endorsement, dissemination, and implementation of the principles and norms espoused in the 1984 Cartagena Declaration, in particular its expanded definition of 'refugee'. It did so by persuading States to both use the Cartagena Declaration in a sensible and realistic fashion based on practical considerations, and to regard it not as a legal document, which it is not, but rather as a 'conceptual framework for refugee protection policy'.[31] In essence,

[26] *Coloquio Sobre la Protección Internacional de los Refugiados en América Central, México y Panamá: problemas jurídicos y humanitarios* (Memorias del Coloquio de Cartagena de Indias, 19–22 November 1984) (ACNUR/Centro Regional de Estudios del Tercer Mundo/Universidad Nacional de Colombia, 1985).

[27] ibid 11.

[28] For the drafting process of the 1981 Mexico colloquium, the 1983 La Paz seminar, and the 1984 Cartagena colloquium, see José H Fischel de Andrade, 'The 1984 Cartagena Declaration: A Critical Review of Some Aspects of Its Emergence and Relevance' (2019) 38 RSQ 348, 352–8.

[29] *Coloquio Sobre la Protección Internacional de los Refugiados en América Central, México y Panamá* (1985) 336 (author's translation; emphasis added). In the Spanish language original: 'la definición o concepto de refugiado *recomendable* para su utilización en la región es aquella que además de contener los elementos de la Convención de 1951 y el Protocolo de 1967, considere también como refugiados a las personas que han huido de sus países porque su vida, seguridad o libertad han sido amenazadas por *la violencia generalizada, la agresión extranjera, los conflictos internos, la violación masiva de los derechos humanos u otras circunstancias que hayan perturbado gravemente el orden público*' (emphasis added).

[30] In the theory of international relations literature 'norm entrepreneur' is defined as an individual or organization that sets out to change the behaviour of others; see Ann Florini, 'The Evolution of International Norms' (1996) 40 International Studies Quarterly 363, 375.

[31] UNHCR, 'Note on International Protection', UN doc A/AC.96/830 (7 September 1994) para 36.

it was a highly pragmatic instrument designed to accord a legal status to foreigners in need of protection who did not fall under the refugee definition in the Refugee Convention.

The Cartagena Declaration's broad definition of 'refugee' was not innovative: its wording did not differ substantially from definitions adopted by previous colloquia (or reflected in other regional instruments, such as in Africa). However, unlike the documents produced by previous seminars and colloquia, the Cartagena Declaration had an unprecedented impact in Latin America, both on policy, legal developments, and the conduct of protection policy advocacy. Yet, with the passage of time, its practical, political, and legal relevance has become obsolete. The area in which the Cartagena Declaration remains relevant is its role as an advocacy instrument and an effective advocacy model.[32]

The multiplying effect resulting from the Cartagena Declaration's tangible achievements, both in the area of policy and legal development and the conduct of protection policy advocacy, led to a tradition of *ad hoc* and *sui generis* UNHCR-led events, regional fora, and programmes in Latin America.[33] These resulted in the adoption, *inter alia*, of the 1994 San José Declaration on Refugees and Displaced Persons, the 2000 Rio de Janeiro Declaration on the Institution of Refuge, the 2004 Mexico Declaration and Plan of Action to Strengthen the International Protection of Refugees in Latin America, the 2010 Brasília Declaration on the Protection of Refugees and Stateless Persons in the Americas, the 2012 Fortaleza Mercosul Declaration of Principles on International Refugee Protection, and the 2014 Brazil Declaration 'A Framework for Cooperation and Regional Solidarity to Strengthen the International Protection of Refugees, Displaced and Stateless Persons in Latin America and the Caribbean' and respective Plan of Action.[34]

d. Human Rights

The legal framework in Latin America for the protection of political asylees and refugees also draws on the regional human rights regime, the two most relevant instruments being the 1948 American Declaration of the Rights and Duties of Man and the 1969 American Convention on Human Rights.[35]

[32] Fischel de Andrade (n 28) 361–2.

[33] Liliana L Jubilut, 'Fora and Programmes for Refugees in Latin America' in Ademola Abass and Francesca Ippolito (eds), *Regional Approaches to the Protection of Asylum Seekers: An International Legal Perspective* (Ashgate 2014) 257–63.

[34] All listed declarations are available at <https://www.refworld.org>.

[35] American Declaration of the Rights and Duties of Man, OAS Res XXX adopted by the Ninth International Conference of American States (1948) reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System OEA/Ser L V/II.82 Doc 6 Rev 1, 17 (1992); American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123.

The 1948 American Declaration preceded the adoption of the UDHR by eight months (which contained the first global provision on the right to seek and enjoy asylum, in article 14). Article XXVII of the American Declaration states that: 'Every person has the right, in case of pursuit not resulting from ordinary crimes, to seek and receive asylum in foreign territory, in accordance with the laws of each country and with international agreements'. Even though non-binding, the provision nevertheless constitutes a recommendation to States to base their legal practices on its principles. To some extent, State practice did come to reflect these principles, given that this provision was a mere codification of a regional practice in the region.

The 1969 American Convention enshrines two provisions that are directly relevant to the regional refugee sub-regime: article 22(7) (on the right to seek and be granted asylum) and article 22(8) (reflecting the principle of *non-refoulement*). The impact of these two provisions is discussed below. Furthermore, articles 1 (obligation to respect rights), 2 (domestic legal effects), 8 (right to a fair trial), and 25 (right to judicial protection) may, when read together with articles 22(7) and 22(8), give rise to a series of obligations in the context of RSD procedures. Of the 20 Latin American States, only Cuba and Venezuela are not parties to this treaty.

e. National Legislation

In addition to the global and regional instruments, protection for asylees is generally found within national constitutions,[36] while the legal framework for the protection of political asylees and refugees in Latin America is usually found in domestic legislation.[37]

Most national legislation on the regional political asylee sub-regime is based on the 1954 Caracas Conventions. By contrast, the vast majority of Latin American States have been inspired by the Refugee Convention and its definition of 'refugee', as well as by the Cartagena Declaration, when it comes to their domestic laws and practices on the regional refugee sub-regime. While some States have directly imported the definition adopted in the Cartagena Declaration in their national legislation, others use different wording; only a few have not incorporated a broad definition in their domestic law.[38]

[36] For a list of the provisions in the Latin American constitutions on 'asylum', see 'Table 9: The Right to Asylum Is Included in the Constitution (*Protección/Buenas prácticas*)' <https://acnur.org> accessed 15 October 2020.

[37] cf 'Cuadro 12 Bis: Mecanismos Nacionales Reguladores en Materia de Migración y de Refugiados en las Américas (*Protección/Buenas prácticas*)' <https://acnur.org> accessed 15 October 2020.

[38] Michael Reed-Hurtado, 'The Cartagena Declaration on Refugees and the Protection of People Fleeing Armed Conflict and Other Situations of Violence in Latin America' in Volker Türk, Alice Edwards, and Cornelis Wouters (eds), *In Flight from Conflict and Violence—UNHCR's Consultations on Refugee Status and Other Forms of International Protection* (CUP 2017) 158–61. For a compilation of the various definitions of 'refugee' that replicate or were inspired by the Cartagena Declaration, see 'Table 1: Regional Definition of Refugee (Cartagena). Latin American States that Have Incorporated It in Their National Legislation (*Protección/Buenas prácticas*)' <https://acnur.org> accessed 15 October 2020.

4. Institutional Framework

a. Political Asylee Sub-regime

There is no institutional framework at the Latin American regional level mandated with the direct supervision or implementation of the norms and practices that States and other relevant actors use when coordinating and/or cooperating in the adoption and implementation of regional actions aimed at regulating the protection of political asylees. None of the binding instruments on political asylum (noted above) contemplates such a body.

As such, any institutional frameworks for the political asylee sub-regime exist only at the national level. As a rule, the Ministry of the Interior or the Ministry of Justice is responsible for adjudicating political asylee claims and granting political asylee status. Their decisions are, more often than not, linked to political considerations rather than to an objective, legal analysis.

b. Refugee Sub-regime

Just like the political asylee sub-regime, the refugee sub-regime in Latin America also lacks a regional framework to directly supervise or implement the norms and practices that States and other relevant actors use when coordinating and/or cooperating in the adoption and implementation of regional actions aimed at regulating the protection of refugees. Thus, the refugee sub-regime's institutional framework also only exists at the national level.

Regional initiatives by UNHCR have been instrumental in shaping the domestic institutional framework. The most relevant of these is UNHCR's *Guidelines for the Harmonization of Legislation and National Procedures with the Norms and Principles of International Refugee Law*, which were presented during a UNHCR-run workshop in 1995 in Buenos Aires, attended by government representatives from Argentina, Bolivia, Brazil, Chile, Paraguay, Peru, and Uruguay, as well as NGO representatives, experts, and UNHCR staff.[39] The 1995 Guidelines recommended that national committees or commissions on refugees be created with responsibility for both refugee policy and eligibility determination, and be comprised of members from various ministries and also civil society. When Latin American States did start to develop domestic legislation on refugees, mostly in the late 1990s and 2000s, the majority of the committees or commissions were inspired by the 1995 Guidelines. They were estab-

[39] UNHCR, 'Guidelines for the Harmonization of Legislation and National Procedures with the Norms and Principles of International Refugee Law' (1995), reproduced in Irigoin Barrene (ed), *Derecho de Refugiados en el Sur de América del Sur* (1996).

lished within the Ministries of the Interior, Justice, or Foreign Affairs and were composed, to a varying degree, of representatives from the Ministries of the Interior, Justice, Foreign Affairs, Defence, Labour, Health, Education, Family, and Religion, as well as other actors such as the migration authority, the General Attorney's Office, NGOs, the Catholic Church, the Evangelical Church, and UNHCR—the latter often as an observer without the right to vote.[40] The structure and functioning of these committees and commissions are a major challenge in Latin America, as discussed in Section 5.a below.

c. Human Rights Sub-regime

In the absence of an institutional framework at the Latin American regional level, mandated with the direct supervision or implementation of the norms and practices that States and other relevant actors use when coordinating and/or cooperating in the adoption and implementation of regional actions aimed at regulating the protection of asylees in general, and political asylees and refugees, in particular, the institutional framework made available by the Inter-American human rights sub-regime has acquired some relevance.

The organs and human rights machinery established regionally by the OAS are meant to implement the legal framework of the regional human rights sub-regime, of which the two most relevant instruments are the 1948 American Declaration and the 1969 American Convention. In turn, the two most relevant institutions of the Inter-American human rights sub-regime are the Inter-American Commission on Human Rights (based in Washington, DC) and the Inter-American Court of Human Rights (based in San José in Costa Rica).[41]

The Commission was created in 1959. It first inspected the human rights situation in an OAS Member State in 1961, and in 1965 its seven commissioners were expressly authorized to examine specific cases of human rights violations. In 1969, the guiding principles enshrined in the 1948 American Declaration were taken, reshaped, and restated in the legally binding 1969 American Convention, which established the Court.

In its early years, in the mid-1960s, the Commission identified as a major challenge the lack of domestic legislation that adequately recognized and defined the situation of 'political refugees', the non-existence of an Inter-American convention that contemplated and regulated their situation, and the absence of an organization in the

[40] cf 'Cuadro 12: Mecanismos Nacionales para la Determinación de la Condición de Refugiado (*Protección/Buenas prácticas*)' <https://acnur.org> accessed 15 October 2020.

[41] These are described here as Commission and Court, respectively. The former may make decisions on cases and precautionary measures and issue annual, country, and thematic reports; the latter has contentious and consultative jurisdiction.

Inter-American system empowered to coordinate their protection and assistance.[42] Despite recommendations by the Commission to address this, a lack of political will within Latin American States meant that domestic legislation was not adopted, and no organization was established to coordinate protection and assistance work.[43]

In the early 1980s, and as a result of the problems raised by large-scale influxes of refugees in Central America, there was some momentary interest in exploring the potential role that the Inter-American human rights sub-regime could play in the refugee regime in Latin America. This interest surfaced in the UNHCR-sponsored 1981 Mexico Colloquium 'Asylum and International Protection of Refugees in Latin America', whose recommendations 3, 4, 5, and 7 addressed the relevance of using and involving the OAS, the Commission,[44] and the Court in refugee matters.[45] These recommendations were well received by the regional human rights mechanisms and the Commission, in particular, which for the first (and only) time devoted an entire sub-chapter to 'Refugees and the Inter-American System' in its annual report.[46] It referred not only to the 1981 Mexico Colloquium and its recommendations, but also proposed to the OAS General Assembly that the definition of 'refugee' applied in the region should be broadened to encompass the grounds mentioned in the colloquium.[47]

However, it was only in the late 1990s that the Commission—whose reports and recommendations enjoy moral force but are not legally binding—advanced the analysis

[42] Inter-American Commission on Human Rights, 'Informe sobre Refugiados Políticos en América', OEA/Ser.L/V/II.11, doc 7 rev.2 (2 November 1965) 75–6. When referring to 'political refugees' the Commission introduced a misconceived idea, based on a false understanding that endured for decades, that 'refugees', as opposed to 'political asylees', move in large numbers and are destitute; cf ibid 75. *A contrario sensu*, two relevant examples of large-scale granting of political asylee status were when in late 1973, early 1974 in Chile over 2,000 persons enjoyed diplomatic asylum as political asylees (cf Comisión Internacional de Juristas, *Aplicación de las Declaraciones y Convenciones Internacionales referentes al Asilo en América Latina* (Ginebra 1975) 149) and when in 1980 over 10,000 Cubans enjoyed diplomatic asylum in Havana's Peruvian Embassy. For further criticism of the pseudo-difference between political asylees and refugees based on the latter's rural origin, limited economic resources, low level of education, and political irrelevance, cf Jaime Ruiz de Santiago, 'Contribución de Héctor Gros Espiell al desarrollo del Derecho Internacional de los Refugiados' in *Héctor Gros Espiell—Amicorum Lieber*, vol 2 (Bruylant 1997) 1370.

[43] A member of the Inter-American Juridical Committee (CJI) recommended that the Commission itself assume the role of protection and assistance coordination but this did not occur (see CJI, 'Anteproyecto de Convención Interamericana sobre Refugiados' in *Trabajos Realizados por el Comité Jurídico Interamericano durante su Periodo Extraordinario de Sesiones (Abril 1966)*, OEA/Ser.I VI.2—CIJ-85 (Unión Panamericana/OEA1966) 47), and a draft Convention on Refugees proposed by the CJI in 1966 was stillborn.

[44] The only Commission member who attended the 1981 Mexico Colloquium mentioned clearly, in his conclusion no. 14, the Commission's competence to write up reports on the situation of asylees and refugees in the Americas; cf Carlos A Dunshee de Abranches, 'Conclusiones y Recomendaciones' in *Asilo y Protección Internacional de Refugiados en América Latina* (Memorias del Coloquio de Ciudad de México, 11–15 May 1981) (Universidad Nacional Autónoma de México 1982) 202.

[45] *Asilo y Protección Internacional de Refugiados en América Latina* (Memorias del Coloquio de Ciudad de México, 11–15 May 1981) (Universidad Nacional Autónoma de México 1982) 207–8.

[46] Inter-American Commission on Human Rights, 'Informe Anual de la Comisión Interamericana de Derechos Humanos 1981–1982', OEA/Ser.L/V/II.57, doc 6 rev.1 (20 September 1982) Chapter VI, B.

[47] ibid Chapter VI, B, 11, d.

of the right to seek and receive asylum, particularly in contentious cases and precautionary measures. From 1997 onwards, with the *Haitian Interdiction case*, and in light of article XXVII of the 1948 American Declaration, the Commission set an important benchmark in the extra-territorial application of the principle of *non-refoulement* in holding that it has 'no geographical limitations'.[48] It also interpreted the content of the right to asylum as the 'right of a person seeking refuge to a hearing in order to determine whether that person meets the criteria' to qualify as a refugee.[49] The Commission has held that, in order to facilitate the interpretation of the right to seek and receive asylum established in the Inter-American human rights instruments, the latter must have as their main reference point the treaties on the protection of refugees and asylum seekers,[50] thereby establishing a clear link between the asylum and human rights (sub-) regimes.

The Commission's reports have also covered a number of matters relating to asylum and refugees.[51] For instance, in a report on the human rights of asylum seekers in the Canadian RSD system, the Commission stated that the right to asylum entails the procedural right of the claimant to be heard in presenting the application, thus setting an important procedural benchmark.[52] More recently, the Commission has reported on the human rights of refugee and migrant families and unaccompanied children in the United States.[53] Despite their focus on North American States, both reports are relevant to Latin American States—indeed, to all States from the Americas—since there are more members of the Commission (36) than of the OAS itself (35), or even States parties to the 1969 American Convention (24).

The Court has only twice had occasion to address the interpretation and application of articles 22(7) and 22(8) of the 1969 American Convention, respectively concerning the right to seek and be granted asylum, and the principle of *non-refoulement*. The first was the *Case of the Pacheco Tineo Family v Plurinational State of Bolivia*, concerning a family of asylum seekers from Peru who were removed by Bolivia before their refugee claim was properly determined.[54] In considering the obligation of a State to give proper consideration to asylum requests and to respect the principle of *non-refoulement*, the Court established a series of minimum guarantees with respect to asylum, deportation,

[48] *Haitian Centre for Human Rights v United States*, Inter-American Commission on Human Rights Report No 51/96, Case No 10.675 (13 March 1997) para 157.

[49] ibid para 155. See further Chapter 48 in this volume.

[50] *120 Cuban Nationals and 8 Haitian Nationals Detained in the Bahamas*, Inter-American Commission on Human Rights Report No 6/02, Admissibility Petition No 12.071 (27 February 2002).

[51] In addition to the two discussed below, see others mentioned in David Cantor and Stefania Barichello, 'Protection of Asylum Seekers under the Inter-American Human Rights System' in Abass and Ippolito (n 33) 267–94.

[52] Inter-American Commission on Human Rights, 'Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System', OEA/Ser.L/V/II.106, doc 40 rev (2000) para 60.

[53] Inter-American Commission on Human Rights, 'Refugees and Migrants in the United States: Families and Unaccompanied Children', OAS/Ser.L/V/II.155, doc 16 (24 July 2015).

[54] *Pacheco Tineo Family v Bolivia*, Inter-American Court of Human Rights Series C No 272 (25 November 2013).

expulsion, and extradition proceedings, which it derived from the 1969 American Convention. The importance of this decision goes beyond the *cas d'espèce* as it is the result of a well sought-after 'universality' of solutions, which harmonizes the 1969 American Convention not only with various regional but also with global norms and standards, including UNHCR guidelines. The Court's furtherance of third-party effectiveness of the determination of refugeehood and granting of refugee status by one State, of the application of the *pro homine* principle, and of the search for the application of the most protective legal instrument, can serve as an example to other regions and to the international community.[55]

The second time the Court considered articles 22(7) and 22(8) of the 1969 American Convention, as well as article XXVII of the 1948 American Declaration, was in its *Advisory Opinion OC-25/18* on 'The Institution of Asylum and Its Recognition as a Human Right in the Inter-American System of Protection' in 2018. The Court, referring to the scope of article 22(7) of the 1969 American Convention and article XXVII of the 1948 American Declaration, stated that the human right to seek and receive asylum can be enjoyed only in a 'foreign territory', thus excluding a human right to seek and be granted diplomatic asylum.[56] According to the Court, the right to seek and receive asylum includes refugee status and territorial asylum, as if these existed in parallel.[57] As for article 22(8) of the 1969 American Convention, the Court stated that the principle of *non-refoulement* is not exclusive to the refugee sub-regime and is therefore enforceable in respect of any foreigner over whom the State concerned exercises authority or has effective control. The Court further stated that the principle of *non-refoulement* not only requires that a person not be removed, but also imposes positive obligations on States, such as taking diplomatic measures to request the territorial State to issue a laissez-passer (*salvoconducto*), or to take other measures under its authority.[58] Finally, the Court advised that, in accordance with international law, States must ensure that the human rights enshrined in the 1969 American Convention and other human rights instruments are guaranteed to refugees and asylum seekers.[59]

Aside from these specific matters, the Court has considered some other cases relevant to the broader issue of forced migration, such as the 1998 *Case of Castillo-Páez v Peru*,[60]

[55] Fernando M Mariño Menéndez, 'A propósito del caso *Familia Pacheco Tineo* ante la Corte Interamericana de Derechos Humanos' in Luciano J Parejo Alfonso and others (eds), *Los retos del Estado y la Administración en el siglo XXI: libro homenaje al profesor Tomás de la Quadra-Salcedo Fernández del Castillo*, vol 1 (Ed Tirant lo Blanch 2017) 338.

[56] *The Institution of Asylum and Its Recognition as a Human Right in the Inter-American System of Protection (Interpretation and Scope of Articles 5, 22.7 and 22.8 in relation to Article 1(1) of the American Convention on Human Rights)*, Advisory Opinion OC-25/18 (30 May 2018) 52.

[57] ibid 68. This view is disputed throughout this chapter, whose author considers that territorial asylum includes political asylee status and refugee status, in addition to other protective statuses, such as subsidiary protection status, temporary protection, and humanitarian protection.

[58] ibid 67. [59] ibid 51, 63. See further Chapter 36 in this volume.

[60] *Castillo-Páez v Peru* (Reparations and Costs), Inter-American Court of Human Rights Series C No 43 (27 November 1998).

the 2005 *Case of the Mapiripán Massacre v Colombia*,[61] and the 2006 *Case of the Ituango Massacres v Colombia*.[62] In *Advisory Opinion OC-18/03* on 'Juridical Condition and Rights of Undocumented Migrants', the Court established that the right to due process is one of the minimum guarantees that should be offered to any migrant, irrespective of their migratory status, and—most importantly—that the migratory status of a person cannot constitute a justification for depriving them of the enjoyment and exercise of human rights.[63] This rationale has also been used in RSD procedures.[64]

5. Selected Contemporary Challenges

a. National Commissions and Committees on Refugees

The national commissions and committees on refugees of most Latin American States face two major challenges. The first is structural and has to do with its functioning; the second pertains to the use of broader 'refugee' definitions reflected in domestic law.

With regard to the structural challenge, the current eligibility procedures in most Latin American States allow for representatives from various ministries and other entities to be involved in the adjudication of asylum seekers' protection claims.[65] Most members are not experts in refugee law, however, and many are poorly trained, lack independence, and are not readily available for eligibility meetings. Furthermore, even though some commissions and committees meet periodically (but not as often as necessary to clear the frequently large backlog), they are rarely efficient or sufficiently funded and staffed. They also use accelerated procedures that do not comply with internationally established due process guarantees, and some RSD procedures are not regulated by domestic law.[66]

One reform that could make these national committees or commissions more agile and efficient would be to distinguish more clearly between their policy and operational mandates. For instance, plenary meetings, to be attended by all members, should be convened only to discuss and determine policy decisions that require the view and involvement of various actors from the government and civil society. By contrast, the determination of asylum seekers' eligibility for refugee status should be conducted by a smaller group of professional and trained case officers whose eligibility interviews and opinions would be reviewed and decided by a senior eligibility officer or the committee's

[61] *Case of the Mapiripán Massacre v Colombia*, Inter-American Court of Human Rights Series C No 134 (15 September 2005).

[62] *Case of the Ituango Massacres v Colombia*, Inter-American Court of Human Rights Series C No 148 (1 July 2006).

[63] *Juridical Status and Rights of Undocumented Migrants*, Advisory Opinion OC–18, Inter-American Court of Human Rights Series A No 18 (17 September 2003).

[64] Fischel de Andrade 2014 (n 10) 658.

[65] See Chapter 31 in this volume.

[66] See further Fischel de Andrade 2014 (n 10) 661.

or commission's chairperson. The assessment of refugee status is a highly technical matter that should not be adjudicated by a forum of inexpert, untrained, and sometimes politically biased individuals.

The second major challenge concerns the use of broad 'refugee' definitions in national law. An unfortunate aspect of the national legislation in the majority of Latin American States is that even though most already contain a broader definition than the Refugee Convention, it rarely replicates the one in the Cartagena Declaration—contrary to the assumptions of many scholars and even practitioners. This is why the Cartagena Declaration has far greater rhetorical than practical influence.[67] There is therefore a need for country-specific interpretive guidelines on the range of language used in national legislation across the region.[68] Inter-American human rights institutions, such as the Commission, the Inter-American Juridical Committee (CJI), or the Inter-American Institute of Human Rights, could work jointly with UNHCR and universities in Latin America to draft such guidelines.

b. Venezuela

For the first time in 40 years, Latin America is experiencing a major displacement crisis. On 31 December 2019 there were over four million Venezuelan asylum seekers, refugees, and 'displaced abroad'. The vast majority of them are hosted by Latin American countries, in particular Colombia (1,780,486), Peru (861,665), Chile (455,494), Ecuador (388,861), Brazil (248,105), and Argentina (176,370).[69] As in many contexts, it is increasingly difficult to distinguish between voluntary and forced migrants.[70] Venezuelans have left their homes for multiple reasons, including lack of access to food and medicine, loss of income, and the absence of effective national protection systems, and the situation has been politicized by many actors. However, the calamitous political and economic situation prevailing in Venezuela means that most who have left are asylees in search of protection (*non-refoulement* and a 'protective' legal status).

The problem is that, for various reasons, Latin American States apply different asylum regime norms and use different practices in relation to Venezuelan asylum seekers.[71] With regard to the refugee regime norms, very few Venezuelans meet the refugee definition of the Refugee Convention, and Latin American States have rarely used the

[67] Reed-Hurtado (n 38) 163–7, 179–80.

[68] Gros Espiell and others (n 23) and UNHCR's Guidelines on Claims for Refugee Status related to Situations of Armed Conflict and Violence (UNHCR, 'Guidelines on International Protection No 12: Claims for Refugee Status related to Situations of Armed Conflict and Violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees and the Regional Refugee Definitions', HCR/GIP/16/12 (2 December 2016) 12–16 only partially address this need, as they focus only on the elements of the Cartagena Declaration and not on the variations that one finds in the variety of Latin American domestic refugee legislation.

[69] See UNHCR Population Statistics Database <https://www.unhcr.org/refugee-statistics/download/?url=5Mk7> accessed 15 October 2020.

[70] See Chapter 7 in this volume.

[71] See Chapter 19 in this volume.

broad definitions adopted in their domestic legislation. UNHCR issued a Guidance Note to encourage States in the region to use the broad definition of 'refugee' when processing the protection claims of Venezuelans,[72] and, furthermore, to do so through group-based determination.[73] UNHCR also recommended that States bypass the generally recommended sequential approach that requires a preliminary assessment of the applicability of the Refugee Convention, and instead directly examine the applicability of the broader refugee definition.[74] As for the different asylum regime practices applicable to Venezuelans, UNHCR surveyed 12 Latin American States and found huge differences between the rights accorded to asylees (which depend on the legal status they are granted), the duration of the various legal statuses, and the costs with which asylum seekers are encumbered.[75]

In September 2018, a Joint UNHCR–IOM Special Representative for Venezuelan Refugees and Migrants was appointed by the UN Secretary-General to promote a coherent and harmonized regional approach to the Venezuela situation in coordination with national governments, international organizations, and other relevant stakeholders. Furthermore, since Venezuelan movements have affected many States due to the sheer numbers, governments in the region have established mechanisms for coordinating their responses and facilitating the legal, social, and economic inclusion of Venezuelans. Chief amongst them is the Quito Process, a multilateral initiative of initially 11 Latin American States (Argentina, Brazil, Chile, Colombia, Costa Rica, Ecuador, Mexico, Panama, Paraguay, Peru, and Uruguay), plus IOM and UNHCR, which aims to harmonize domestic policies in receiving States.[76]

6. Conclusion

Latin America has played a rather innovative and creative role in the development of regional political asylum and refugee regimes, but much remains to be done to ensure their effective implementation. Furthermore, the legal frameworks are deficient. First, the 1954 Caracas Conventions regulating political asylum are concerned more with the rights of States than with those of asylum seekers and political asylees. Secondly, the 'broad' refugee definitions contained in the legislation of most Latin American States rarely replicate the refugee definition in the Cartagena Declaration (contrary to

[72] According to UNHCR, 'the majority of Venezuelan nationals are in need of international protection under the criteria contained in the Cartagena Declaration on the basis of threats to their lives, security or freedom resulting from the events that are currently seriously disturbing public order in Venezuela': UNHCR, 'Guidance Note on International Protection Considerations for Venezuelans—Update I' (May 2019) para 5 <https://www.refworld.org/docid/5cd1950f4.html> accessed 15 October 2020.

[73] ibid para 4. [74] ibid para 5.

[75] cf 'Cuadro 52: Respuestas de protección para personas venezolanas (*Protección/Buenas prácticas*)' <https://acnur.org> accessed 15 October 2020.

[76] See 2018 'Declaration of Quito on Human Mobility of Venezuelan Citizens in the Region' <https://www.iom.int/quito-process> accessed 15 October 2020.

the assumptions of many scholars and even practitioners), thus giving the latter rhetorical rather than practical influence. Thirdly, the institutional protection framework could be improved at the national level. For instance, the adjudication of claims by asylum seekers applying for political asylee status could be more objective and less subject to political considerations, and structural reforms and investment in professional and technical staff could improve the efficiency of the national committees or commissions processing applications for refugee status. Finally, situations such as the Venezuela crisis highlight the need to streamline the region's asylum regime norms and avoid the use of different practices. Harmonized approaches, therefore, should be agreed upon and implemented.

CHAPTER 18

REGIONAL REFUGEE REGIMES

Middle East

MAJA JANMYR AND DALLAL STEVENS*

1. Introduction

This chapter focuses on the Middle East as a region. While it is important to acknowledge at the outset that the Middle East (and Near East) is a Western and contested construct, for the purposes of the discussion, the following States are included in the analysis: Bahrain, Egypt, Iran, Iraq, Israel, Jordan, Kuwait, Lebanon, Oman, Palestine, Qatar, Saudi Arabia, Syrian Arab Republic (Syria), Turkey, United Arab Emirates (UAE), and Yemen. UNHCR's definition excludes Egypt, Iran, Palestine, and Turkey, but these are addressed here to provide a broader understanding and comparison. In addition, there is limited analysis of refugee law and policy in Iran, while Turkey, a country that is described alternatively as in Western Asia, the Middle East, and Europe, provides a very useful comparison in its approach to refugees, particularly in relation to Syrians.

In this chapter, it is not possible to cover all States in detail. The aim is to provide an overview of some key issues and highlight developments to assist the reader in understanding the refugee and human rights contexts of the Middle East.

2. Legal Framework

a. International Refugee Law

The Middle East provides a fascinating arena for the examination of international law and its application due to the range of States and varied approaches adopted towards

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refugee and human rights law. Geographically, it can be described as a region, but historically, nationally, culturally, religiously, the area is diverse and such diversity is reflected in the treatment of asylum seekers and refugees. Broadly speaking, most Arab States are not party to the Refugee Convention or Protocol, except for Yemen and Egypt.

Yemen acceded to the Refugee Convention and Protocol on 18 January 1980. Egypt acceded to the Refugee Convention and Protocol on 22 May 1968 and entered reservations in respect of articles 12(1), 20, 22(1), 23, and 24.[1] Iran, Israel, and Turkey are also Contracting States, but all have entered reservations. Iran acceded to the Refugee Convention and Protocol on 28 July 1976. It considers the stipulations in articles 17, 23, 24, and 26 to be recommendations only and has limitations on the most favourable treatment provisions of the Convention. Israel signed the Refugee Convention on 1 August 1951 and ratified it on 1 October 1954. It acceded to the Protocol on 14 June 1968. Israel entered statements and reservations to the Refugee Convention, such that articles 8 and 12 do not apply; article 28 is limited by national law; and permits issued under article 30 are discretionary.[2] Turkey signed the Refugee Convention on 24 August 1951 and ratified it on 30 March 1962. It acceded to the Protocol on 31 July 1968. Turkey also entered a reservation to the effect that 'no provision of this Convention may be interpreted as granting to refugees greater rights than those accorded to Turkish citizens in Turkey'. Significantly, Turkey maintains its geographical limitation under article 1B of the Convention, according to which it applies the Convention only to persons who have become refugees as a result of events occurring in Europe.

While this chapter has adopted a definition of 'the Middle East' that excludes North African States (except for Egypt), it should be noted that most Arabic-speaking States of Africa are parties to the Refugee Convention and/or Protocol: Algeria, Djibouti, Egypt, Morocco, Somalia, Sudan, and Tunisia. They (including Libya) have mostly ratified the OAU Convention; Djibouti and Somalia have signed but not ratified it.

The reluctance of many Arab States to accede to international refugee and human rights law treaties is contentious and requires explanation. Various reasons have been proffered over the years. The most common is that Arab States do not wish to offer permanent residence, despite their willingness to host large numbers of refugees.[3] Linked to this is the Palestinian issue. Countries—such as Lebanon and Jordan—which are home to hundreds of thousands of Palestinians, are fearful that ratification of the Convention/Protocol would encourage local integration and potentially 'upset the sensitive demographic and socio-economic balance'.[4] In addition, there is the view that 'the political situation in the region especially in relation to the situation for Palestinian

[1] There is some uncertainty regarding the validity of Egypt's reservations due to its failure to include the reservations in the Official Gazette, which is required for legal enforcement: see US Committee for Refugees and Immigrants, 'World Refugee Survey 2005—Egypt' (20 June 2005).

[2] Article 28 applies with the limitations resulting from section 6 of the Entry into Israel Law, Law No 5712-1952.

[3] Michael Kagan, '"We Live in a Country of UNHCR": The UN Surrogate State and Refugee Policy in the Middle East', UNHCR New Issues in Refugee Research Series (2011); Maja Janmyr, 'No Country of Asylum: "Legitimizing" Lebanon's Rejection of the 1951 Refugee Convention' (2017) 29 IJRL 438.

[4] UNHCR, 'Country Operations Plan 2006: Lebanon' (1 September 2005) 2 <http://www.refworld.org/docid/43327bde2.html> accessed 22 September 2019.

refugees is not yet conducive to achieve [the] goal [of accession]';[5] in other words, an obligation to integrate is contrary to the Palestinian right to return. A more nuanced standpoint is that, while most North African Arab States are parties to the Convention/Protocol, only one Arab country in Western Asia is a party (Yemen), while many Asian countries are not. Since Arab States of Asia have participated in the Bangkok Principles on the Status and Treatment of Refugees,[6] which contains similar principles to the international instruments on refugees (see Section 2.c), 'the problem is due, not to the essence of the principles but to procedural and formal difficulties'.[7]

It should also be noted that several States of the Middle East participated in the Refugee Convention's drafting in 1950 and 1951: Egypt, Iran, Iraq, Israel, Lebanon, Saudi Arabia, and Turkey. Furthermore, insofar as refugee protection is concerned, some are members of UNHCR's governing Executive Committee (ExCom), which, *inter alia*, advises on international protection. Currently, this includes both non-Contracting States in the Middle East (Jordan and Lebanon) and Contracting States (Egypt, Iran, Israel, Turkey, and Yemen). Membership and participation in ExCom, especially by non-Contracting States, does suggest that they accept ExCom's Conclusions on the International Protection of Refugees as having 'strong political authority as consensus resolutions of a formal body of government representatives', and should be afforded real deference, notwithstanding their legally non-binding status.[8]

The States of the region voted to adopt the UN's New York Declaration for Refugees and Migrants in September 2016,[9] which included a 'vision for a more predictable and more comprehensive response' to large-scale refugee movements via the Comprehensive Refugee Response Framework.[10] Pursuant to the Declaration, Member States also agreed to work towards the adoption of a Global Compact on Refugees, which was affirmed by the UN General Assembly on 17 December 2018.[11] Middle Eastern States appear to have embraced the process. Akram argues that '[t]he Global Compacts have generated a much-needed renewed focus on the protracted and interconnected nature of refugee, statelessness, and other displacement concerns across the region'.[12] Certainly, Arab States have engaged in high-level conferences and discussions to address issues on

[5] See eg ibid; UNHCR, 'Country Operations Plan 2006: Jordan' (1 September 2005) <www.refworld.org/docid/43327b4e2.html> accessed 27 April 2019.

[6] Asian-African Legal Consultative Organization (AALCO), 'Final Text of the AALCO's 1966 Bangkok Principles on Status and Treatment of Refugees ("Bangkok Principles")' (24 June 2001) <www.refworld.org/docid/3de5f2d52.html> accessed 10 October 2019.

[7] Ikbal Al-Fallouji, 'Arab Countries and Refugee Law' (Seminar on Asylum and Refugee Law in the Arab Countries, San Remo, 16–19 January 1984) 47.

[8] James C Hathaway, *The Rights of Refugees under International Law* (CUP 2005) 113–14.

[9] On 19 September 2016, all 193 UN Member States adopted the Declaration.

[10] See UNHCR, 'Comprehensive Refugee Response Framework' <www.unhcr.org/comprehensive-refugee-response-framework-crrf.html> accessed 22 September 2019.

[11] In tandem with the refugee process, discussions took place on the Global Compact for Migration, which was adopted by the UN General Assembly on 19 December 2018 (although not all States voted in favour).

[12] Susan Akram, 'Assessing the Impact of the Global Compacts on Refugees and Migration in the Middle East' (2018) 30 IJRL 691.

refugees and statelessness. One noteworthy outcome is the Memorandum of Understanding (MoU) signed between UNHCR and the League of Arab States (LAS) in September 2017 to establish a cooperation framework on refugee and stateless matters.

b. International Human Rights Law

All Middle Eastern States have ratified or acceded to some international human rights instruments, but none has ratified or acceded to all. For example, Jordan has a relatively good record amongst Arab States in the region, having ratified the ICCPR, ICESCR, CAT, CERD, CRC, CEDAW, and the Convention on the Rights of Persons with Disabilities.[13] It has also agreed to two of three Optional Protocols to the CRC (but not Optional Protocols to other instruments).[14] By contrast, Saudi Arabia has only acceded to the CAT, CERD, CEDAW, and CRC, including two CRC Optional Protocols. Turkey's ratification of human rights treaties is almost complete with one exception—the Convention for the Protection of All Persons from Enforced Disappearance (CED);[15] similarly, Iraq and Israel have a good accession record although Israel has signed neither the CED nor the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW).[16]

There is a lack of consistency in the region about the universality of some fundamental rights, especially amongst the Arab States. Furthermore, many States have entered significant reservations, often stated to be due to conflict between international law and national and/or Shari'a Law.[17] Of course, signatures and ratification are not indicative of States' willingness to enforce international human rights treaties and the reputation of Middle Eastern States in this regard is not good.

c. Regional Law

The differences between States of the Middle East are further evidenced when considering regional law. There is a clear bifurcation between Arab States, when acting as the LAS, and the three non-Arab States of Israel, Iran, and Turkey. Unlike Israel, though,

[13] Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3.

[14] Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (adopted 25 May 2000, entered into force 12 February 2002) 2173 UNTS 222; Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (adopted 25 May 2000, entered into force 18 January 2002) 2171 UNTS 227.

[15] Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3 (CED).

[16] Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3.

[17] Mervat Rishmawi, *The League of Arab States Human Rights Standards and Mechanisms—Towards Further Civil Engagement: A Manual for Practitioners* (Open Society Foundations/Cairo Institute for Human Rights Studies 2015) 76.

Iran and Turkey are members of the Organisation of Islamic Cooperation and participate in its deliberations over refugees (see Section 2.c.i). Arguably, Arab States have revealed a preference for inter-Arab State instruments and regional principles, as opposed to international refugee law, although these, too, have long suffered from a reluctance by States to implement them fully.

i. *Regional Refugee and Asylum Law*

The regional law applicable to Middle Eastern States relates to international treaties of the Arab States, of the African Union and of the Council of Europe. Arab States have agreed a range of instruments relating to refugees, both Palestinian and non-Palestinian, and to human rights law, for example, the Casablanca Protocol on the Treatment of Palestinian Refugees 1965, the Declaration on the Protection of Refugees and Displaced Persons in the Arab World 1992, the Arab Convention Regulating the Status of Refugees in the Arab Countries 1994, and the Arab Charter on Human Rights 2004.[18]

The Casablanca Protocol is one of the first regional agreements to address refugee issues in the Middle East, and concerns Palestinians in Arab States.[19] A brief document, it calls on Arab States to ensure that Palestinians residing in their lands have the same right of employment as citizens,[20] are permitted to leave and return to the State of residence,[21] and are provided with travel documents if requested.[22] Reference in the Casablanca Protocol is to 'Palestinians' rather than 'refugees'.[23] Seven Member States signed without reservations,[24] while three others entered reservations.[25] Lebanon imposed the greatest number of restrictions, especially in relation to employment and entry. The Protocol was poorly implemented and applied and, thus, the 1991 Conference of Supervisors of Palestinians provided an opportunity for change. However, at the request of Kuwait and Saudi Arabia, a resolution was amended 'in such a way as to compromise the force of the Casablanca Protocol' and 'essentially release[e] the signatories from their obligations under the Casablanca Protocol' leaving the treatment of the Palestinians 'up to their discretion'.[26] Certainly, the consequence was that the Casablanca Protocol was severely weakened.[27]

[18] League of Arab States (LAS), Protocol for the Treatment of Palestinians in Arab States ('Casablanca Protocol'), 11 September 1965; Declaration on the Protection of Refugees and Displaced Persons in the Arab World ('Cairo Declaration'), 19 November 1992; LAS, Arab Convention on Regulating Status of Refugees in the Arab Countries 27 March 1994 (not in force); LAS, Arab Charter on Human Rights (adopted 22 May 2004, entered into force 15 March 2008).

[19] See Chapter 35 in this volume.

[20] Casablanca Protocol (n 18), para 1.

[21] ibid para 2.

[22] ibid para 4.

[23] Lex Takkenberg, *The Status of Palestinian Refugees in International Law* (OUP 1998) 141.

[24] Jordan, Algeria, Sudan, Iraq, Syria, Egypt, and Yemen.

[25] Kuwait, Lebanon, and Libya.

[26] Oroub El-Abed, *Unprotected: Palestinians in Egypt since* 1949 (Institute for Palestine Studies/ Ottawa, International Development Research Centre, Washington 2009) 169.

[27] Takkenberg (n 23) 149.

In 1991, at the Third Seminar of Arab Experts on 'Asylum and Refugee Law' held in Amman, participants—mainly from Arab States—arrived at several pro-refugee law conclusions that extended beyond the Palestinian issue.[28] These conclusions supported the significance of international and national refugee law for those in need of protection in Arab States. Yet, two years later, at the 1993 Fourth Seminar of Arab Experts on 'Asylum and Refugee Law' held in Cairo, a different approach was adopted.[29] Though it was reiterated that asylum and refugee law were inherent parts of human rights law, there was no expression of regret that Arab States had failed to accede to international refugee law or enact national refugee law;[30] rather, there was simple recognition 'that the United Nations Convention of 28 July 1951 and the Protocol of 31 January 1967 constitute the basic universal instruments governing the status of refugees'.[31] The seminar did, however, go on to adopt a Declaration on the Protection of Refugees and Displaced Persons in the Arab World, in which a hope was expressed that Arab States that had not yet acceded to the Refugee Convention or the Protocol would do so.[32] The Declaration is inclusive and far-reaching. Thus, for example, it recommends that:

> pending the elaboration of an Arab Convention relating to refugees, Arab States adopt a broad concept of 'refugee' and 'displaced person' as well as minimum standard for their treatment, guided by the provisions of the United Nations instruments relating to human rights and refugees as well as relevant regional instruments.[33]

The LAS was not long in fulfilling the avowed ambition of drafting an Arab Convention: in 1994, the Arab Convention on Regulating Status of Refugees in the Arab Countries was adopted.[34] The definition of a 'refugee' is similar to that of the Refugee Convention,[35] but is also broader, encompassing:

> Any person who unwillingly takes refuge in a country other than his country of origin or his habitual place of residence because of sustained aggression against, occupation and foreign domination of such country or because of the occurrence of natural disasters or grave events resulting in major disruption of public order in the whole country or any part thereof.[36]

[28] *Conclusions of the Third Seminar of Arab Experts on 'Asylum and Refugee Law': Declaration on the Protection of Refugees and Displaced Persons in the Arab World*, 2–4 November 1991. The Seminar was organized by the International Institute of Humanitarian Law in cooperation with the Jordanian national Red Crescent Society under the patronage of HRH Crown Prince Hassan of Jordan and under the auspices of UNHCR.

[29] Cairo Declaration (n 18). [30] ibid preambular para 9. [31] ibid preambular para 10.

[32] ibid art 4. [33] ibid art 6.

[34] Arab Convention on Regulating Status of Refugees in the Arab Countries (n 18).

[35] 'Any person who is outside the country of his nationality or outside his habitual place of residence in case of not having a nationality and owing to well-grounded [sic] fear of being persecuted on account of his race, religion, nationality, membership of a particular social group or political opinion, unable or unwilling to avail himself of the protection of or return to such country' (art 1).

[36] Arab Convention on Regulating Status of Refugees in the Arab Countries (n 18) art 1.

The inclusion of 'natural disasters' is certainly an advance on the traditional definition of a 'refugee' and to be commended.[37] The Convention also includes *non-refoulement*, non-discrimination obligations, and an expectation that treatment of refugees would be no less than for other foreign residents. However, its silence on education, housing, employment, welfare and access to courts means that it was a mixed bag of commitments. Ultimately, its main flaw is the failure of States to accede and, consequently, it has never entered into force.

Despite this apparent failure, the Arab Convention provided a template for further discussion. In 2010, prompted by the enormity of displacement in the Middle East, the Arab Parliament initiated its revision and, in 2012, adopted a revised text that was circulated to the Arab League General Secretariat and League bodies for further consideration.[38] Redrafting has continued in collaboration with UNHCR and, in 2018, the LAS announced that a final version should be adopted in the near future.[39] UNHCR has reported that the proposed Arab Convention adopts the extended refugee definition contained in the OAU Refugee Convention, but goes beyond it to include persons fleeing disasters or grave events disrupting public order.[40]

African, Asian, and Middle Eastern States[41] have also agreed to the 1966 Bangkok Principles.[42] Two addenda—on the right to return and on principles of burden-sharing—were added in 1970 and 1987 and a revised text incorporating these changes was adopted in June 2001.[43] The definition of 'refugee' is similar to that of the Refugee Convention but extends the grounds of persecution to 'colour', 'ethnic origin', and 'gender';[44] the OAU Refugee Convention definition is also incorporated.[45] The Principles include familiar rights, such as the right to seek and to enjoy asylum from persecution,[46] *non-refoulement* and non-expulsion,[47] and minimum standards of treatment;[48] there is also a right of return to the country of nationality or habitual residence;[49] a right to compensation from the State of departure under certain circumstances;[50] and recognition of the need for burden-sharing.[51] While the revised Bangkok Principles are only declaratory, some Arab States still entered reservations against the principal articles, undermining the instrument's effectiveness.

Some Middle Eastern States have participated in other non-binding discussions and arrangements. For example, Turkey and Iran (observer status) are part of the Almaty

[37] See further on natural disasters, Chapter 46 in this volume.

[38] Rishmawi (n 17) 83.

[39] LAS, 'Contribution to The Sixteenth Coordination Meeting on International Migration', UN/POP/MIG-16CM/2018/4 (New York, 15–16 February 2018) 4.

[40] UNHCR/Inter-Parliamentary Union, 'A Guide to International Refugee Protection and Building State Asylum Systems—Handbook for Parliamentarians No 27' (2017) 21.

[41] Bahrain, Egypt, Iraq, Iran, Jordan, Kuwait, Lebanon, Oman, Qatar, Saudi Arabia, Palestine, Syria, Turkey, UAE, and Yemen.

[42] There are 47 Member States in the Asian-African Legal Consultative Organization, which advises on international law issues and which led the drafting of the Principles. The original 1966 version of the Bangkok Principles is available at AALCO website: <www.aalco.int/scripts/view-posting.asp?recordid=461> accessed 22 September 2019. See also Chapters 21, 22, and 23 in this volume.

[43] At its 40th Session in New Delhi: Bangkok Principles (n 6).

[44] Art I(1).

[45] Art I(2).

[46] Art II.

[47] Arts III and V.

[48] Art IV.

[49] Art VI.

[50] Art XI.

[51] Art X.

Process on Refugee Protection and International Migration[52] from which the Almaty Declaration emerged.[53] Iraq, Jordan, Syria, Turkey, and the United Arab Emirates are members of the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime (Bali Process). While the focus is evidently not on asylum or refuge, the Declarations often reflect the tenet of other Middle Eastern instruments. The 2016 Bali Declaration encourages Member States 'to explore potential temporary protection and local stay arrangements for asylum seekers and refugees, subject to domestic laws and policies of member states'.[54] Turkey is the most notable example of a State having vigorously pursued this approach, with its unique temporary protection regime (TPR) for Syrians (as discussed below), which pre-dated the 2016 Declaration. Interestingly, the 2018 Bali Declaration makes no reference to asylum and simply notes the development of the Global Compacts on Refugees and Migration 'as frameworks for international cooperation, seeking to address displacement and promote well-managed migration'.[55]

There is growing recognition of the role of Islam in refugee protection, and the Ashgabat Declaration of 2012, adopted by Member States of the Organisation of Islamic Cooperation (OIC), is an example of an alternative approach to refugee issues. It opens with a recognition that 'Islam laid down the bases for granting refuge, which is now deeply ingrained in Islamic faith, heritage and tradition' and noted that the Refugee Convention and Protocol 'have enduring value and relevance in the twenty-first century' and 'the importance of respecting the principles and values' underlying the instruments.[56] The Declaration is a useful reminder of the pressing issues and challenges posed by refugee movements and calls on the international community to address root causes of 'the problem of refugees' and to improve the global availability of resettlement. Yet, again, it is only a non-binding declaration.

ii. *Regional Human Rights Law*

There is a significant number of inter-Arab treaties on human rights, but, like their international equivalents, many suffer from either a low number of ratifications, weak enforcement, or both.[57] The Arab Charter on Human Rights is one such example. Initially

[52] The objective of the Almaty Process is to promote sustained dialogue and exchange of information on migration issues and on refugee protection challenges in Central Asia and the wider region.

[53] Almaty Declaration Adopted by Participating States at the Regional Conference on Refugee Protection and International Migration held in Almaty, Kazakhstan (16 March 2011). Available at: <www.iom.int/files/live/sites/iom/files/What-We-Do/docs/2011_Almaty_Declaration.pdf> accessed 21 April 2019.

[54] Declaration of the Sixth Ministerial Conference of the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime ('Bali Process') (Bali, 23 March 2016) para 6.

[55] Declaration of the Seventh Ministerial Conference of the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime (Bali, 7 August 2018) para 6.

[56] Ashgabat Declaration of the International Ministerial Conference of the Organization of Islamic Cooperation on Refugees in the Muslim World (11–12 May 2012) <www.refworld.org/pdfid/595c95ba4.pdf> accessed 22 September 2019; for further discussion of asylum and Islam, see Volker Türk, 'Reflections on Asylum and Islam' (2008) 27(2) RSQ 7.

[57] See for a useful list of LAS international treaties: Rishmawi (n 17) Annex 3.

adopted in 1994, it never entered into force due to lack of ratifications and was, in any event, criticized for failing to meet basic international human rights standards.[58] In 2004, the Charter was revised, and it was adopted and entered into force in 2008.[59] Its implementation is overseen by the Arab Human Rights Committee. While it continues to have its limitations, the 2004 Charter is regarded as an improvement on its forebear.[60] However, there are areas of concern. While article 28 protects the right to seek political asylum, and prohibits the extradition of political refugees, it excludes those 'facing prosecution for an offense under ordinary criminal law'. Several rights are dependent on State legislation and a number only benefit the citizen.[61] Finally, not all States have ratified it—for example, Egypt, Morocco, and Tunisia all signed in 2004, but have failed to ratify.

There are several other examples of inter-Arab human rights instruments that might appear to have a bearing on the rights of asylum seekers and refugees. However, there is no consistency in ratifications and many instruments are only applicable either to Arabs or to citizens. For example, the Charter on the Rights of the Arab Child 1983 and the Convention on Citizenship for Arab Residents of Arab States Other than their Native Countries 1952 are, as the titles state, restricted to the Arab child or resident;[62] they will therefore not apply to non-Arab asylum seekers or refugees in Arab States. In the case of the Arab Child Charter, there are only seven signatories to date[63] and this Charter has been criticized for inconsistency with its international counterpart, the CRC.[64]

While the clear direction of regional asylum and refugee law principles in the Middle East is to favour non-binding agreements and declarations, there is one country that is part of a binding regional human rights instrument: Turkey. Turkey stands alone in having ratified the European Convention on Human Rights (ECHR) and is therefore bound by the European Court of Human Rights' judgments, many of which impact State treatment of asylum seekers and refugees.[65] However, in 2017 it was reported that Turkey was the worst rights violator in the 58-year history of the ECHR, and therefore its commitment to upholding the rights of asylum seekers and refugees is somewhat questionable.[66]

[58] See further Mervat Rishmawi, 'The Arab Charter on Human Rights: A Comment' (1996) 10 Interights Bulletin 1.

[59] LAS, Arab Charter on Human Rights (n 18).

[60] See Mervat Rishmawi, 'The Revised Arab Charter on Human Rights' in Catarina Krause and Martin Scheinin (eds), *International Protection of Human Rights: A Text Book* (Turku/Åbo 2012).

[61] eg arts 39 and 41.

[62] LAS, Charter on the Rights of the Arab Child (adopted 6 December 1983); LAS, Convention on Citizenship for Arab Residents of Arab States Other than Their Native Countries (adopted 23 September 1952, entered into force 5 January 1956).

[63] Egypt, Iraq, Jordan, Libya, Palestine, Syria, and Yemen.

[64] Mervat Rishmawi, 'The League of Arab States and Human Rights' in Scott Sheeran and Sir Nigel Rodley (eds), *Routledge Handbook of International Human Rights Law* (Routledge 2013).

[65] See for further information the Council of Europe website: <www.coe.int/en/web/portal/home> accessed 22 September 2019; see further Chapter 19 in this volume.

[66] Sedat Ergin, 'Turkey is the Champion of Rights Violations at the ECHR', *Hurriyet Daily News* (20 December 2017) <http://www.hurriyetdailynews.com/opinion/sedat-ergin/turkey-is-the-champion-of-rights-violations-at-the-echr-124411> accessed 22 September 2019.

d. Domestic Law

With the extant inter-State differences at international and regional levels, it is unsurprising that domestic law and policy on asylum seekers and refugees is also varied. Egypt, for example, though party to the Refugee Convention, has no domestic legislation on the treatment of refugees.[67] As Jones notes:

> Both the constitution of 1971 (amended in 1980) and the more recently adopted constitution of 2014 recognize the right to 'political asylum' (in Articles 53 and 91, respectively) and the direct enforceability of international treaties (in Article 151 in both constitutions). The latter article unhelpfully, due to the lack of domestic legislation, requires the exercise of this right 'according to the Law'.[68]

In line with the norm in the region, Egypt applies several laws and decrees on foreigners to refugees and asylum seekers, but permits UNHCR to conduct refugee status determination (RSD) on its territory, though not for Palestinians (see Section 3a).

Israel, another State party and one of the first States to sign the Refugee Convention,[69] was also the first country to develop a national asylum determination system in 2001.[70] Initial screening and substantive interviews were conducted by UNHCR with the final decision taken by the Ministry of Interior. In July 2009, full transfer of the responsibility for RSD commenced, and, in January 2011, the 2001 Regulations were revised.[71] Israel was, consequently, the first Middle Eastern country to establish an RSD process.[72] However, these regulations are administrative instruments, focusing on process, rather than primary legislation.[73] There is a very low acceptance rate of refugees in Israel (for example, since 2009, there has been a 0.01 per cent acceptance rate for Eritreans in Israel compared to 85–90 per cent in Canada).[74]

[67] Presidential Decree No 331–1980, Al-Jarīdah Al-Rasmīyah, 28 May 1981 ratified the Refugee Convention and Protocol: Leila Hilal and Shahira Samy, 'Asylum and Migration in the Mashrek—Asylum and Migration Country Fact Sheet: Egypt' 3 <https://idcoalition.org/wp-content/uploads/2009/09/factsheet_egypt_en1.pdf> accessed 22 September 2019.

[68] Martin Jones, 'Legal Empowerment and Refugees on the Nile: The Very Short History of Legal Empowerment and Refugee Legal Aid in Egypt' (2015) 19 International Journal of Human Rights 308, 315 note 8.

[69] Israel was the tenth country to sign. Ruvi Ziegler, 'No Asylum for "Infiltrators": The Legal Predicament of Eritrean and Sudanese Nationals in Israel' (2015) 29 Journal of Immigration, Asylum and Nationality Law 172.

[70] Israel introduced secondary legislation through a directive: Regulations regarding the Treatment of Asylum Seekers in Israel (2001).

[71] Procedure for Handling Political Asylum Seekers in Israel (effective 2 January 2011). See Dallal Stevens, 'Between East and West: The Case of Israel' in Hélène Lambert, Jane McAdam, and Maryellen Fullerton (eds), *The Global Reach of European Refugee Law* (CUP 2013).

[72] Michael Kagan and Anat Ben-Dor, *Nowhere to Run: Gay Palestinian Asylum Seekers in Israel* (Tel Aviv University/Buchmann Faculty of Law 2008) 23.

[73] Stevens (n 71).

[74] René Provost, 'Israel's Treatment of Eritrean and Sudanese Migrants is Shameful', *The Globe and Mail* (14 February 201); Yonathan Paz, 'Ordered Disorder: African Asylum Seekers in Israel and Discursive Challenges to an Emerging Refugee Regime', UNHCR Policy Development and Evaluation Series, Research Paper No 205 (2011).

Turkey, as a Contracting State to the Convention, also provides an interesting case study. In the mid-1980s, UNHCR commenced RSD in Turkey for non-European asylum seekers.[75] In 1994, Turkey adopted a Regulation on Asylum.[76] The system was complicated and the outcomes uncertain, with the possibility of *refoulement* or removal notwithstanding a positive UNHCR refugee determination.[77] In 2013, the Law on Foreigners and International Protection (LFIP)[78] and Temporary Protection Regulation were passed.[79] The Directorate General of Migration Management (DGMM) was established and the sole power for RSD was transferred to Turkey in September 2018.[80]

States that are not parties to the Refugee Convention and/or Protocol tend to apply immigration law/law on foreigners to those who enter, irrespective of whether they are asylum seekers or refugees.[81] The Gulf Cooperation Council (GCC) States and Lebanon routinely use the kafala system in which a migrant worker's immigration status is bound to an individual employer or sponsor (the kafil); this often leads to serious exploitation and vulnerability of the individual.[82] While migrant workers in Jordan are not formally bound to sponsors, they are often vulnerable due to poor application of Jordanian employment laws.[83]

3. Institutional Framework

a. UNHCR

Many States of the Middle East, including those that have not ratified the Refugee Convention, have long been heavily reliant on UNHCR (and the UN Relief Works Agency (UNRWA))[84] to help cope with large numbers of refugees. UNHCR expanded its operations into the region in the 1960s, when it emerged from being a largely European organization.[85] It began operations in Turkey in 1960, and in 1963 it

[75] Irem Sengul, 'Rethinking the Category of Temporary Protection in Turkey: Legality, Uncertainty, and Home-Making in the City of Gaziantep' (PhD thesis, University of Warwick, 2020).

[76] No 1994/6169, last amended 2006.

[77] Sengul (n 75).

[78] In force April 2014.

[79] In force October 2014.

[80] UNHCR, 'Turkey: Strengthening a Quality Asylum System' (September 2018) <https://data2.unhcr.org/en/documents/details/67139> accessed 14 January 2020. UNHCR continues to conduct individual case assessment or resettlement in close cooperation with the government of Turkey.

[81] See on Jordan, Dallal Stevens, 'Legal Status, Labelling, and Protection: The Case of Iraqi "Refugees" in Jordan' (2013) 25 IJRL 1.

[82] ILO, 'Policy Brief No 2: Reform of the Kafala (Sponsorship) System' <www.ilo.org/dyn/migpractice/docs/132/PB2.pdf> accessed 22 September 2019.

[83] See for further discussion on Jordan, Katharina Lenner and Lewis Turner, 'Making Refugees Work? The Politics of Integrating Syrian Refugees into the Labor Market in Jordan' (2019) 28 Middle East Critique 65.

[84] See Chapter 35 in this volume.

[85] See generally Gil Loescher, *The UNHCR and World Politics: A Perilous Path* (OUP 2001).

established a regional office in Lebanon. Today, UNHCR has a presence in most States of the region, including a regional representation in Saudi Arabia, catering for the GCC States, and a Syria Regional Refugee Coordination Office in Amman, Jordan. Since 1987, UNHCR has also worked in Yemen, while in Israel UNHCR's honorary correspondent was replaced by an official representative office in 2007.[86]

Characteristic of UNHCR's operations in the region is that it has adopted a pragmatic approach largely focusing on establishing what it considers an acceptable 'protection space' for refugees. This includes strengthening institutional support for protection and community-based protection, rather than (merely) promoting ratification of the Convention.[87] Stevens has noted how, 'to a large extent, UNHCR has considerable latitude, within its mandate to orient policy in a direction of its own choosing'.[88] UNHCR notably produces a 'multi-dimensional protection regime' by drawing on a range of instruments, including its own Statute as well as any MoU, to inform action on the ground.[89] At the same time, UNHCR's ability to execute its international protection mandate is heavily affected by Middle Eastern host State policies, leading to a constant negotiation and re-negotiation of refugee protection.[90]

Currently, the largest groups of refugees falling under UNHCR's mandate in this region are refugees from Syria and Iraq, but its mandate has also been extended to internally displaced persons in, for example, Syria, Iraq, and Yemen, who outnumber refugees. Given that the States of the GCC are outside UNRWA's areas of operation, Palestinians are under international protection and covered by UNHCR's mandate.[91] UNHCR therefore also monitors the situation of the estimated 300,000 Palestinians living in Saudi Arabia and the other Gulf States.[92] They have generally first resided in one of the neighbouring States of Palestine and are believed to have been initially registered with UNRWA in their first country of asylum. Egypt, too, is outside UNRWA's areas of operation, but those Palestinians based there are excluded from UNHCR's mandate.[93]

86 Paz (n 74).

87 Janmyr (n 3); Dallal Stevens, 'Access to Justice for Syrian Refugees in Lebanon' in Maria O'Sullivan and Dallal Stevens (eds), *States, the Law and Access to Refugee Protection: Fortresses and Fairness* (Hart 2017).

88 Dallal Stevens, 'Rights, Needs or Assistance? The Role of the UNHCR in Refugee Protection in the Middle East' (2016) 20 International Journal of Human Rights 264.

89 ibid.

90 Janmyr (n 3); Martin Jones, 'Moving Beyond Protection Space: Developing a Law of Asylum in South East Asia' in Susan Kneebone, Dallal Stevens, and Loretta Baldassar (eds), *Refugee Protection and the Role of Law: Conflicting Identities* (Routledge 2014).

91 UNHCR, 'UNHCR Country Operations Plan 2004—Saudi Arabia' (2003) <www.refworld.org/docid/3fd9c6cb7.html> accessed 24 May 2019.

92 UNHCR, 'UNHCR Country Operations Plan 2007—Kingdom of Saudi Arabia & Gulf Countries' (2006) <www.refworld.org/docid/45221de92.html> accessed 24 May 2019.

93 Up-to-date statistics are difficult to establish but, in 2009, it was claimed that there were 50,000 to 70,000 Palestinians in Egypt: Oroub El-Abed, 'The Palestinians in Egypt: Identity, Basic Rights and Host State Policies' (2009) 28(2–3) RSQ 531.

i. *Memoranda of Understanding*

UNHCR's presence in the region is often formalized through the negotiation of MoUs with the host authorities. For example, UNHCR negotiated an MoU with Saudi Arabia in 1988, an agreement that also laid the basis for a close working relationship between UNHCR and the OIC.[94] Today, UNHCR operates in Saudi Arabia under a 1993 MoU (as amended in 2010), when the country hosted roughly 35,000 Iraqi refugees in the Rafha camp.[95] Following the closure of this camp in 2006, UNHCR negotiated alternative protection solutions with Saudi authorities to allow the remaining 363 persons to leave the camp and settle in urban areas in Saudi Arabia. These refugees were provided with refugee identification cards issued by the Saudi Ministry of Interior as well as residence permits. They could work and access medical and education facilities.[96]

MoUs can be viewed as alternative protection regimes to the Refugee Convention providing a legal framework to regulate the status of refugees in many Middle Eastern States. For example, UNHCR's 1998 MoU with Jordan adopts a refugee definition similar to that of the Refugee Convention (article 1) and declares Jordan's commitment to international standards of refugee protection (article 5), including the principle of *non-refoulement* (article 2). UNHCR's 2003 MoU with Lebanon, on the other hand, makes no mention of key refugee protection norms, and, rather, affirms that 'Lebanon does not consider itself an asylum country', and that an 'asylum seeker' means a 'person seeking asylum in a country other than Lebanon'.[97]

The main purpose of several of UNHCR's MoUs with Middle Eastern governments appears to be to shift the responsibility of refugee protection from States to UNHCR, with host States' obligations frequently being 'limited to tolerating refugees' presence temporarily on condition that they be resettled to a third country'.[98] UNHCR's respective agreements with Lebanon and Jordan, for example, establish that residence in these States is intended to be temporary and there is no long-term governmental responsibility

[94] UNHCR (n 91). This collaboration notably resulted in UNHCR sponsoring a study of Islamic influence on international refugee law in 2009. See UNHCR, 'UNHCR Sponsors Study of Islamic Influence on International Refugee Law' (22 June 2009) <www.unhcr.org/news/press/2009/6/4a3f95969/unhcr-sponsors-study-islamic-influence-international-refugee-law.html> accessed 24 May 2019.

[95] UNHCR, 'Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report—Universal Periodic Review: The Kingdom of Saudi Arabia' (2013) <www.refworld.org/pdfid/5135c0902.pdf> accessed 24 May 2019.

[96] UNHCR, 'UNHCR Country/Regional Operations Plan 2008–2009: Saudi Arabia, Kuwait, UAE, Qatar, Bahrain, Oman' (2007) <www.refworld.org/docid/4756bb232.html> accessed 24 May 2019.

[97] UNHCR, 'The Memorandum of Understanding between the Directorate of the General Security (Republic of Lebanon) and the Regional Office of the UN High Commissioner for Refugees, concerning the Processing of Cases of Asylum-Seekers Applying for Refugee Status with the UNHCR Office' (9 September 2003).

[98] Ghida Frangieh, 'Relations between UNHCR and Arab Governments: Memoranda of Understanding in Lebanon and Jordan' (Blog at LSE Middle East Centre, 23 September 2016) <blogs.lse.ac.uk/mec/2016/09/23/relations-between-unhcr-and-arab-governments-memoranda-of-understanding-in-lebanon-and-jordan/> accessed 24 May 2019.

for refugee protection. The MoU with Lebanon only accepts UNHCR's protection role for specific cases and it is expected that UNHCR-recognized refugees will be resettled within 12 months. The agreements thus impose a responsibility for resettlement on UNHCR, even though it is resettlement States, not UNHCR, that have absolute discretion as to which refugees to accept. This approach has garnered much criticism and the MoU was disused shortly after its negotiation.[99]

GCC governments have similarly been reluctant to apply UNHCR's extended mandate to refugees other than Iraqis in the Rafha camp. Many individuals falling under UNHCR's mandate in the GCC States have uncertain status due to irregular entry or an expired residence permit or visa, and, as UNHCR has explained, on occasion this challenging situation left it with 'no other choice than to obtain from the concerned Governments clearance for a temporary stay of recognized refugees against a commitment to find durable solutions for them'.[100] Thus, through UNHCR intervention, refugees without residence permits in States such as Oman and Kuwait have managed to secure temporary residence permits pending the finalization of resettlement procedures to a third country.[101]

UNHCR's 1996 MoU with Kuwait, for example, limits Kuwait's duties to facilitating access of UNHCR to refugees and other persons falling within UNHCR's mandate. At the same time, it defines UNHCR's tasks to include providing international protection to refugees and other persons who fall within the scope of its mandate, organizing and providing humanitarian assistance for refugees, and to 'seek permanent solutions to their problems by facilitating their voluntary return to their States of origin, or their assimilation within new national communities'.[102]

ii. *Registration, RSD, and Resettlement*

While the MoUs are one clear example of a shift of responsibility in this region from the sovereign State to UNHCR, UNHCR's role for RSD, registration, healthcare, education, and livelihood assistance for refugees appears so substantial that some scholars classify UNHCR as a form of 'surrogate State'.[103] Indeed, host States in the Middle

[99] Maja Janmyr, 'UNHCR and the Syrian Refugee Response: Negotiating Status and Registration in Lebanon' (2018) 22 International Journal of Human Rights 393.

[100] UNHCR (n 96).

[101] UNHCR, 'Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report—Universal Periodic Review: The Sultanate of Oman' (2015) <www.refworld.org/docid/56371d0f4.html> accessed 7 April 2019; UNHCR, 'Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report—Universal Periodic Review: State of Kuwait' (2014) <www.refworld.org/docid/54c236a34.html> accessed 7 April 2019.

[102] UNHCR, 'Co-operation and Office Agreement between the Office of the United Nations High Commissioner for Refugees and the Government of the State of Kuwait' (1996) art 4 <www.refworld.org/docid/3ae6b3181b.html> accessed 7 April 2019.

[103] Kagan (n 3); Stevens (n 87); Ruben Zaiotti, 'Dealing with Non-Palestinian Refugees in the Middle East: Policies and Practices in an Uncertain Environment' (2006) 18 IJRL 333.

East—including Contracting States to the Convention, such as Egypt and Yemen—have either partially or wholly handed over registration procedures and RSD to UNHCR.

Recently, however, several States have moved towards a nationalization of these procedures. While Israel historically outsourced the RSD process to UNHCR, in 2009 it assumed control via the newly established RSD unit within the Authority of Immigration at the Office of the Interior.[104] UNHCR reported in 2018 that since Israel took over RSD from UNHCR in 2009, only 10 Eritreans and one Sudanese had been recognized as refugees.[105] Turkey similarly allowed UNHCR to take charge of all asylum issues until 2013, when it established a State agency tasked to take over gradually from UNHCR and become the sole decision-maker on asylum.[106] The development of a national registration and RSD process was also the stated objective of Lebanon's decision in 2015 to suspend UNHCR's registration of Syrian refugees.[107]

In many States, UNHCR furthermore assumes responsibility for RSD processes for certain refugee groups, while other groups are under the purview of national authorities. Yemen has recognized *prima facie* Somali refugees and certain groups of Ethiopian and Eritrean refugees, but requests that UNHCR conduct individual status determination for all other asylum seekers.[108] Since the first Syrian arrivals, Turkish authorities have been exclusively in charge with respect to Syrians, but both UNHCR and Turkish authorities conduct registration and RSD for refugees with other national backgrounds.[109]

While UNHCR has provided *prima facie* refugee status for several groups of refugees in the region, it has occasionally also developed alternative procedures. In 2003, it attempted to introduce a TPR for Iraqi refugees in Lebanon and Jordan, for example.[110] The TPR sought to protect Iraqis from *refoulement* to Iraq and enable UNHCR to avoid processing asylum claims. Notably, the TPR in Jordan would 'reduce the burden on UNHCR by absolving it of the obligation to seek resettlement for the beneficiaries within six months, as demanded by the MOU for UNHCR recognized refugees'.[111] As the TPR was rejected by the Jordanian government, UNHCR started to apply *prima*

[104] Tanja R Müller, 'Realising Rights within the Israeli Asylum Regime: A Case Study among Eritrean Refugees in Tel Aviv' (2018) 37 African Geographical Review 134; Stevens (n 88); Paz (n 74).

[105] UNHCR, 'UNHCR Appeals to Israel over Forced Relocations Policy' (2018) <www.unhcr.org/news/briefing/2018/1/5a548e064/unhcr-appeals-israel-forced-relocations-policy.html> accessed 24 May 2019.

[106] AIDA, 'Country Report: Turkey' (2015) <www.asylumineurope.org/sites/default/files/report-download/aida_tr_update.i.pdf> accessed 24 May 2019; Kemal Kirişçi, 'UNHCR and Turkey: Cooperating for Improved Implementation of the 1951 Convention relating to the Status of Refugees' (2001) 13 IJRL 71.

[107] Janmyr (n 3).

[108] Nesya Hughes, 'Yemen and Refugees: Progressive Attitudes but Policy Void' (2003) 16 Forced Migration Review 36.

[109] AIDA (n 106).

[110] Stevens (n 81) 1.

[111] ibid.

facie refugee status for certain categories of Iraqi nationals, even though the status was not fully respected by some host States.[112]

As for refugees from Syria, UNHCR has adopted regional standard operating procedures for use in Lebanon, Iraq, Egypt, Jordan, and Turkey.[113] These procedures provide that Syrians generally do not undergo RSD unless they are selected for resettlement screening. While resettlement screening and RSD are normally considered to be separate processes, UNHCR applies a 'merged procedure' that combines the resettlement procedure with an expedited RSD procedure. This alternative protection procedure was initiated in 2014, when UNHCR found individual status determination not to be feasible following the large scale of displacement, and aims to ensure that resources are deployed only where completely necessary.[114]

Characteristic of the pragmatism demonstrated by both UNHCR and host States towards refugees in this region is the differential treatment of refugees depending on their country of origin and time of arrival in the host country. In States hosting large numbers of Syrian refugees, including Lebanon and Jordan, UNHCR has adopted one approach for Syrians with respect to registration, RSD and resettlement, and another for 'non-Syrians' such as Sudanese and Somali asylum seekers and refugees. UNHCR has been criticized for failing to align its protection and assistance policies across the various nationalities, leading UNHCR Jordan to develop a 'One Refugee' policy for all groups under its protection.[115]

In many Middle Eastern States, refugee recognition by way of registration is a contentious issue, and governments have sometimes sought to control UNHCR's registration activities. While Jordan considers registered Syrian refugees to have legal stay, in Lebanon the UNHCR registration certificate has not normally conferred formal status or exempted refugees from penalties associated with irregular entry or a lack of residency in the country. Thus, the certificate has predominantly entitled refugees to international protection and humanitarian assistance.[116] In 2014, Jordan requested that UNHCR stop issuing certificates for those who left the designated refugee camps without government approval, namely, without providing a sponsor as per the bailout programme.[117]

In a similar attempt to reduce the official number of refugees in the country, the Lebanese government suspended UNHCR's registration of Syrian refugees in 2015. It

[112] Samira Trad and Ghida Frangieh, 'Iraqi Refugees in Lebanon: Continuous Lack of Protection' (2007) Forced Migration Review 35 (special issue on Iraq's displacement crisis); Andrew Harper, 'Iraq's Refugees: Ignored and Unwanted' (2008) 90(869) International Review of the Red Cross 169.

[113] Janmyr (n 99); UNHCR Lebanon, 'Accelerated Processing of Claims from Syria in the context of Large Influxes into Lebanon' (2015) <http://www.refworld.org.ru/pdfid/56c4> accessed 10 October 2019.

[114] Janmyr (n 99).

[115] UNHCR, 'Global Focus Jordan' <reporting.unhcr.org/node/2549> accessed 24 May 2019.

[116] Janmyr (n 99).

[117] ACAPS, 'Quarterly Regional Analysis for Syria Report, 1 October–31 December 2014' (2016) <www.acaps.org/country/jordan/special-reports#container-682> accessed 24 May 2019.

also adopted restrictive regulations that resulted in a loss of legal status for more than two-thirds of Syrian refugees. Some refugees were nevertheless granted legal stay based on UNHCR registration certificates in return for a pledge not to work, and this was the first time that UNHCR registration granted refugees the right to stay in the country outside the scope of the 2003 MoU.

b. Courts and Civil Society

Over the last two decades, refugee legal aid organizations have been established in a wide range of Middle Eastern States, including Turkey, Lebanon, Jordan, and Egypt.[118] There is a degree of legal aid in Egyptian national courts, and the country has also seen some of the most well-developed programmes seeking to enforce refugee protection through legal mechanisms, such as African and Middle East Refugee Assistance (AMERA), which has provided direct representation of individuals undergoing RSD with UNHCR. St Andrews Refugee Services (StARS) similarly provides resettlement-focused legal aid to all refugee communities.[119]

The increasingly hostile environment for civil society in many Middle Eastern States has negatively impacted refugee access to rights. In Egypt, growing xenophobia and State security concerns about the politics of certain refugee communities has been coupled with the shrinking operational space of legal advocacy organizations since 2011.[120] In Turkey, the government has since 2015 taken a much stricter approach against international NGOs.[121]

There is limited research focusing on the role of local courts in providing protection for refugees and asylum seekers in this region. Civil society organizations in Lebanon (including Frontiers Ruwad and Legal Agenda) and Israel (such as the African Refugee Development Centre (ARDC), the Refugee Law Clinic and the Hotline for Migrant Workers) have notably represented asylum seekers and refugees in national courts.[122] UNHCR has also intervened before Israeli courts, for example in relation to Israel's application of the Anti-Infiltration Law to asylum seekers and refugees.[123]

In utilizing international human rights obligations and constitutional provisions, national courts have been instrumental in preventing detention and deportation of asylum seekers and refugees. In Lebanon, for instance, a series of court judgments removed irregular entry charges for several Syrian refugees with reference to the right to

[118] Barbara Harrell-Bond, 'Starting a Movement of Refugee Legal Aid Organizations in the South' (2007) 19 IJRL 729.

[119] Jones (n 68). [120] ibid. [121] AIDA (n 106).

[122] See Frontiers Ruwad, 'Double Jeopardy: Illegal Entry—Illegal Detention' (2009) <www.frontiersruwad.org/pdf/FR_DoubleJeopardy_Eng_FINAL_5January2009.pdf> accessed 24 May 2019.

[123] See UNHCR, 'UNHCR Intervention before the Supreme Court of Israel in the Case HCJ 7146/12' (2013) <www.refworld.org/docid/51ad9be64.html> accessed 24 May 2019.

seek asylum as set out in article 14 of the UDHR.[124] Throughout the last decade, Israeli Supreme Court rulings have similarly protected asylum seekers from forced deportation to third States.[125]

4. Contemporary Challenges and Conclusions

Ratification of international law instruments does not necessarily provide enhanced protection or greater individual rights in the Middle East. Most States in the region are party to some instruments of international human rights law, but implementation, enforcement, and access to justice are major issues in the majority. Few of them can be said to be (positive) international norm exporters and few are legal norm importers. Many States in the region turn to domestic law when dealing with migration issues—including refugees—with a tendency towards using laws on immigration, foreigners, or migrant workers, rather than asylum or refugee law, to control entry and migration (of all forms). This is the case in many States despite constitutional rights to political asylum.

Turkey has ratified the greatest number of international human rights instruments in the region and has undergone significant developments in its handling of displacement. While some regard its TPR as a model for other States, and thus as a possible norm exporter within and beyond the region, there is now a clear body of evidence that many of those who have sought sanctuary in Turkey face increasing precarity and uncertain futures, contesting the appropriateness of TPR where assumed temporality extends into the long-term or even permanence.

The legal context in the Middle East is heavily influenced by political and economic considerations and, as shown in this chapter, there is no single approach to cross-border displacement or refugee protection that is widely accepted and applied. Perhaps the one constant is the pervasive regional claim to 'hospitality' as the underlying rationale for generous treatment of 'guests';[126] but this discourse is no longer universally accepted and, as with many of the region's refugee policies, can be critiqued for 'boosting the political value of receiving States' and dividing social groups rather than unifying them.[127]

[124] Janmyr (n 3). [125] Müller (n 104).

[126] This argument is also put forward in relation to refugee protection in South Asia (see Chapter 22 in this volume).

[127] Estella Carpi and Pinar H Şenoğuz, 'Refugee Hospitality in Lebanon and Turkey. On Making "The Other"' (2019) 57 International Migration 126, 137. A different view is provided by Dawn Chatty, 'The Duty to Be Generous (Karam): Alternatives to Rights-Based Asylum in the Middle East' (2017) 5 Journal of the British Academy 177.

CHAPTER 19

REGIONAL REFUGEE REGIMES

Europe

EVANGELIA (LILIAN) TSOURDI*

1. Introduction

This chapter examines refugee protection in Europe, defining Europe based on its two distinct legal regimes, the European Union[1] and Council of Europe (CoE).[2] The EU and its Member States have developed a regional asylum framework, encompassing legislative, responsibility-allocation, and practical components. In parallel, EU border control, visa, and migration measures impact asylum by deflecting protection obligations to non-EU countries. Section 2 analyses the EU's ambivalent asylum system. Section 3 turns to the CoE, focusing on both the ECHR and soft law adopted in the CoE framework. EU asylum law has an expansive impact beyond the EU, including in neighbouring non-EU countries. To illustrate these expansive trends, I focus on refugee protection in Turkey and Ukraine (Section 4).

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[1] In April 2020, the EU had 27 Member States. All EU Member States are also States parties to the CoE.

[2] In April 2020, the CoE had 47 Member States. According to its Statute its membership is open to 'any European state' that is able and willing to 'accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms'. See Statute of the Council of Europe (adopted 5 May 1949) 87 UNTS 103, arts 3, 4. The concept of 'European' has been interpreted freely to include geographically transcontinental States, such as Turkey, or States beyond the European continent.

2. Asylum in the European Union: Torn between Protection and Deflection

a. Origins and Development of EU Asylum Cooperation

European coordination of asylum policy began outside the framework of EU law. A group of Member States established the so-called Schengen system,[3] mainly aiming to abolish internal border controls between the Member States. In addition, a number of Conventions were agreed between Member States, an early but enduring example being the 1990 Dublin Convention,[4] designed to allocate responsibility amongst EU countries for examining asylum applications. Although the 1992 Maastricht Treaty formalized EU cooperation on asylum, few binding measures were adopted.[5] Early initiatives were largely conceived as flanking measures to the completion of the internal market and the abolition of internal border controls.[6]

The EU's approach to refugee protection has entailed protection hand in hand with deflection. Deflection measures include carriers' sanctions, the visa 'black list', and extraterritorial border controls. As early as 2001, Noll identified the 'common market of deflection',[7] while both Moreno-Lax[8] and Gammeltoft-Hansen[9] have provided insightful accounts on how the EU's external border control, visa, and migration policies impede access to protection and deflect protection obligations to non-EU States. The critiques of containment and deterrence measures are many. Critics argue that these measures overestimate the capacity of borders to bar irregular entry; generate humanitarian crises at external borders; and, that their operation inevitably entails human rights violations.[10] Nevertheless, the EU and its Member States continue to

[3] See eg the Schengen Implementing Convention (adopted 19 June 1990, entered into force 1 September 1993) OJ L 239/19.

[4] Convention Determining the State Responsible for Examining Applications for Asylum Lodged in one of the Member States of the European Communities (adopted 15 June 1990, entered into force 1 September 1997) OJ C 254, 1.

[5] See Treaty on European Union [1992] OJ C 191/1.

[6] Vincent Chetail, 'The Common European Asylum System: Bric-à-Brac or System?' in Vincent Chetail, Philippe De Bruycker, and Francesco Maiani (eds), *Reforming the Common European Asylum System: The New European Refugee Law* (Brill 2016) 3, 11; Sandra Lavenex, 'The Europeanization of Refugee Policies: Normative Challenges and Institutional Legacies' (2001) 39 Journal of Common Market Studies 860.

[7] Gregor Noll, *Negotiating Asylum: The EU Acquis, Extraterritorial Protection and the Common Market of Deflection* (Brill 2001).

[8] Violeta Moreno-Lax, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law* (OUP 2017).

[9] Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (CUP 2011). See also Chapter 27 in this volume.

[10] Maarten Den Heijer, Jorrit J Rijpma, and Thomas Spijkerboer, 'Coercion, Prohibition, and Great Expectations: The Continuing Failure of the Common European Asylum System' (2016) 53 Common Market Law Review 607, 615–18.

rely on containment, so the EU remains torn between the imperatives of protection and deflection.

The 1999 Treaty of Amsterdam[11] and the Tampere Conclusions of the European Council[12] marked greater ambition and a new *telos* for European asylum policy, calling for a 'common EU policy on asylum and migration'[13] and specifically a Common European Asylum System (CEAS).[14] In spite of this language, asylum policy in the Treaty of Amsterdam was ambivalent. Although still framed as a corollary to the establishment of an internal market, the mobility of asylum seekers was excluded. Despite the aim being 'common' policies, in reality the Treaty envisaged only 'minimum standards', by definition allowing Member States to adopt more favourable standards.[15]

Formally, minimum harmonization does not connote a low level of protection.[16] Yet, in practice, the dynamics of EU harmonization led to mixed outcomes. The Council of the EU adopted the first generation of asylum instruments acting unanimously.[17] Although this does not mean that asylum harmonization necessarily led to a 'race to the bottom',[18] States generally sought to maintain their own domestic standards. As poignantly argued by Zaun, strong regulators (a term she uses to describe States with effective government and refugee protection, such as Germany and France) have an interest in harmonizing asylum policies to reflect their pre-existing domestic policies.[19] These Member States with developed asylum systems would often remain bound by higher standards under national, sometimes constitutional, law, so they had no interest in inserting minimal guarantees in EU law. At the same time, strong regulators wanted to see their own national administrative traditions reflected in EU legislation, including their various national asylum procedures, in particular accelerated, admissibility, and border procedures. This led, for example, to the establishment of highly differentiated standards in the 2005 Asylum Procedures Directive, prompting Costello to conclude that through this instrument exceptional procedures were normalized.[20]

[11] See Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts [1997] OJ C 340/1.

[12] Tampere European Council, 'Presidency Conclusions' (15–16 October 1999) (Tampere Conclusions).

[13] ibid para 10. [14] ibid para 13.

[15] See eg Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status [2005] OJ L 326/13, art 5.

[16] See Case C-84/94 *UK and Ireland v Council (Working Time Directive)* [1996] ECR I-5793, para 56.

[17] See Tampere Conclusions (n 12) art 67.

[18] See contributions in Philippe De Bruycker and Constança Urbano Dias De Sousa (eds), *The Emergence of a European Asylum Policy* (Bruylant 2004).

[19] Natascha Zaun, *EU Asylum Policies: The Power of Strong Regulating States* (Palgrave Macmillan 2017) 38.

[20] Cathryn Costello, 'The Asylum Procedures Directive in Legal Context: Equivocal Standards Meet General Principles' in Anneliese Baldaccini, Elspeth Guild, and Helen Toner (eds) *Whose Freedom, Security and Justice? EU Immigration and Asylum Law after 1999* (Hart 2007), 151.

The Treaty of Lisbon reflected in law the ambition to create a CEAS that had up to that point only been expressed in EU policy documents.[21] In addition, it confirmed notable changes in the decision-making processes, requiring the significant involvement of the European Parliament and the Council, now acting through qualified majority.[22]

b. A Common European Asylum System: What's in a Name?

Member States' international refugee and human rights law obligations underpin the EU's asylum policy. The EU Treaties,[23] legislation adopted to realize the policy,[24] and the Court of Justice of the European Union (CJEU) affirm this.[25] The EU Charter of Fundamental Rights contains a right to asylum in article 18, viewed as creating an individual right,[26] although the CJEU has not yet clarified its scope.[27] The EU Treaties establish an overarching aim of developing 'a common policy on asylum, subsidiary protection and temporary protection'[28] and stipulate that the policy should be a CEAS.[29] They then set out the details of the different measures on asylum that comprise such a system, nuancing the notion of asylum under EU law as compared to international law.[30] The resultant CEAS legislation comprises the EU Qualification Directive on the definition of, and the standards of treatment for, refugees and beneficiaries of subsidiary protection.[31] Other Directives cover temporary protection,[32] asylum procedures,[33] and reception conditions for asylum seekers, including several socio-economic rights.[34]

[21] Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community [2007] OJ C 306/1, art 78.

[22] Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47 (TFEU), arts 78(1)–(2), 289(1), 294.

[23] ibid art 78(1).

[24] See Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted [2011] OJ L 337/9 (EU Qualification Directive), recital 4.

[25] Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08 *Abdullah v Bundesrepublik Deutschland* [2010] ECR I-1493, para 52.

[26] See María-Teresa Gil-Bazo, 'The Charter of Fundamental Rights of the European Union and the Right to be Granted Asylum in the Union's Law' (2008) 27(3) RSQ 33.

[27] See analysis in Maarten den Heijer, 'Article 18—Right to Asylum' in Steve Peers, Tamara Hervey, Jeff Kenner, and Angela Ward, *The EU Charter of Fundamental Rights: A Commentary* (Hart 2014) 532; see also Chapter 48 in this volume.

[28] See TFEU (n 22) art 78(1). [29] See ibid art 78(2). [30] ibid art 78(2) (a)–(g).

[31] See EU Qualification Directive (n 24).

[32] Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts between Member States in Receiving Such Persons and Bearing the Consequences Thereof [2001] OJ L212/12 (TPD).

[33] Council Directive 2013/32/EU of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection [2013] OJ L 180/60 (2013 Asylum Procedures Directive).

[34] Council Directive 2013/33/EU of 26 June 2013 Laying Down Standards for the Reception of Applicants for International Protection [2013] OJ L180/96.

Finally, an EU Regulation assigns responsibility for asylum claims.[35] In 2016, the European Commission introduced proposals to amend all legal instruments apart from the Temporary Protection Directive. In summer 2020, those negotiations were ongoing.

The Treaties frame the external dimension of the CEAS[36] broadly, enabling a diverse range of actions, from providing funding to organizing extraterritorial processing. To date, two main types of actions have been operationalized, namely EU-supported refugee resettlement,[37] and 'regional protection programmes' in the form of projects implemented primarily by UNHCR, together with local non-governmental organisations.[38] The EU also seeks to 'externalize' and deflect protection obligations through its other policies. Under the guise of migration management, it integrates deflection into its external relations.[39]

Legislative harmonization is not the only element of a CEAS. The actors that are meant to implement these rules equally form part of the asylum system. The CEAS is both the rules and their implementation. In view of this understanding, the goal in article 78(2) TFEU to establish a 'common system' arguably creates a legal obligation to institutionalize deeper integration, not merely through legislation but also through institutional cooperation.[40]

The initial implementation design of the CEAS was underpinned by the theory of executive federalism[41] whereby, in general, EU law implementation is left to national authorities.[42] The CEAS, according to this orthodox view, was conceptualized as a 'common system of national variants'.[43] EU legislation on asylum is also explicit on this point: these instruments impose specific duties on Member States to establish functioning and well-resourced national asylum systems.[44] Nevertheless, Member States have different

[35] Council Regulation (EU) No 604/2013 of 26 June 2013 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in One of the Member States by a Third-Country National or a Stateless Person (Recast) [2013] OJ L 180/31 (Dublin III Regulation). See Section 2(c).

[36] ibid art 78(2)(g).

[37] See Council Regulation (EU) 516/2014 of 16 April 2014 Establishing the Asylum, Migration and Integration Fund, Amending Council Decision 2008/381/EC and Repealing Decisions No 573/2007/EC and No 575/2007/EC of the European Parliament and of the Council and Council Decision 2007/435/EC [2014] OJ L 150/168, arts 7, 17; and Chapter 60 in this volume.

[38] See eg Aspasia Papadopoulou, *Regional Protection Programmes: An Effective Policy Tool?* (ECRE 2015).

[39] See Section 3.

[40] See Evangelia (Lilian) Tsourdi, 'The Emerging Architecture of EU Asylum Policy: Insights into the Administrative Governance of the Common European Asylum System' in Francesca Bignami (ed), *EU Law in Populist Times: Crises and Prospects* (CUP 2020) 191–226.

[41] See Koen Lenaerts, 'Regulating the Regulatory Process: "Delegation of Powers" in the European Community' (1993) 18 European Law Review 28.

[42] See eg Jürgen Schwarze, *European Administrative Law* (rev edn, Sweet and Maxwell 2006) 6–8.

[43] See TFEU (n 22) art 78(2)(e).

[44] See 2013 Asylum Procedures Directive (n 33).

levels of economic development and conceptualizations of welfare, and so diverse protection capacity. Executive federalism, in particular when combined with the Dublin System (a responsibility assignation system that disregards fair sharing)[45] has contributed to widely divergent recognition rates for asylum seekers,[46] quality of asylum procedures, and reception conditions.[47] Moreover, the theory of executive federalism, increasingly fails to capture the reality of implementation.

c. EU Asylum Law and the Refugee Convention: Convergence and Divergence

In many respects, EU law reflects and further develops international refugee law. The Qualification Directive defines the concept of persecution,[48] includes a non-exhaustive list of acts of persecution,[49] and adds precisions to the five Convention grounds.[50] These legal precisions are generally in line with the Refugee Convention. However, there are divergences. Most notably, the Directive excludes EU citizens from its scope,[51] in contravention of article 42 of the Refugee Convention.[52] It cumulates the 'social perception' and the 'sharing innate characteristics' tests to define 'membership of a particular social group', thus narrowing the scope of the term in the Refugee Convention, an interpretation that has led to a restrictive turn in some national courts.[53] The Directive also contains problematic exclusion grounds. For instance, article 14(5) states that where there are reasonable reasons to consider a person a danger to security, or where they have been convicted by a final judgment of a particularly serious crime, Member States may decide not to grant status. This goes beyond the Refugee Convention's exhaustive list. Further problematic features include the introduction of the concept of non-State actors of protection,[54] and the further development of the internal protection alternative concept.[55]

[45] See Section 2.c.

[46] See data in European Asylum Support Office, 'Annual Report on the Situation of Asylum in the European Union 2018' (EASO 2019) 55–9.

[47] See Asylum Information Database and European Council on Refugees and Exiles <https://www.asylumineurope.org> accessed 23 May 2020.

[48] See EU Qualification Directive (n 24) art 9(1).

[49] See ibid art 9(2).

[50] See ibid art 10.

[51] See TFEU (n 22) art 78(1); Protocol (No 24) on Asylum for Nationals of Member States of the European Union [2012] OJ C 326/1.

[52] Jane McAdam, 'The Qualification Directive: An Overview' in Karin Zwaan (ed), *The Qualification Directive: Central Themes, Problem Issues, and Implementation in Selected Member States* (Wolf Legal Publishers 2007) 10.

[53] See EU Qualification Directive (n 24). Christel Querton, 'The Interpretation of the Convention Ground of "Membership of a Particular Social Group" in the Context of Gender-Related Claims for Asylum' (2012) Refugee Law Initiative Working Paper No 3 <https://sas-space.sas.ac.uk/4690/5/RLI_Working_Paper_No.3.pdf> accessed 28 May 2020.

[54] EU Qualification Directive (n 24) art 7.

[55] ibid art 8.

On the other hand, EU law expands protection by introducing an additional protection status—subsidiary protection. This status is 'subsidiary' to refugee status, which must be given precedence.[56] In brief, subsidiary protection encompasses categories that go beyond the refugee definition, based on Member States' obligations under international and European human rights law.[57] As McAdam observes, however, the Directive has not reflected all the protection obligations under international law.[58] Member States continue to operate divergent national protection statuses, alongside the harmonized EU ones.[59] These statuses are often weak, and typically offer minimal levels of socio-economic rights.

Another way EU law expands protection is by, at least potentially, introducing the status of temporary protection.[60] The Temporary Protection Directive stipulates conditions for the grant of a protection status—a maximum two-year duration in cases of 'mass influx' or 'imminent mass influx'.[61] It guarantees a minimum level of rights;[62] contains arrangements for accessing an asylum determination procedure;[63] and incorporates provisions on solidarity and balancing of efforts.[64] It has not been activated once. There are various reasons for the Directive's non-implementation, including the procedure for the institution of a temporary protection scheme; the indeterminacy of the concept of 'mass influx'; and the political fear that its instatement would create a so-called pull factor, 'inviting' to the EU refugees and displaced persons qualifying for its protection. To this, one must add the visa facilitation obligations for the protected groups that are included in the Directive.[65] These are the closest to formalized legal entry obligations towards protection seekers that exist to date in the CEAS.

The Asylum Procedures Directive seeks to harmonize, in a detailed manner, rules around asylum procedures at national level, including the right to an effective remedy. This is an ambitious aspect of the EU asylum policy, given that the Refugee Convention does not include relevant norms.[66] However, aspects of that Directive undermine protection, including through the adoption of a safe third country concept.[67]

[56] See ibid recital 33; 2013 Asylum Procedures Directive (n 33) art 10(2).

[57] See EU Qualification Directive (n 24) art 15; Case C-465/07 *Elgafaji v Staatssecretaris van Justitie* [2009] ECR I-921; Case C-285/12 *Diakité v Commissaire Général aux Réfugiés et aux Apatrides* (CJEU, 30 January 2014); Case C-542/13 *M'Bodj v État belge* (CJEU, 18 December 2014).

[58] Jane McAdam, *Complementary Protection in International Refugee Law* (OUP 2007) 56.

[59] See European Migration Network, 'Comparative Overview of National Protection Statuses in the EU and Norway' (European Commission, 11 February 2019) <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/00_eu_national_protection_common_template_en.pdf> accessed 28 May 2020.

[60] See Chapter 37 in this volume.

[61] See TPD (n 32) art 2(a).

[62] See ibid arts 8–16.

[63] See ibid arts 17–19.

[64] See ibid arts 22–4.

[65] See ibid art 8(3) stating: '[t]he Member States shall, if necessary, provide persons to be admitted to their territory for the purposes of temporary protection with every facility for obtaining the necessary visas, including transit visas. Formalities must be reduced to a minimum because of the urgency of the situation. Visas should be free of charge or their cost reduced to a minimum.'

[66] See Chapter 32 in this volume.

[67] 2013 Asylum Procedures Directive (n 33) art 38; see Chapter 28 in this volume.

d. Intra-EU Responsibility-sharing: In Search of Solidarity

Another innovative, but highly controversial, feature of CEAS is responsibility assignation for asylum claims under the Dublin III Regulation. Its basic premise is that a single Member State is responsible for each application.[68] The Regulation provides a hierarchy of criteria for identifying the responsible State.[69] Apart from limited cases related to unaccompanied minors and safeguarding family unity, this is the State primarily responsible for the person's presence in the EU.[70] In practice, this usually means the State of first irregular entry to the EU territory. Where asylum seekers are not present in the territory of the 'responsible' Member State, they are to be transferred there. However, as a matter of EU law, Member States must abstain from such a transfer, at least when there is a real risk of a breach of the prohibition of inhuman or degrading treatment.[71] In addition, they may abstain from a transfer for any other reasons, including on humanitarian and compassionate grounds.[72] Finally, they retain the right to return the applicant to a safe third country outside the EU territory, provided the rules and safeguards contained in the Asylum Procedures Directive are ensured.[73]

This system does not lead to fair sharing of responsibility between the Member States, a legal requirement according to EU law.[74] More deeply, it fails to reflect asylum provision as a regional public good. Instead, once responsibility is assigned, it is for the individual Member State alone to provide for the refugee. EU support measures, such as EU funding, are limited. The CEAS does not generally incorporate people-sharing measures, such as further redistribution of asylum seekers or recognized beneficiaries of international protection.[75] Even once recognized, refugees and subsidiary protection beneficiaries do not enjoy free movement across the EU, unless they fulfil the conditions of the Long-Term Residents Directive, which include a five-year residence requirement and stable and regular resources.[76]

The problems created by the system long predated the surge of asylum seeker arrivals in 2015–16, as noted by most academic commentators,[77] as may be illustrated by

[68] See ibid art 3(1). [69] See Dublin III Regulation (n 35) ch III.

[70] eg the Member State that issued a residence document or a visa. See ibid art 12.

[71] See ibid art 3(2); Joined Cases C-411/10 and 493/10 *NS v United Kingdom* [2011] ECR I-13905; Case C-578/16 PPU *CK v Republika Slovenija* (CJEU, 16 February 2017).

[72] See Dublin III Regulation (n 35) ch IV.

[73] See ibid art 3(3); 2013 Asylum Procedures Directive (n 33).

[74] See TFEU (n 22) art 80; Evangelia (Lilian) Tsourdi, 'Solidarity at Work? The Prevalence of Emergency-Driven Solidarity in the Administrative Governance of the Common European Asylum System' (2017) 24 Maastricht Journal of European and Comparative Law 667, 673–5.

[75] People sharing measures have only been adopted exceptionally, in the form of *ad hoc*, time-limited emergency relocation schemes. See analysis below.

[76] See Council Directive 2003/109/EC of 25 November 2003 Concerning the Status of Third-Country Nationals Who Are Long-Term Residents [2003] OJ L 16/44, as extended in 2011.

[77] See eg Paul McDonough and Evangelia (Lilian) Tsourdi, 'The "Other" Greek Crisis: Asylum and EU Solidarity' (2012) 31(4) RSQ 67; Francesco Maiani, 'The Dublin III Regulation: A New Legal Framework for a More Humane System?' in Vincent Chetail, Philippe De Bruycker, and Francesco Maiani (eds), *Reforming the Common European Asylum System: The New European Refugee Law* (Brill 2016) 104–14.

examining the situation relating to asylum in Greece. As early as 2011, the European Court of Human Rights (ECtHR) identified structural deficiencies in the country's asylum procedures and reception conditions.[78] These were arguably due to both Greece's inability (the country was hard hit by the financial crisis) and unwillingness to protect asylum seekers and refugees. Arguably, the Dublin System incentivized these breaches of the CEAS, in order to shirk off responsibilities imposed by the Dublin System, which Greece perceived as unfairly imposed. Greece has been slowly improving its national asylum system, for example through the establishment of a dedicated national administrative authority.[79] Supported by EU funding, it has implemented programmes to provide urban accommodation and cash assistance to growing numbers of asylum seekers.[80] Nevertheless, deficiencies in asylum processing, and most notably in reception conditions, persist throughout the country.

No lasting change has been made to the EU's responsibility-allocation system. A temporary shift took place in 2015–17. Emergency relocation, meaning intra-EU transfer of asylum seekers between Member States, was established to benefit Italy and Greece.[81] It was undercut through several factors, including its own legislative and administrative set up.[82] In addition, certain Member States simply refused to relocate asylum applicants. The CJEU found this refusal to violate EU law.[83] Despite these failings, that time-limited scheme included binding obligations for Member States, in the form of relocation quotas, and led to the relocation of around 35,000 asylum seekers from Greece and Italy to other Member States.[84]

[78] See in particular *MSS v Belgium and Greece* (2011) 53 EHRR 2.

[79] First established through Law No 3907/2011 (26 January 2011) Official Gazette of the Greek Government, Series A, Issue 7, 19 *et seq*.

[80] See 'Emergency Support to Integration and Accommodation' (ESTiA, UNHCR) <http://estia.unhcr.gr/en/home/> accessed 18 May 2020.

[81] Council Decision (EU) 2015/1523 of 14 September 2015 Establishing Provisional Measures in the Area of International Protection for the Benefit of Italy and of Greece [2015] OJ L 239/146; Council Decision (EU) 2015/1601 of 22 September 2015 Establishing Provisional Measures in the Area of International Protection for the Benefit of Italy and Greece [2015] OJ L 248/80.

[82] See Bruno De Witte and Evangelia (Lilian) Tsourdi, 'Confrontation on Relocation—The Court of Justice Endorses the Emergency Scheme for Compulsory Relocation of Asylum Seekers within the European Union: *Slovak Republic and Hungary v Council*' (2018) 55 Common Market Law Review 1457, 1459–67; Elspeth Guild, Cathryn Costello, and Violeta Moreno-Lax, 'Implementation of the 2015 Council Decisions Establishing Provisional Measures in the Area of International Protection for the Benefit of Italy and of Greece' (2017) Study for the LIBE Committee, 42–4 <https://www.europarl.europa.eu/RegData/etudes/STUD/2017/583132/IPOL_STU(2017)583132_EN.pdf> accessed 28 May 2020.

[83] Joined Cases C-715/17, C-718/17 and C-719/17 *Commission v Poland* (Temporary Mechanism for the Relocation of Applicants for International Protection) (CJEU, 2 April 2020).

[84] See European Commission, 'Progress Report on the Implementation of the European Agenda on Migration' COM (2018) 301 final.

e. Practical Cooperation: From Information Exchange to the Joint Processing of Applications

As mentioned above, the EU generally leaves implementation to the national level. However, over time, the CEAS has come to include a greater role for EU bodies in the implementation of EU asylum policy, in particular as seen with the creation of the European Asylum Support Office (EASO) in 2010.[85] One of EASO's roles was to offer operational support to national asylum systems, at the request of the Member State concerned,[86] in relation to the initial analysis of asylum applications and reception facilities, including by deploying Asylum Support Teams.[87] These teams are made up of seconded national experts, including interpreters.[88] However, EASO was originally not granted a role in asylum decision-making, with its governing regulation excluding even indirect powers in this area,[89] or adopting any binding instructions about the granting or refusal of individual asylum applications.[90]

In spite of these limitations, in practice EASO engages in joint implementation with national authorities.[91] For example, based on Greek national law, EASO experts conduct interviews and issue non-binding opinions on the admissibility of claims and in the merits stage.[92] While the final decision formally remains with the Greek Asylum Service, evidently EASO has a significant, if not decisive, impact on the outcome of applications. EASO officials increasingly work in non-EU countries, based on bilateral or multilateral arrangements, becoming an actor in the EU externalization of migration control. They are currently involved in capacity-building (eg training and study visits), information exchange (eg on resettlement to assist implementation), and operational support through targeted presence (eg currently there is a resettlement expert deployed at the European Union Delegation in Ankara).[93]

An increasingly 'integrated European administration'[94] is emerging in asylum and might be the precursor to more radical shifts in the implementation modes of EU

[85] Council Regulation (EU) No 439/2010 of 19 May 2010 Establishing a European Asylum Support Office [2010] OJ L 132/11 (EASO Regulation).

[86] ibid arts 10, 13. [87] ibid arts 10(a)–(c). [88] ibid art 15. [89] ibid recital 14, art 2(6).

[90] ibid art 12(2).

[91] For a conceptual framework on joint processing see Evangelia (Lilian) Tsourdi, 'Holding the European Asylum Support Office Accountable for its Role in Asylum Decision-Making: Mission Impossible?' (2020) 21 German Law Journal 506, 513–16.

[92] See Law 4346/2019 (1 November 2019) Official Gazette of the Greek Government, Series A, Issue 169, 4827 *et seq*, arts 76(1) (re: admissibility), 76(2) (re: merits), 90 (re: border procedures).

[93] See EASO, 'EASO External Cooperation Strategy' (February 2019) 14 <https://www.easo.europa.eu/sites/default/files/easo-external-cooperation-strategy.pdf> accessed 28 May 2020.

[94] See Herwig Hoffmann and Alexander Türk, 'The Development of Integrated Administration in the EU and Its Consequences' (2007) 13 European Law Journal 253.

asylum policy.[95] The exercise of executive powers and discretion by EU agency (deployed) staff has a direct impact on the fundamental rights of migrants and asylum seekers. This brings to sharp relief the need for appropriate accountability arrangements.[96]

3. European Refugee Protection and the Council of Europe: Of Human Rights Law and Soft Law

The ECHR is the cornerstone of the CoE system. The Convention does not regulate the situation of refugees directly, nor does it contain a right to asylum. Nevertheless, it contains several asylum-relevant rights. The most notable is the prohibition of torture, inhuman, or degrading treatment or punishment (article 3), which the ECtHR has interpreted to include a *non-refoulement* component. In this Section, I critically assess ECtHR case law, finding the court to be deferential to States' migration management prerogatives. Beyond the ECHR and the court, the CoE influences refugee protection through the practice of its decision-making bodies and non-judicial institutions. They complement the court, impacting refugee protection through their powers of soft enforcement.

a. The ECtHR and Asylum: An Appraisal

The court's interpretation of ECHR rights has arguably bolstered and expanded protection against *refoulement* under the Refugee Convention. In the *Soering* case, the ECtHR underlined that while Contracting Parties may remove individuals to States where ECHR safeguards are not fully met,[97] there are (at least) two exceptions to this general rule. First, because of the absolute and non-derogable nature of article 3 of the ECHR, which prohibits torture and inhuman or degrading treatment or punishment, individuals may not be sent to countries where they face real risks of being subjected to such treatment.[98] Given the reasoning of the ECtHR in *Soering*, this prohibition of *refoulement* also applies to violations of other non-derogable rights.[99] Secondly, an

[95] Guy S Goodwin-Gill, 'The Mediterranean Papers: Athens, Naples, and Istanbul' (2016) 28 IJRL 276, 285–8.

[96] See Tsourdi (n 91). For external border controls see Melanie Fink, *Frontex and Human Rights: Responsibility in 'Multi-Actor Situations' under the ECHR and EU Public Liability Law* (OUP 2018).

[97] *Soering v United Kingdom* (1989) 11 EHRR 439, para 86.

[98] ibid para 88. See also *Saadi v Italy* (2008) 47 EHRR 17.

[99] Cornelis W Wouters, *International Legal Standards for the Protection from Refoulement* (Intersentia 2009) 345. See eg *Bader and Kanbor v Sweden*, App No 13284/04 (ECtHR, 8 November 2005) para 42.

extradition 'might exceptionally' be prohibited under the ECHR if there is a risk that the individual would face a 'flagrant denial of justice' (in the sense of a breach of article 6 ECHR) during his trial in the receiving country.[100] The content of that 'flagrant denial test' and its implications for derogable rights, other than the right to fair trial, remain controversial.[101]

Apart from the prohibition of *refoulement*, the ECtHR held in *MSS* that the situation of an asylum seeker who, due to the inaction of the State, '[f]ound himself for several months, living in the street, with no resources or access to sanitary facilities, and without any means of providing for his essential needs'[102] attained the level of severity required to fall within the scope of article 3 of the Convention. The ECtHR has scrutinized asylum seeker detention through the prohibition of arbitrary deprivation of liberty.[103] Asylum seekers have utilized the right to an effective remedy, a corollary to the prohibition of *refoulement*, to challenge the adequacy of national procedural guarantees.[104] These are but few examples to illustrate ECHR rights' invocation by asylum seekers. The *Soering* case was a landmark for *non-refoulement*, especially in countries that have not adopted national asylum legislation and related guarantees. The *MSS* case, later confirmed by the CJEU,[105] shook the EU, influencing policy and legislative change on the EU's responsibility-allocation system.[106]

Some Contracting Parties and commentators have criticized the ECtHR for 'judicial activism'.[107] While these criticisms are not specifically geared to the ECtHR's asylum-relevant case law, they reflect the political backdrop against which the court operates. In reality, the ECtHR has not always provided an interpretation of Convention rights that is protective of refugees. The ECtHR is deferential to States' migration management prerogatives. According to the settled case law, the right to a fair trial does not apply to proceedings on entry, stay, and deportation of foreigners including migrants, asylum seekers, and refugees.[108] The ECtHR does not impose a necessity requirement to limit immigration-related detention (instead requiring that it not be arbitrary, a lower standard), essentially permitting the deprivation of liberty of asylum seekers for

[100] *Soering* (n 97) para 113. See amongst others: *Othman (Abu Qatada) v United Kingdom* (2012) 55 EHRR 1.

[101] See Chapter 36 in this volume for analysis.

[102] *MSS v Belgium and Greece* (n 78) para 253.

[103] See eg *Ilias and Ahmed v Hungary*, App No 47287/15 (ECtHR, Grand Chamber, 21 November 2019).

[104] See eg *MA v Cyprus*, App No 41872/10 (ECtHR, 23 July 2013) para 133; *Jabari v Turkey* ECHR 2000-VIII, para 50.

[105] See *NS* (n 71). The CJEU's reasoning in *NS* initially resulted in confusion regarding the establishment of a higher threshold of 'systemic deficiencies' in national asylum procedures and reception conditions for invoking the *non-refoulement* principle to prevent a transfer to another Member State. The court later clarified its approach, eg *CK* (n 71).

[106] See Violeta Moreno-Lax, 'Dismantling the Dublin System: MSS v Belgium and Greece' (2012) 14 EJML 1.

[107] See eg Marc Bossuyt, 'Judicial Activism in Strasbourg' in Karel Wellens (ed), *International Law in Silver Perspective: Challenges Ahead* (Brill 2015) 31.

[108] See *Maaouia v France* (2000) 33 EHRR 42 para 40.

administrative convenience.[109] As regards derogable rights, its 'flagrant denial' test, analysed above, presents limitations. This means that the scope of the notion of persecution, as understood under EU asylum law, is more extensive.[110]

Recent case law of the ECtHR has even prompted commentators to observe that the court's deferential approach to States' migration control imperatives risks a loss of 'credibility as an effective defender of human rights in times of crisis'.[111] These observations have merit. A panoramic view of the court's case law reveals tensions between protection and deference to be constant. Costello has argued that the ECtHR has always been in a weaker position than its EU counterpart and that it 'tends to operate in an incrementalist, minimalist, fact-specific mode, as it faces more extensive threats of non-compliance, particularly in the greater Europe it services'.[112]

b. Refugee Protection beyond the ECHR

The European Committee on Social Rights (ECSR), the Committee of Ministers (CM), the Parliamentary Assembly of the Council Europe (PACE), and the Council of Europe Commissioner for Human Rights (Commissioner) also have an impact on refugee protection. The ECSR is responsible for hearing complaints regarding the violation of the CoE's European Social Charter.[113] It found, for example, systemic flaws in Greek law, policy, and practice, which deprive unaccompanied children of rights to housing, health, and education.[114] The CM is the CoE's statutory decision-making body. It has issued recommendations on the concept of 'membership of a particular social group' in the framework of the Refugee Convention and on 'life projects for unaccompanied migrant minors', including those seeking asylum.[115] The CM is also tasked with supervising the execution of ECtHR judgments.[116] For example, the execution of the *MSS* case remains pending and in 2019 the CM addressed recommendations

[109] See eg *Saadi v the United Kingdom* (2008) 47 EHRR 17.

[110] See Joined Cases C-71/11 and C-99/11 *Bundesrepublik Deutschland v Y and Z* (CJEU, 5 September 2012). See also commentary in Luc Leboeuf and Evangelia (Lilian) Tsourdi, 'Assessing the Potential Impact of Y and Z' (2013) 13 Human Rights Law Review 405.

[111] Maximilian Pichl and Dana Schmalz, '"Unlawful" May Not Mean Rightless: The Shocking ECtHR Grand Chamber Judgment in Case ND and NT' (*Verfassungsblog*, 14 February 2020) <https://verfassungsblog.de/unlawful-may-not-mean-rightless/> accessed 19 May 2020.

[112] Cathryn Costello, *The Human Rights of Migrants and Refugees in European Law* (OUP 2015) 57.

[113] European Social Charter (revised) (adopted 3 May 1996, entered into force 1 July 1999) ETS 163.

[114] See *International Commission of Jurists (ICJ) and European Council for Refugees and Exiles (ECRE) v Greece*, European Committee of Social Rights, Complaint No 173/2018 (23 May 2019).

[115] Respectively, CoE CM, 'Recommendation Rec(2004)9 of the Committee of Ministers to Member States on the Concept of "Membership of a Particular Social Group" (MPSG) in the context of the 1951 Convention relating to the Status of Refugees' (30 June 2004); CoE CM, 'Recommendation CM/Rec(2007)9 of the Committee of Ministers to Member States on Life Projects for Unaccompanied Migrant Minors' (12 July 2007).

[116] ECHR, art 46.

to Greece on its asylum procedures and detention conditions.[117] PACE is a political accountability forum, which issues non-binding but influential pronouncements. Its committee on migration, refugees and displaced persons has engaged with topics spanning from refugees' right to work to the responsibility for lives lost in the Mediterranean.[118] As part of her mandate,[119] the Commissioner engaged with asylum, for example issuing a position on the right to seek and enjoy asylum,[120] and intervening as a third party before the ECtHR in a case relating to returns from Austria to Hungary under the EU's responsibility-allocation system.[121]

4. The Regional Reach of European Refugee Law: Turkey and Ukraine

Scholars have explored the global reach of EU asylum law, in the sense that EU practices and norms are often shared across the globe, particularly those that deflect responsibility for asylum seekers and refugees.[122] The EU's expansive regional reach is even more pronounced as the EU directly engages with its neighbours in developing their asylum systems. This engagement aims to enhance refugee protection elsewhere, so as to deflect and limit the EU's own protection obligations. In addition, the CoE human rights system influences refugee protection. To illustrate, I focus on two case studies: Turkey and Ukraine.

a. Turkey: From a Hesitant Participant to a Strategic Protection Actor

Turkey maintains a geographic limitation to the Refugee Convention, limiting its obligations to refugees from Europe,[123] interpreted in its national law as including all CoE

[117] CoE CM, 'Decision H46-9 on Supervision of the Execution of the European Court's Judgments MSS and Rahimi Groups v Greece (App No 30696/09)', CM/Del/Dec(2019)1348/H46-9 (6 June 2019).

[118] Respectively, CoE PACE, 'Resolution 1994: Refugees and the Right to Work' (11 April 2014); CoE PACE, 'Resolution 1872: Lives Lost in the Mediterranean Sea: Who is Responsible?' (24 April 2012).

[119] For her mandate, see CoE CM, 'Resolution (99) 50 Creating the Post of Commissioner for Human Rights' (7 May 1999).

[120] Commissioner for Human Rights, 'Positions on the Right to Seek and Enjoy Asylum', CommDH/PositionPaper(2010)4 (24 June 2010).

[121] Commissioner for Human Rights, 'Third Party Intervention by the Council of Europe Commissioner for Human Rights under Article 36 of the European Convention on Human Rights Applications No 44825/15 and No 44944/15 SO v Austria and AA v Austria', CommDH(2016)3 (17 December 2015).

[122] Hélène Lambert, Jane McAdam, and Maryellen Fullerton (eds), *The Global Reach of European Refugee Law* (CUP 2013).

[123] Refugee Convention, art 1B.

Member States.[124] The ECtHR has found violations concerning deportation, detention, and treatment of asylum seekers and refugees.[125] Cooperation with the EU has impacted refugee protection. Ineli-Ciger retraces the influence of European asylum law on Turkish national legislation currently including four main forms of protection: refugee status, conditional refugee status, subsidiary protection status mirroring the EU's homonymous status, and temporary protection status drawing from the EU's sister status.[126] In order to retain the geographic limitation to the Refugee Convention, while protecting Syrian refugees, Turkey activated temporary protection for the benefit of Syrians and Palestinian refugees and stateless persons fleeing Syria.[127] The status includes access to healthcare and education, and a limited right to work.[128] However, there are challenges on accessing these entitlements.[129] In addition, the situation remains fluid with instances of *refoulement* at the Syrian border and threats by Turkey to close its border.[130]

Nevertheless, in April 2020 there were about 3.6 million registered Syrian refugees in Turkey,[131] rendering it a crucial partner in the EU's externalization strategy. This was cemented through the 2016 so-called EU–Turkey deal.[132] Arguably a legally non-binding document based on its wording,[133] this agreement explicitly mentions commitments of the EU and its Member States towards Turkey as part of a cooperation 'bargain', whereby those newly arrived in the Greek islands after 18 March 2016, including asylum seekers, were to be returned to Turkey. In exchange, EU Member States undertook to resettle Syrian refugees from Turkey to the EU, provide funding for refugee protection there, and consider the exemption of Turkish nationals from visa requirements for short stays to the EU.

[124] Law No 6458 on Foreigners and International Protection 2013 (as amended 29 October 2016) (Turkey) (unofficial UNHCR translation) (LFIP).

[125] See eg *Abdolkhani v Turkey*, App No 30471/ 08 (ECtHR, 22 September 2009). See also analysis in Meltem Ineli-Ciger, 'Remedies Available against Asylum Decisions and Deportation Orders in Turkey: An Assessment in View of European Law and the European Convention on Human Rights' (2019) 88 Nordic Journal of International Law 216.

[126] Meltem Ineli-Ciger, 'How Have the European Union and the EU Asylum *Acquis* Affected Protection of Forced Migrants in Turkey? An Examination in View of the Turkish Law on Foreigners and International Protection and the EU–Turkey Statement of March 2016' in Vladislava Stoyanova and Eleni Karageorgiou, *The New Asylum and Transit Countries in Europe During and in the Aftermath of the 2015/ 2016 Crisis* (Brill 2019) 115, 118–19.

[127] See LFIP (n 124) art 91; Turkey: Temporary Protection Regulation [2014] OJ 29153 (TTPR).

[128] See TPPR (n 127) and analysis in Ineli-Ciger (n 126) 119–20.

[129] See eg UNHCR, 'Turkey: Regional Refugee and Resilience Plan in Response to the Syria Crisis' (2020) 3RP Country Chapter <https://reliefweb.int/sites/reliefweb.int/files/resources/74179.pdf> accessed 28 May 2020.

[130] See eg 'Country Report: Turkey' (*ECRE/Asylum Information Database*, March 2019) <https://www.asylumineurope.org/reports/country/turkey> accessed 23 May 2020.

[131] Based on UNHCR data: UNHCR, 'Operational Portal: Refugee Situations' (18 May 2020) <https://data2.unhcr.org/en/situations/syria/location/113> accessed 19 May 2020.

[132] European Council, 'EU–Turkey Statement' (Press Release 144/16, 18 March 2016) <https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/> accessed 19 May 2020.

[133] See for the opposite opinion, Maarten den Heijer and Thomas Spijkerboer, 'Is the EU–Turkey Refugee and Migration Deal a Treaty?' (*EU Law Analysis*, 7 April 2016) <http://eulawanalysis.blogspot.com/2016/04/is-eu-turkey-refugee-and-migration-deal.html.> accessed 19 May 2020.

The EU's General Court affirmed that it lacked jurisdiction to examine the legality of this statement, as it was not authored by the EU but rather by 'the Heads of State or Government of the Member States of the European Union and the Turkish Prime Minister'.[134] The CJEU dismissed an appeal against this decision as manifestly inadmissible.[135] The EU courts' conclusion that the EU did not author the agreement absolved them from scrutinizing its compatibility with EU law. This, however, does not mean that its *implementation* is also beyond scrutiny under EU law. The EU–Turkey 'deal' involves Member State action under the EU asylum and return *acquis*, and therefore the consequent applicability of the EU Charter of Fundamental Rights on those actions.[136]

Is Turkey a safe third country under the EU's own definition? While this is analysed on a case-by-case basis, the answer is arguably no. The functioning of the temporary protection regime (ie the practical hurdles to access rights mentioned above), its limitation to Syrian refugees, and the documented instances of *refoulement* in Turkey's borders with Syria, also referred to above, point to the conclusion that Turkey does not meet the criteria of safety established under the Procedures Directive for qualifying as a 'safe third country'.[137] The CJEU has not yet pronounced on this matter. From the Turkish side, the EU–Turkey readmission agreement[138] is used to give effect to the 'deal'. In addition, it involves actions such as the imposition of restrictions to the freedom of movement of protected persons and strict border controls at exit points.

b. Ukraine: A Nascent Refugee Protection Regime

Ukraine acceded without reservations to the Refugee Convention and the 1967 Protocol in 2002. As of March 2020, the country hosts a modest number of refugees (close to 2,200 persons), asylum seekers (close to 2,450 persons), and a more significant

[134] Joined Case T-192/16, T-193/16 and T-257/15 *NF, NG and NM v European Council* (CJEU, 28 February 2017) para 73.

[135] Joined Cases C-208/17 P to C-120/17 P *NF, NG and NM v European Council* (CJEU, 12 September 2018).

[136] See EU Charter of Fundamental Rights, art 51(1).

[137] See 2013 Asylum Procedures Directive (n 33) art 38(1). See Chapter 28 in this volume. There is a legal debate on whether the term 'in accordance with' refers to ratification of the Refugee Convention itself, or merely to 'equivalent protection' to the Refugee Convention, see eg Daniel Thym, 'Why the EU–Turkey Deal Can Be Legal and a Step in the Right Direction' (*EU Migration Law Blog* 11 March 2016) <http://eumigrationlawblog.eu/why-the-eu-turkey-deal-can-be-legal-and-a-step-in-the-right-direction/> accessed 28 May 2020, supporting the equivalence standard, while Steve Peers and Emanuela Roman, 'The EU, Turkey and the Refugee Crisis: What Could Possibly Go Wrong?' (*EU Law Analysis*, 5 February 2016) <http://eulawanalysis.blogspot.com/2016/02/the-eu-turkey-and-refugee-crisis-what.html> accessed 28 May 2020, support the ratification standard. In any case, it is arguable that currently protection in Turkey, even for Syrians benefiting from the temporary protection status, does not fulfil even the equivalence standard given the practical difficulties in accessing rights.

[138] Agreement between the European Union and the Republic of Turkey on the Readmission of Persons Residing without Authorisation [2014] OJ L 134/3.

population of internally displaced persons (734,000 persons).[139] It is a nascent refugee protection regime. Although it adopted its first national refugee law in 1993, it only granted protection to 6,147 persons in the period 1996–2012,[140] with diminishing numbers of asylum applications in recent years.[141]

There is asylum-relevant ECtHR case law, for example on extradition, or lack of an effective remedy,[142] and CoE membership has influenced human rights protection in the country.[143] In refugee protection, though, the impact of the EU is more decisive. Ukraine was one of the countries targeted by the EU's first regional protection programme launched in 2007.[144] A readmission agreement with the EU entered into force the same year.[145] Since 2011, Ukraine's asylum law includes both refugee status and subsidiary protection, even if the scope of the latter is more restrictive than its EU counterpart.[146] The development of the country's asylum system has been linked with visa liberalization plans. Launched in 2008, they bore fruit for Ukraine in 2017, when its nationals were exempt from visa requirements for short stays in the Schengen zone.[147] Migration management, asylum, and ensuring *non-refoulement* form part of the EU's association agreement with Ukraine.[148] The case of Ukraine illustrates how the EU streamlines asylum capacity-building in its relations with its neighbours, even when they do not (yet) constitute major transit countries. This has arguably a dual aim: enhancing refugee protection, but also making them potential candidates for the EU's future externalization projects.

139 UNHCR, 'Ukraine: Country Fact Sheet' (March 2020) <https://www.unhcr.org/ua/wp-content/uploads/sites/38/2020/03/2020-03-UNHCR-UKRAINE-Fact-Sheet-FINAL_ENG-1.pdf> accessed 19 May 2020.

140 UNHCR, 'Ukraine as a Country of Asylum: Observations on the Situation of Asylum-Seekers and Refugees in Ukraine' (4 July 2013) <https://www.refworld.org/docid/51ee97344.html> accessed 19 May 2020.

141 UNHCR, 'Ukraine: Refugees and Asylum Seekers Update' (June 2019) Thematic Updates, 2 <https://www.unhcr.org/ua/wp-content/uploads/sites/38/2019/06/2019-06-UNHCR-UKRAINE-Refugee-and-Asylum-Seekers-Update-FINAL_V2.pdf> accessed 19 May 2020.

142 Respectively, *Soldatenko v Ukraine*, App No 2440/07 (ECtHR, 23 October 2008); *Kebe v Ukraine*, App No 12552/12 (ECtHR, 12 January 2017).

143 See Ganna Yudkivska, 'Ukraine: Ukraine on the Way to Democracy: Role and Achievements of the European Court of Human Rights' in Iulia Motoc and Ineta Ziemele (eds), *The Impact of the ECHR on Democratic Change in Central and Eastern Europe: Judicial Perspectives* (CUP 2016) 457; Mykola Gkatovskyy and Yulia Ioffe, 'Twenty Years of the ECHR in Ukraine' (*EJIL:Talk!*, 18 September 2017) <https://www.ejiltalk.org/twenty-years-of-the-echr-in-ukraine/> accessed 19 May 2020.

144 On regional protection programmes see Section 2.a.

145 Council Decision of 29 November 2007 concerning the Conclusion of the Agreement between the European Community and Ukraine on Readmission of Persons (2007/839/EC) [2007] OJ L 332/46. On this earlier period see Lyubov Zhyznomirska, 'Externalities of the EU Immigration and Asylum Policy: The Case of Ukraine' (2006) 2 Review of European and Russian Affairs 28.

146 See Law No 3671-VI Refugees and Persons who Need of Complementary or Temporary Protection 2011 (Ukraine); UNHCR, 'Ukraine as a Country of Asylum' (n 140) 6.

147 Relevant documents are accessible at: <https://ec.europa.eu/home-affairs/what-we-do/policies/international-affairs/eastern-partnership/visa-liberalisation-moldova-ukraine-and-georgia_en>.

148 See Association Agreement between the European Union and its Member States, of the One Part, and Ukraine, of the Other Part [2014] OJ L 161/3, art 16.

5. Conclusion

The EU and the CoE have heavily influenced refugee protection in Europe. The EU's sophisticated asylum system encompasses legislative, responsibility-allocation, and practical cooperation components. It broadly adheres to the Refugee Convention in many respects, but undermines it in others, while expanding protection by introducing subsidiary protection. It contains elements of intra-State cooperation, such as responsibility assignation, and increasingly links the EU with national authorities in implementing the EU's asylum policy, for example through joint processing. Nevertheless, lack of fair intra-EU responsibility-sharing, implementation gaps, and an externalization impetus riddle the CEAS. The development of an armoury of deflection measures by means of its visa, external border control, migration, and international relations policies illustrates the EU's ambivalent stance towards refugee protection. The EU is constantly torn between protection and deflection. The evolving administrative governance of CEAS and the intersection of deflection and protection in the EU constitute areas of further study.

The CoE impacts regional refugee protection through the ECtHR jurisprudence and its other institutions' soft law. The ECHR has become seminal for refugee protection, mainly through the court's *non-refoulement* and effective remedy case law. Nonetheless, tensions between protection and deference to States' migration management imperatives are a constant in the court's case law. While not containing a regional refugee protection treaty, the CoE has streamlined asylum as an area of concern in its workings. Its institutions and bodies, such as the PACE and the Commissioner, are in dialogue with its Member States on protection matters. The impact of growing State scepticism on the ECtHR and its case law, as well as the (soft)-enforcement potential of CoE's other institutions, merit further research.

CoE human rights and EU asylum law and policy have impacted the protection systems of Turkey and Ukraine. Through its law and practice on temporary protection, Turkey has become a strategic regional protection actor. Those protected under this status, however, face barriers in accessing the rights formally attached to it. Despite these failings, the EU has increasingly sought to deflect its protection obligations to Turkey, making use of its external relations policy and funding. Ukraine remains a potential future externalization partner. The impact of EU externalization, and the evolving legal standards and practice in the EU's neighbourhood form topics of future scientific interest.

CHAPTER 20

REGIONAL REFUGEE REGIMES

Central Asia

KHALIDA AZHIGULOVA

1. Introduction

This chapter examines refugee protection laws and practices in the political region of Central Asia, which includes five post-Soviet States. Four of them—Kazakhstan, Kyrgyzstan, Tajikistan, and Turkmenistan—are parties to the Refugee Convention and its Protocol and have been at the crossroads of massive refugee movements since the 1990s. The fifth State, Uzbekistan, is not a party to either instrument. The chapter undertakes a comparative analysis of local legislation, refugee status determination (RSD) procedures, and jurisprudence in asylum cases between 2010–17, and draws on findings from fieldwork in Central Asian States in 2016–17.[1]

Section 2 establishes the 'region' under examination, explores who 'refugees' are in this region, and discusses the availability of protection (including in Uzbekistan, which has not ratified the refugee treaties). Next, it analyses the legal framework relating to RSD, and the content of refugee status, in the three Contracting States that have viable refugee protection regimes—Kazakhstan, Kyrgyzstan, and Tajikistan—to identify any gaps and inconsistencies vis-à-vis international protection standards. The chapter then explores the institutional refugee framework in each of the above-mentioned States and

[1] Fieldwork in Kazakhstan, Kyrgyzstan, and Tajikistan was carried out by the author in May–June 2016 and March–April 2017. Ethics approval for empirical research in Central Asia was granted by the University Ethics Sub-Committee for Science and Engineering and Arts Humanities, University of Leicester, Ethics Reference: 5627-ka243-leicesterlawschool (12 April 2016). All research participants consented to the use of their anonymized quotes in publications. The author would like to thank Cynthia Orchard for her input and suggestions on an earlier version of this chapter.

reflects on the role of UNHCR, refugee lawyers, and civil society in improving the effectiveness of refugee law in the region. The chapter concludes by examining common regional RSD practices in extradition and non-extradition asylum claims, demonstrating that, in practice, approaches are divergent.

The chapter advances two main arguments. The first argument is that refugee protection in the region is highly politicized and aligned with the self-interests of the States. To this end, although four of the Central Asian States have enacted the provisions of the Refugee Convention in their domestic legislation, the regional practice has been to avoid 'pull factors' to the region through various evasive strategies designed to limit the effectiveness of refugee law in favour of political considerations. The second argument is that, despite the lack of full compliance with refugee law in the region, over the past two decades, the ratification of the Refugee Convention and international pressure in landmark refugee cases and other efforts has led to noticeable improvements in refugee protection, and a reduction in *refoulement* in three States which care about their political image internationally (Kazakhstan, Kyrgyzstan, and Tajikistan).

2. Central Asia: What is the 'Region' and Who are Its 'Refugees'?

a. The 'Region'

Due to its geopolitical location, Central Asia has been historically a place of massive population movements. The region shares borders with Afghanistan, China, Iran, and Russia, some of which are amongst the top refugee-producing countries with 2.7 million, 212,000, 85,000, and 67,000 refugees, respectively.[2] Central Asian States' own conflicts and repression have at times resulted in mass refugee flows and internal population displacements. The most recent examples include the 1992–97 civil war in Tajikistan that resulted in the displacement of one million people, and the 2010 ethnic clashes in southern Kyrgyzstan that resulted in rapid displacement of 400,000 people, including 100,000 refugees to Uzbekistan.[3]

Analysis of refugee protection laws and practices in the region reveals that only three States (Kazakhstan, Kyrgyzstan, and Tajikistan) have detailed refugee laws and functioning asylum systems, accept asylum seekers, and grant refugee status. Despite being a party to the Refugee Convention and having a 2017 Refugee Law (which repealed the earlier 2012 Refugee Law), Turkmenistan does not have well-established asylum institutions and has not recognized any new refugees since the late 2000s,

[2] UNHCR, 'Global Trends: Forced Displacement 2018' (2019) annex table 2.

[3] Luke Harding, 'Uzbek Refugees from Kyrgyzstan Pogrom Vow to Return', *The Guardian* (17 June 2010) <http://www.theguardian.com/world/2010/jun/17/kyrgyzstan-uzbek-pogrom-refugees> accessed 20 September 2019.

FIGURE 20.1 Map of Central Asia and Adjacent Countries.

which was one of the reasons that contributed to the closure of UNHCR's field office in 2016.[4] As for Uzbekistan, which is not a party to the Convention, there are no refugee laws, established refugee protection institutions, or recognized refugees in its territory. Indeed, despite Uzbekistan's presence amongst the four Contracting States to the Convention and Protocol, this has had no effect on the introduction of any national refugee protection mechanisms, nor on any refugee NGO activity in the State. Finally, there are no regional practices of temporary protection or hospitality that could provide for refugee protection outside the Convention regime in Turkmenistan or Uzbekistan.

There are numerous theories about why States ratify human rights treaties, including the Refugee Convention, with some duly complying in good faith and others choosing not to comply. Based on the various causal factors that drive States to ratify human rights treaties, Simmons developed a theory of 'sincere' ratifiers and 'strategic' ratifiers.[5] Sincere ratifiers do so because they believe that ratification of a human rights treaty is the right thing to do, and thus comply with these treaties in good faith.

By contrast, strategic ratifiers ratify treaties without a strong normative commitment to implement them or comply with them in good faith. Rather, they may pursue other interests instead. For example, strategic ratifiers may expect material and non-material benefits and rewards from ratification,[6] such as the positive publicity associated with

[4] Information provided by UNHCR Regional Representation in Central Asia (May 2016). The situation had not changed at the time of publication.

[5] Beth Simmons, 'From Ratification to Compliance' in Thomas Risse, Stephen C Ropp, and Kathryn Sikkink (eds), *The Persistent Power of Human Rights: From Commitment to Compliance* (CUP 2013) 48.

[6] Oona A Hathaway, 'Do Human Rights Treaties Make a Difference?' (2002) 111 Yale Law Journal 1935.

treaty ratification, which in turn may improve a State's image and reputation at home and in the international arena[7] and facilitate access to trade, foreign aid, and foreign investments.[8]

Next, through ratification, States may seek to validate the identity of a democratic or democratizing State. Specifically, Simmons notes that States' 'ratification is an act of emulation of values of the Western culture in an effort to identify themselves as members of good standing of the modern society of States'.[9] Thus, States may ratify to be deemed 'modern' and 'civilized' by Western States.[10] Once again, this may coincide with the aim to secure greater financial and political support from the West. Thus, ratification of human rights treaties, in general, may be symbolic for governments that want legitimacy and to be perceived as supportive of human rights.[11]

Fieldwork revealed that Uzbekistan's decision not to ratify the Convention or Protocol was a calculated one, especially since it is a party to all other universal human rights treaties. Uzbekistan has a 137km border with Afghanistan, but the State's president occasionally noted that they would keep the border closed for refugees.[12] Turkmenistan's lack of implementation and full compliance with the Refugee Convention is in line with its general approach to human rights treaties and its poor human rights record.[13]

The remaining discussion of refugee protection in Central Asia in this chapter is thus limited to Kazakhstan, Kyrgyzstan, and Tajikistan, and focuses on the period between 1992 (when these States started to accept refugees as newly independent States) and 2019.

b. 'Refugees' in the Region

There is no publicly available disaggregated data on refugee populations in any of the Central Asian States. The most recent statistics come from 2016–17 and were collected during fieldwork. At that time, the number of acknowledged refugees in the whole region was around 3,200, with roughly 700 in Kazakhstan, 200 in Kyrgyzstan, and 2,300 in Tajikistan.[14]

[7] Beth Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (CUP 2009) 77–8.

[8] Simmons (n 7) 49. [9] Simmons (n 7) 97. [10] ibid. [11] ibid 111.

[12] Carlotta Gall and Elizabeth Becker, 'A Nation Challenged: The Displaced; As Refugees Suffer, Supplies Sit Unused Near Afghan Border', *The New York Times* (6 December 2001) <https://www.nytimes.com/2001/12/06/world/nation-challenged-displaced-refugees-suffer-supplies-sit-unused-near-afghan.html> accessed 20 September 2019.

[13] Human Rights Watch, 'World Report 2020: Turkmenistan' <https://www.hrw.org/world-report/2020/country-chapters/turkmenistan> accessed 20 March 2020.

[14] See Tables 20.1, 20.2, and 20.3. It should be noted that each State adheres to its own system of representing statistical data. In particular, in Kyrgyzstan and Tajikistan the data were available only for recognized refugees, while omitting the numbers of asylum seekers.

Table 20.1 Asylum Seekers and Recognized Refugees in Kazakhstan, 1998–2017*

Year/Status	1998–99	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
Refugees	840	n/a	664	643	662	646	674	582	454	603	622	603	602	600	620	630	640	653	681
Asylum seekers	1200	n/a	85	100	68	57	52	200	86	0	0	147	134	50	90	288	356	243	259

Table 20.2 Recognized Refugees in Kyrgyzstan, 1994–2016**

Year/Status	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016
Refugees	7181	10,300	13,311	16,422	15,114	14,560	10,609	9,212	8,260	n/a	6,410	3,521	1,878	1,145	700	371	239	205	175	137	171	177	169

Table 20.3 Recognized Refugees in Tajikistan by Country of Origin, 1995–2016***

Year/Status	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016
Afghanistan	437	1,121	4,470	5,278	n/a	4,628	n/a	n/a	n/a	n/a	1,017	n/a	n/a	n/a	2,607	2,432	2,586	2,522	1,901	2,465	2,314	2,294
Ukraine	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	1	2
Iran	-	2	3	5	-	-	-	-	-	-	-	-	-	-	2	5	5	5	3	3	-	-
Kyrgyzstan	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	56	49	36	-	-	-	-
Russia (Chechnya)	4	7	7	7	n/a	n/a	n/a	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Total	441	1,130	4,480	5,290	n/a	4,628	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	2,609	2,493	2,604	2,563	1,904	2,468	2,315	2,296

* Ombudsman for Human Rights in Kazakhstan, 'Report on Observation of the Rights of Refugees and Oralmans in the Republic of Kazakhstan' (2008); Human Rights Commission under the President of Kazakhstan, 'Special Report on the Situation of Human Rights of Oralmans, Stateless and Refugees in the Republic of Kazakhstan' (2012); UNHCR Office in Kazakhstan (2016).

** Khurnisa Makhaddinova, 'Review of the Situation with Protection of Refugees' Rights in the Kyrgyz Republic' (NGO Legal Clinic Adilet 2015); Migration Service of the Kyrgyz Republic (2016).

*** Migration Service of the Ministry of Labour, Migration and Employment of Tajikistan; Migration Service of the Ministry of Interior of Tajikistan.

As can be observed from the data, since the late 1990s, all recognized refugees have arrived from States outside the region. It should be noted that there is no solidarity towards refugees from within the region and Central Asian governments do not recognize refugees from other Central Asian States. The main reason is that Central Asian governments consider the act of granting refugee status an unfriendly act and an affront to their regional neighbours. Also, all Central Asian States are parties to two main regional treaties on extradition and cooperation in criminal cases: the 1993 Minsk Convention together with Russia[15] and the 2001 Shanghai Convention with China.[16] Regional practice shows that in extradition cases involving asylum seekers from within the region, Central Asian States prioritize regional extradition treaties over the Refugee Convention. This is discussed further in Section 5.

3. The Legal Framework of Central Asian States

Following their independence in 1991, Kazakhstan, Kyrgyzstan, and Tajikistan engaged in the process of ratification of the universal human rights treaties, including ICCPR, CRC, CAT, and the Refugee Convention and Protocol. These new post-Soviet nations chose the route of democratization and throughout the 1990s ratified major human rights treaties in part as a means to identify with Western democratic States, on whose political and economic support they largely relied.[17]

The Central Asian States are not bound by any regional framework on refugee protection. In the 1990s, each individually ratified the Refugee Convention and Protocol without any reservations: Tajikistan in 1993, Kyrgyzstan in 1996, and Kazakhstan in 1999.[18] However, it took considerable time before these obligations were transposed into domestic legislation: Kyrgyzstan and Tajikistan adopted their domestic refugee laws in 2002; Kazakhstan delayed until 2010,[19] when it needed to demonstrate its commitment

[15] Convention on Legal Aid in Civil, Family and Criminal Cases (adopted 22 January 1993, entered into force 19 May 1994) (Minsk Convention).

[16] Shanghai Convention on Combating Terrorism, Separatism and Extremism (adopted 15 June 2001, entered into force 23 March 2003).

[17] Scott Newton, *The Constitutional Systems of the Independent Central Asian States: A Contextual Analysis* (Bloomsbury Publishing PLC 2017); Johan Engvall, 'Kyrgyzstan and Trials of Independence' in Marlen Laruelle and Johan Engvall (eds), *Kyrgyzstan beyond 'Democracy Island' and 'Failing State'* (Lexington Books 2015) 5; Kathleen Collins, 'Kyrgyzstan's Latest Revolution' (2011) 22 Journal of Democracy 150, 152; Mariya Y Omelicheva, *Democracy in Central Asia: Competing Perspectives and Alternative Strategies* (University Press of Kentucky 2015) 16; David Lewis, 'Understanding the Authoritarian State: Neopatrimonialism in Central Asia' (2012) 19 Brown Journal of World Affairs 1.

[18] UNHCR, 'States Parties to the 1951 Convention relating to the Status of Refugees and 1967 Protocol' <http://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf> accessed 10 June 2017.

[19] Law on Refugees No 50 of 10 May 2002 (Tajikistan); Law on Refugees No 54 of 25 March 2002 (Kyrgyzstan); Law on Refugees No 216-IV of 4 December 2009 (Kazakhstan).

to human rights before becoming chair of the Organization for Security and Co-operation in Europe (OSCE) that same year.[20] Also, amongst the three States, Tajikistan's 1994 Constitution and Kyrgyzstan's 2010 Constitution directly provide for asylum to be granted, respectively, to foreign nationals who have become victims of human rights abuse,[21] and to foreigners and stateless people persecuted for political reasons and whose civil rights and liberties have been violated by their country of origin.[22]

In each of the three States, domestic legislation includes provisions on the content of refugee status, the RSD process, and designated asylum institutions. As of 2019, Kazakhstan's refugee law framework is the most detailed and advanced. It includes a refugee act and separate by-laws on RSD, which appear to be the most detailed of the three countries.[23] Moreover, its national RSD regulations contain the largest number of UNHCR's 'soft law' guidelines and recommendations on the RSD process, including special provisions for female applicants and applicants who have experienced trauma. The inclusion of these soft law guidelines into domestic legislation makes them mandatory for administrative and judicial decision-makers in the RSD process.

In Kyrgyzstan, refugee legislation is also advanced and detailed, and includes both a refugee act and a by-law on RSD procedures.[24] Moreover, the refugee legislation is supplemented by internal and unofficial RSD guidelines for decision-makers, which were developed in cooperation with UNHCR's country office and closely follow a UNHCR RSD assessment form.

Tajikistan's refugee legislation is the least detailed of the three.[25] It contains only the minimum provisions reflected in the Refugee Convention and the minimum international RSD standards established by UNHCR Executive Committee (ExCom) Conclusion No 8.[26]

The content of refugee status in Kazakhstan, Kyrgyzstan, and Tajikistan shares certain commonalities. Refugees enjoy only a temporary residency status, with limited access to employment, healthcare, education, and other socio-economic and cultural rights, and no access to political rights on the terms that are generally applied to other foreigners. Refugees must renew their status every year in Kazakhstan and every three years in Tajikistan, and prove that the situation in the country of origin has not improved enough for them to return. By contrast, in Kyrgyzstan, refugees are not obliged to renew their status. Also, in all three States, refugee status incorporates the fundamental principles of protection including *non-refoulement*, non-discrimination, and non-penalization for

[20] Adam Hug, 'Kazakhstan at a Crossroads' (The Foreign Policy Centre 2011).

[21] Constitution of the Republic of Tajikistan 1994, art 16.

[22] Constitution of the Kyrgyz Republic 2010, art 19 (2).

[23] Regulation on Granting, Renewal, Cessation and Termination of Refugee Status enacted by the Resolution of the Government of Kazakhstan No 183 of 9 March 2010; Regulation on Registration and Consideration of Refugee Status Applications enacted by the Decree of the Minister of Interior of Kazakhstan No 496 of 29 November 2010 (Kazakhstan RSD Regulation).

[24] Regulation on Work with Refugees approved by the Kyrgyz Government Resolution No 188 of 4 April 2003 (Kyrgyzstan RSD Regulation).

[25] Tajikistan Law on Refugees (n 19).

[26] UNHCR ExCom Conclusion No 8 (XXVIII) 'Determination of Refugee Status' (1977).

irregular entry, which distinguishes refugees from other foreigners in the region. However, the status does not go beyond the Refugee Convention regime to offer more favourable protection. In all three States, refugee status is not equated to permanent residency and does not automatically lead to its acquisition or to naturalization. In practice, due to cumbersome bureaucracy involved in the acquisition of permanent residency or citizenship, refugees who have decided to remain in Central Asian States have kept their temporary residency status, with limited access to socio-economic rights and no access to political rights.

An analysis of RSD by-laws in all three States shows that they comply with minimum RSD standards set out in ExCom Conclusion No 8,[27] including procedural rights to receive guidance about the procedure, access to a UNHCR representative, access to an interpreter and facilities to present a claim, the right to appeal a negative decision to a higher administrative authority, and the right to remain in the territory while the appeal is pending.

Finally, in all three States, refugee law-related norms are also found in other domestic legislation that is applicable to any person in the territory regardless of their status. In particular, the civil procedure legislation provides that refugees have a right to access courts, appeal RSD decisions and any other administrative decisions of the migration authorities, and receive free legal advice and representation.[28] Thus, the analysis of the domestic legislation in these three Central Asian States shows that the Refugee Convention and its minimum protection standards have been effectively transposed into domestic law, at least on paper.

4. Institutional Framework and the Effectiveness of International Refugee Law

In Kazakhstan, Kyrgyzstan, and Tajikistan, the legal framework is supplemented and supported by an institutional framework. In each country, there is a designated national institution that makes asylum decisions and courts that examine appeals. UNHCR country offices have been operating in the region since the 1990s, and a few refugee NGOs offer legal advice and socio-economic assistance to refugees. However, the contribution of each actor to the effectiveness of refugee law in protecting refugees from

[27] ibid.

[28] Civil Procedure Code of Kazakhstan No 377-V of 31 October 2015; Civil Procedure Code of Kyrgyzstan No 146 of 29 December 1999; Civil Procedure Code of Tajikistan of 5 January 2008; Legal Profession Act of Kazakhstan No 196-1 of 5 December 1997; Legal Profession Act of Kyrgyzstan No 135 of 14 July 2014; Legal Profession Act of Tajikistan No 1311 of 14 May 2015.

refoulement and enabling them to access asylum varies by country. This section considers the role of each actor in improving or undermining the effectiveness of refugee law in each of the three States under discussion.

a. State Asylum Institutions

In Kazakhstan and Tajikistan, asylum applications are registered by local police departments, while RSD decisions are taken by a collegial body—an RSD Commission established in each regional police department, accountable to the Ministry of Interior.[29] Members of the Commission include representatives of various State bodies, such as the Ministry of the Interior, the Ministry of Labour, the Health Ministry, local government bodies, and national security bodies.[30] In Kyrgyzstan, asylum applications are registered by the State Migration Service, which is accountable directly to the Prime Minister. RSD decision-making is carried out by individual caseworkers, subject to the approval of the Head of the State Migration Service.[31]

As noted earlier, the RSD by-laws in all three States comply with minimum RSD standards, at least in theory. However, deeper research into the practice of refugee protection in the Central Asian region demonstrates that the existence of domestic refugee legislation and refugee institutions does not guarantee effective protection for refugees, because it is not accompanied by a good faith interpretation and application of the law in accordance with the Refugee Convention and other human rights instruments.

For example, although the Refugee Convention takes precedence over domestic legislation in the three examined Central Asian States, the administrative and judicial authorities in the region do not refer to the Refugee Convention and other ratified human rights treaties in their RSD analysis.[32] Rather, the State authorities apply only domestic refugee law, and interpret it to reach pre-defined outcomes expected by the central authorities. Moreover, there are no official instructions for migration officers about how to consider asylum claims. Rather, so-called informal unwritten instructions are reported to have more weight for decision-makers than international refugee law and RSD standards.[33] Finally administrative and judicial decisions across the Central Asian States routinely fail to provide a detailed explanation of the reasons for rejecting asylum claims, despite this being a requirement under domestic legislation. The most frequent explanation provided in court judgments is that the applicant failed to provide sufficient evidence to support the claim.[34] Experts interviewed during fieldwork noted that the absence of official internal instructions may encourage individual case workers to refer to informal instructions only. Finally, experts shared that during the

[29] Kazakhstan RSD Regulation (n 23); Tajikistan Law on Refugees (n 19).
[30] Expert interviews (Kazakhstan, Tajikistan, 2016).
[31] Kyrgyzstan RSD Regulation (n 24).
[32] Field research (Kazakhstan, Kyrgyzstan, Tajikistan, 2016–17).
[33] Expert interviews (Kazakhstan, Kyrgyzstan, Tajikistan, 2016–17).
[34] Data from analysis of some 150 court judgments given in the examined States in 2010–17.

decision-making process, significant weight is given to national security considerations and recommendations from the State's security services.

This stark contradiction between the implementation of the Refugee Convention and soft law RSD standards into domestic legislation, on the one hand, and practices falling below international refugee protection standards, on the other, raises a concern about a potential attempt by the authorities to evade good faith compliance with international refugee law.[35]

b. UNHCR

UNHCR opened field offices in all Central Asian States in the early 1990s. As of 2019, UNHCR offices remained only in Kazakhstan, Kyrgyzstan, and Tajikistan. The role of UNHCR has been important in at least four areas. First, UNHCR provided considerable support and technical advice to governments on ratification of the Refugee Convention and adoption of domestic refugee legislation in line with the Convention's principles. Secondly, UNHCR contributed to the establishment and training of domestic asylum institutions. It also carried out mandate RSD when national asylum institutions were still nascent, and it still does so when refugees from particular countries of origin are denied access to national RSD processes (including refugees from Russia, China, and other neighbouring Central Asian States, with respect to whom government agencies seek to avoid any negative implications for friendly bilateral relations).[36] Thirdly, in selected cases, UNHCR funds refugee lawyers to represent asylum claims in court, where UNHCR considers the applicant is eligible for protection. UNHCR's fourth main contribution to refugee protection in the region is in its financial, legal, and social assistance to refugees through its NGO partners.

Undoubtedly, over the years, UNHCR's involvement has considerably influenced States' greater compliance with international refugee law. However, by 2019, UNHCR's role had become more limited and targeted. This was in part because of other global priorities, such as the ongoing refugee crises in the Middle East and North Africa, but also because certain Central Asian governments limited their cooperation with UNHCR and requested UNHCR to be less active in their countries.

In 2019, Kyrgyzstan had the highest level of cooperation with UNHCR in the region. The State Migration Service continuously participated in UNHCR capacity-building activities and, as noted, cooperated to develop an internal assessment form for eligibility officers that closely followed the UNHCR mandate RSD form and improved the quality of RSD decision-making. Moreover, until 2017, UNHCR funded the temporary accommodation centre for asylum seekers and refugees in Kyrgyzstan's capital city of Bishkek.

[35] See Zoltan Buzas, 'Evading International Law: How Agents Comply with the Letter of the Law but Violate its Purpose' (2017) 23(4) European Journal of International Relations 85, for more detailed discussion on evasion of good faith compliance with their international obligations.

[36] International Federation for Human Rights (FIDH), 'Kazakhstan/Kyrgyzstan: Exploitation of Migrant Workers, Protection Denied to Asylum Seekers and Refugees' (2009).

Arguably, in an attempt to limit the ‘pull factors’ for refugees to enter Kyrgyzstan, the government decided unilaterally to close the temporary accommodation centre in 2017—despite UNHCR’s funding offer. According to experts interviewed during fieldwork, UNHCR’s ability to strengthen the application of refugee law in Kyrgyzstan may also be limited by the government’s competing political interest to maintain cordial bilateral relations with neighbouring strategic partner States (with close economic and political ties) from which refugees to Kyrgyzstan originate.

In Kazakhstan, UNHCR’s influence on the development of refugee law has also been significantly curtailed since 2010. Until 2010, Kazakhstan had denied access to the RSD process to nationals of more powerful States in a wider region, such as Russia, China, and other neighbouring Central Asian countries. In 2010, under pressure from UNHCR, the Kazakhstani government started to register every refugee claim, but in return, officially forbade UNHCR to carry out mandate RSD. Eventually, UNHCR negotiated an agreement to carry out mandate RSD for refugees from neighbouring countries who would be denied access to national refugee status determination. Part of this agreement was that UNHCR prioritize such refugees for resettlement outside the region.[37] Ever since, the cooperation between the Kazakhstani government and UNHCR has remained limited. The government invited UNHCR to be an observer at its State RSD Commissions, but UNHCR was not allowed to vote and its recommendations were rarely taken into consideration (even when an applicant had a strong protection claim).[38] Expert interviewees noted that this type of ‘limited cooperation’ could be seen as sufficient by the authorities to demonstrate their compliance with only the letter of the Refugee Convention, according to which all Contracting States are obliged to cooperate with UNHCR.[39]

Finally, Tajikistan has the most limited cooperation between the government and UNHCR. During fieldwork there, the Tajikistani authorities did not share any statistics on numbers of refugees and asylum seekers in the country. Whereas UNHCR used to be an observer at the State RSD Commission, this ceased in 2013, arguably so that UNHCR would not have first-hand data with which to assess the quality of the RSD decision-making.[40] Nonetheless, despite these non-transparent practices, the authorities have been wary of ending all cooperation with UNHCR. They still ask UNHCR to continue funding capacity-building activities, donating to the State Refugee Department within the Ministry of Interior, and providing financial assistance to refugees. According to interviewed experts, this counterintuitive behaviour of the Tajikistani authorities may be explained by the country’s weak socio-economic development as well as its geographic location. As the poorest country in the region, which shares a 1,200km mostly porous border with Afghanistan—a major refugee-sending State—the government may

[37] Expert interviews (Kazakhstan, 2016–17).
[38] ibid.
[39] Refugee Convention, art 35.
[40] Expert interviews (Tajikistan, 2016).

be interested in maintaining limited compliance with international refugee law to justify the continued presence of UNHCR in the country and its support.[41]

In summary, as of 2019, UNHCR's main role in the region was advocacy to influence Central Asian States to reform or adopt new pieces of uniform legislation to widen protection space in the region as a whole. Some of this work was carried out through the Almaty Process,[42] which was launched in 2011 as a consultative process to coordinate the protection of refugees and migrants in regional mixed-migration flows to, from, and within Central Asia. However, the most recent piece of regional instrument adopted within the process was in 2016—'Regional Guidelines on how to Identify and Refer Refugees and Asylum Seekers at the Borders of Central Asia'[43]—and the Process has not seen much notable development since.

c. Civil Society and Courts

The contribution of civil society and local courts to the effectiveness of international refugee law in Central Asia has been minimal. Local populations in general are not supportive of promoting the rights of refugees or offering them permanent residence, although they have been positive about providing temporary asylum to refugees fleeing armed conflicts, such as following outbreaks of conflict in Afghanistan and Tajikistan in the 1990s.[44] Moreover, in Tajikistan and Kyrgyzstan, high poverty rates contribute to refugees being seen as rivals by the domestic population.[45] In all three States, host populations have biased perceptions of refugees as a source of instability and conflict, which the authorities do not try to dissuade.[46] As a result, there is no State funding for NGOs that assist refugees; they are all funded by UNHCR.

As for courts, despite their function in reviewing refused asylum claims, they have had no role in promoting greater compliance with international refugee law. In-depth research of judicial practices in the region found that domestic courts lacked impartiality and/or independence during the review of asylum claims and were subject to political whims.[47]

For example, contrary to the provisions of the national constitutions that established that ratified international treaties have precedence over domestic legislation, the judicial authorities rarely refer to the Refugee Convention or other human rights treaties in

[41] ibid.

[42] See Cynthia Orchard, 'The Almaty Process: Improving Compliance with International Refugee Law in Central Asia' (2016) 28 IJRL 55, for more detail about the Almaty Process.

[43] The Almaty Process on Refugee Protection and International Migration, 'Regional Guidelines on how to Identify and Refer Refugees and Asylum Seekers at the Borders of Central Asia' (2016) <https://www.refworld.org/pdfid/58bebd734.pdf> accessed 20 September 2019.

[44] Khurnisa Makhaddinova, 'Review of the Situation with Protection of Refugees' Rights in the Kyrgyz Republic' (NGO Legal Clinic Adilet 2015); Anna Matveeva, 'The Perils of Emerging Statehood: Civil War and State Reconstruction in Tajikistan' (Crisis States Research Centre 2009); International Crisis Group, 'Tajikistan: The Changing Insurgent Threats' (2011).

[45] Expert interviews (Kazakhstan, Kyrgyzstan, Tajikistan, 2016–17).

[46] ibid.

[47] Field research (Kazakhstan, Kyrgyzstan, Tajikistan, 2016–17).

their analysis. Moreover, judicial authorities do not apply the principle of purposeful interpretation of refugee law as demanded by the Vienna Convention, to which Kazakhstan, Kyrgyzstan, and Tajikistan are parties.[48] Rather, the courts apply a narrow, legalistic interpretation of the national law that incorporated the treaty provisions, ensuring that the courts' actions are compliant only with the letter of the domestic law.[49] In almost all decisions, courts uphold the decisions of State RSD authorities to deny asylum. The very few court decisions that found in favour of refugees were made not on the basis of international refugee law, but rather because the court found violations of the administrative procedural rules[50] or upheld the rights of children (whose rights had been violated).[51]

5. Regional Practices in Refugee Protection

Even though all Central Asian States comply with minimum RSD standards in theory, in practice, asylum is denied more often than not. In this respect, the following regional practices in application of refugee law have been observed in all three States.

First, there is a prevalence of heavy-handed political approaches to dealing with refugee matters—whether they are perceived by governments as sensitive (for potentially causing security risks, public tensions inside the country or political tensions with their key partners inside and outside the region—China, Russia, and Uzbekistan) or non-sensitive and low-risk. The empirical research data and analysis of court judgments demonstrate that Central Asian governments persistently apply an approach predicated on political convenience, rather than a strictly legal, apolitical approach. According to expert interviews, national security services have the final say on any asylum case. For example, in Kyrgyzstan, well-trained administrative decision-makers are allowed to apply their knowledge objectively and reach a conclusion based on a neutral and unbiased analysis in low-profile cases. However, if such cases are for any reason deemed 'dangerous' by security officers, even without any evidence, then the RSD officers are told to change their decisions and deny refugee status.

In Kazakhstan and Kyrgyzstan, the nationality of asylum applicants is a key issue. Years after ratifying the Convention, asylum seekers from neighbouring partner States

[48] Vienna Convention on the Law of the Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 31.

[49] Data from analysis of some 150 court judgments given in the examined States in 2010–17.

[50] *Case No 2-1095/2015* (Cassation Board of the Kostanay City Court, Kazakhstan, 18 November 2015): a first instance court repealed a RSD decision because it had been signed by an officer without such powers.

[51] *Case No AD-2029/13* (Supreme Court of the Kyrgyz Republic, 10 March 2015): a case involved a child, national of Kyrgyzstan, whose father was an asylum applicant from Morocco and was the only caregiver while the child's mother had moved to Russia as a working migrant.

were not allowed to enter the RSD process. When the practice of registration was enforced under pressure by UNHCR, migration authorities still found a way to reject their claims. For example, in Kyrgyzstan, the authorities shifted responsibility for sensitive cases on to UNHCR. In the case of Chinese and Uzbek asylum applicants, the migration authorities first referred them to UNHCR for an assessment of their claims, and then, if successful, agreed to keep them in the territory. Moreover, the fieldwork data show that Central Asian States keep a blacklist of countries mired by ongoing conflicts, whose nationals are not to be granted asylum under any circumstances. For example, in Kazakhstan, even in low-profile cases (such as people fleeing from Afghanistan and Syria), applicants are mostly denied asylum regardless of their various profiles and grounds for seeking asylum. At the same time, the expert interviews revealed that in rejected low-risk cases, Kazakhstani and Kyrgyzstani authorities do not forcibly remove refugees and instead allow them to stay in the country illegally, mostly because the authorities lack the financial means to deport them. It is not known to what extent the authorities monitor the situation of rejected low-risk refugees. Being 'illegal' and without access to healthcare, employment, or other socio-economic rights does not effectively or humanely resolve a refugee's plight and may push him or her to leave the country to seek asylum elsewhere.[52]

Analysis of successful asylum applications in Kazakhstan and Kyrgyzstan shows that recognized refugees invariably have a family connection to the asylum country or represent a very low security risk. If an applicant's partner or children are nationals of Kazakhstan, the applicant is granted asylum, albeit on the grounds of other domestic legislation such as the law on the rights of the child, which states that a child has a right to live with both parents.[53] Arguably, this is the only way in which local values of family unity can give way to greater compliance with refugee law, even if it is not on account of refugee law *per se* but rather other humanitarian reasons.

The second regional practice is for governments to give preference to compliance with regional extradition agreements over international human rights treaties and the Refugee Convention. Kazakhstan, Kyrgyzstan, and Tajikistan are parties to two regional extradition treaties which do not contain any safeguards against the extradition of asylum seekers and refugees: the 1992 Minsk Convention[54] for members of the Commonwealth of Independent States (CIS) and the 2001 Shanghai Convention[55] for members of the Shanghai Cooperation Organisation (SCO), which also includes Russia and China. Arguably, Central Asian authorities give precedence to regional treaties to avoid tensions with neighbouring countries, especially those that are more politically and economically powerful.[56] Under these regional extradition agreements, Kazakhstan and Kyrgyzstan regularly extradited nationals of neighbouring States, even if they

[52] Expert interviews (Kazakhstan, Kyrgyzstan, 2016–17).

[53] Act of the Republic of Kazakhstan No 345-II of 8 August 2002 on the Rights of the Child in Kazakhstan, art 25.

[54] Minsk Convention (n 15). [55] Shanghai Convention (n 16).

[56] FIDH (n 36); Expert interviews (Kazakhstan, Kyrgyzstan, 2016–17).

approached the local authorities for asylum.[57] The political approach to extradition cases is clear. However, in some extradition cases in Kazakhstan and Kyrgyzstan, international standards were observed, resulting in greater protection for asylum seekers and refugees. These cases and the aforementioned regional approaches to refugee law are discussed in the next section.

a. Kyrgyzstan: The Case of Andijan Refugees

In 2005, 450 Uzbek refugees fled to Kyrgyzstan after an armed conflict in the neighbouring Andijan province of Uzbekistan, two months after the Tulip Revolution that had overthrown the ex-president of Kyrgyzstan. The Kyrgyz government faced tremendous international pressure regarding the fate of these refugees. On the one hand, Uzbekistan labelled them as terrorists and criminals and demanded that Kyrgyzstan return them. Russia and China backed Uzbekistan's demands as well.[58] Also, Kyrgyz nationals living near the Uzbek refugees' camp feared an Uzbekistani invasion and demanded that the Kyrgyz authorities remove the Uzbek refugees. On the other hand, the international community, UNHCR, OSCE, and Western States pressured the Kyrgyz government to abide by its international refugee and human rights obligations, and register the refugees' claims and assess them according to international standards.[59]

Initially, Kyrgyzstan returned four of the refugees to Uzbekistan. However, subsequent reports confirmed that the returnees were tortured and one died. Kyrgyzstan was subjected to harsh criticism and pressure from the international community and local NGOs. As a result, the Kyrgyz government did not deport any more refugees, but nor did it register them, as domestic refugee law required. Instead, the State leadership agreed to UNHCR's assistance to help resettle refugees as the preferred solution.[60]

In August 2015, 439 refugees were resettled outside the Central Asian region. The Kyrgyz government was praised by international human rights organizations and Western States. Uzbekistan immediately reacted by cancelling a bilateral agreement on supplying natural gas to Kyrgyzstan, which caused an energy crisis in Kyrgyzstan. Despite this consequence, the Kyrgyz government was satisfied with its decision, because losing Uzbek gas was not as punishing as potential sanctions from the EU and NATO.[61]

To offset Uzbekistani retaliation, the US government and the European Commission assisted Kyrgyzstan in solving its energy crisis, and the EU and NATO imposed sanctions on Uzbekistan for grave violations of human rights. Uzbekistan then ceased its retributions against Kyrgyzstan and channelled its anger towards international organ-

[57] FIDH (n 36); Amnesty International, 'People's Republic of China: Uighurs Fleeing Persecution as China Wages Its "War on Terror" ' (2004) <https://www.amnesty.org/en/documents/ASA17/021/2004/en/> accessed 20 September 2019.

[58] Erica Marat, 'The Tulip Revolution: Kyrgyzstan One Year After' (Jamestown Foundation 2006) 51, 61.

[59] ibid 51, 53. [60] ibid 53. [61] ibid 71.

izations, namely by closing the Tashkent office of UNHCR and withdrawing permission for other international human rights organizations to operate in Uzbekistan in April 2006.[62]

The Andijan refugee crisis is illustrative in several respects. First, it demonstrates how competing factors may influence a State's decision to comply with international refugee law. It suggests that, in the Central Asian context, compliance with international refugee law is more likely when it serves national interests, either by bringing financial benefits or by avoiding substantial financial and reputational losses.

Secondly, this example also shows that international organizations can affect States' behaviour in certain circumstances. The international community's pressure and offers of support overcame the fear of punitive measures by Uzbekistan. This indicates that compliance with international refugee law is also likely to be the greatest when there is support from powerful partners.

The final significance of the Andijan refugee crisis was the improvement, to some extent, in subsequent practice of extradition of asylum seekers from Kyrgyzstan under the regional extradition agreements. Unfortunately, forcible and secret returns of asylum seekers took place even after the Andijan events.[63] However, the Kyrgyz authorities have abstained from extraditing refugees and asylum seekers who enjoy UNHCR's protection,[64] while demanding that UNHCR resettle them.

b. Kazakhstan: Extradition of Uzbek and Chinese Mandate Refugees

Prior to adopting its Law on Refugees in 2009, Kazakhstan had never registered nor conducted RSD for applicants from China and Uzbekistan. There had been reports about deportations of Chinese Uyghurs and Uzbek refugees since the 1990s.[65]

[62] 'Uzbekistan Gives UN Refugee Agency 1 Month to End its Operations', *UN News* (20 March 2006) <http://www.un.org/apps/news/story.asp?NewsID=17860&Cr=&Cr1=#.WZLEVyiGPD4> accessed 20 September 2019.

[63] UNHCR 'Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights. Compilation Report, Universal Periodic Review: Kyrgyzstan' (2014); Human Rights Council, 'Summary prepared by the Office of the High Commissioner for Human Rights in Accordance with Paragraph 15(c) of the Annex to Human Rights Council resolution 5/1: Kyrgyzstan', UN doc A/HRC/WG.6/8/KGZ/3 (17 February 2010); Human Rights Council, 'Summary prepared by the Office of the United Nations High Commissioner for Human Rights in Accordance with Paragraph 15(c) of the Annex to Human Rights Council Resolution 5/1 and Paragraph 5 of the Annex to Council resolution 16/21', UN doc A/HRC/WG.6/21/KGZ/3 (24 October 2014).

[64] *Sulaimanov v Prosecutor General's Office of Kyrgyzstan* (Court of Cassation, Bishkek City, 1 March 2013).

[65] FIDH (n 36) 70, Amnesty International (n 57); Phillip P Pan, 'US Warns of Plot by Group in W China', *Washington Post* (29 August 2002) <https://www.washingtonpost.com/archive/politics/2002/08/29/us-warns-of-plot-by-group-in-w-china/5607dd9b-9d70-419a-8bac-1f3b39e12bc9/?utm_term=.6251ade64693> accessed 20 September 2019.

After Kazakhstan adopted the Refugee Act it Law on Refugees, the situation changed markedly. The authorities began to register all asylum seekers, including existing UNHCR mandate refugees from China and Uzbekistan. Several months after the new Act took effect, Kazakhstan received an extradition request from China and 29 extradition requests from Uzbekistan, all related to terrorism charges under regional security and extradition treaties. All those whose extradition was requested had enjoyed protection from UNHCR between 2005 and 2009 and were awaiting resettlement to third countries. The Kazakhstani authorities reviewed UNHCR's assessments and decided that none of the applicants was a refugee. The applicants were extradited to China and Uzbekistan in June 2011.

However, these cases drew the attention of the international community to Kazakhstan's non-compliance with its international refugee and human rights obligations. Prior to their extradition, the applicants had applied to UN treaty bodies, to whose competence the Kazakhstani government had agreed (the UN Human Rights Committee[66] and the UN Committee against Torture[67]). The Kazakhstani authorities failed to comply with requests not to extradite the applicants while their cases were being considered by the treaty bodies and extradited the applicants after their applications for asylum were finally rejected by the Supreme Court of Kazakhstan.[68]

In the ensuing decisions, both Committees found grave violations by Kazakhstani authorities pertaining to disregarding requests to not extradite applicants while the Committees were still considering the complaints. Moreover, both Committees found Kazakhstan in violation of its international human rights obligations under the articles 6 and 7 of the ICCPR[69] and articles 3 and 22 of the CAT.[70]

These decisions were the first by UN treaty bodies formally to find Kazakhstan non-compliant with its international human rights obligations towards refugees and asylum seekers, and caused significant reputational damage to Kazakhstan as it was preparing for its 2013–15 membership on the UN Human Rights Council, to which it was elected in November 2012.[71]

To avoid any criticism for non-compliance with treaty obligations, Kazakhstan has subsequently observed international human rights obligations in similar extradition cases. For example, in 2012, Uzbekistan requested the extradition of an Uzbek national who enjoyed UNHCR mandate refugee status in Kazakhstan. On this occasion, Kazakhstani authorities arrested the applicant and refused him refugee status. However, they then cooperated with UNHCR and allowed it to resettle the applicant to a third country. Once the applicant's travel was arranged, Kazakhstani authorities released him and allowed UNHCR to oversee his departure from the airport.[72]

[66] *Israil v Kazakhstan*, UN doc CCPR/C/103/D/2024/2011 (1 December 2011).
[67] *Abdussamatov v Kazakhstan*, UN doc CAT/C/48/D/444/2010 (11 July 2012).
[68] ibid para 1.2; *Israil v Kazakhstan* (n 66) para 1.2.
[69] *Israil v Kazakhstan* (n 66) para 9.6.
[70] *Abdussamatov v Kazakhstan* (n 67) paras 13.9, 14–15.
[71] UNGA, 'Results of the Election of 18 Members of the Human Rights Council Held on 12 November 2012' (November 2012) <https://www.un.org/en/ga/67/meetings/elections/hrc.shtml> accessed 2 April 2020.
[72] Expert interviews (Kazakhstan, 2016).

More recently, in 2016, Turkey requested the extradition of numerous Turkish asylum seekers in Kazakhstan, accusing them of participating in an attempted coup.[73] Despite Turkey and Kazakhstan's close economic and cultural ties and a bilateral extradition agreement, Kazakhstan refused to extradite most of the Turkish nationals. It instead extradited only 11 individuals, claiming that their participation in the coup had been proven by the Turkish authorities. Kazakhstani authorities did not extradite the remaining 40 people because the Turkish authorities had failed to present sufficient evidence for extradition.[74] However, despite the refusal to extradite, the targeted individuals were refused asylum in Kazakhstan on the grounds that they failed to present objective evidence of an individuated risk of persecution.[75] Thus, Turkish nationals were implicitly pushed to seek asylum elsewhere. This inconsistency between the refusal to extradite asylum seekers and the refusal to grant them refugee status may imply an attempt by the Kazakhstani authorities to accomodate its competing political interests. As a result, Kazakhstan avoided being perceived as hostile by Turkey for giving refugee status to its nationals. Simultaneously, the Kazakhstani authorities avoided accusations of violating their international human rights obligations (especially while a member of the UN Security Council in 2017–18).[76]

These cases are significant in several respects. First, they show that decisions on asylum claims and extradition have always involved a balance between the competing self-interests of the ruling regime. Secondly, UN treaty bodies' decisions apparently influenced Kazakhstan's leadership to be more observant of its international refugee law obligations. Thirdly, after the decisions of the UN treaty bodies, Kazakhstan handled politically sensitive situations by complying with the principle of *non-refoulement* and invoking UNHCR's assistance. However, this approach is more political than legal and prioritizes the State's self-interests over the humanitarian needs of refugees.

Finally, the examples of extradition asylum cases in both Kazakhstan and Kyrgyzstan illustrate that although the States' treatment of such asylum claims historically violated international refugee law obligations, gradually the governments have been pressured to improve their compliance with international standards.

6. Conclusion

Compliance with international refugee law has been and remains limited in Central Asia and occurs within the confines of States' political self-interest. While domestic refugee legislation complies with the letter of Refugee Convention and minimum

[73] Ainur Koskina, 'По возвращении нас ждет тюрьма': истории турецких учителей, которых Турция требует от Казахстана выслать на родину' ('Upon Return We Will be Imprisoned: Stories of Turkish Teachers, whose Extradition Turkey Demands from Kazakhstan'), *Current Time* (22 November 2017) <https://www.currenttime.tv/a/28867645.html> accessed 20 September 2019.

[74] ibid. [75] ibid.

[76] 'Sweden, Bolivia, Ethiopia and Kazakhstan elected to Security Council', *UN News* (28 June 2016) <https://news.un.org/en/story/2016/06/533342-sweden-bolivia-ethiopia-and-kazakhstan-elected-security-council> accessed 2 April 2020.

RSD procedural standards in international law, the RSD process to a certain extent has been instrumentalized by the authorities so as not to identify every refugee eligible for international protection, but rather to legitimize State policy on limiting the number of recognized refugees. This strategy has helped States to keep compliance to the minimum required by international refugee law while not undermining other competing political interests, although at the expense of reducing the law's effectiveness in refugee protection.

Nonetheless, the ratification of the Refugee Convention and other efforts, including pressure from international organizations and other States, have contributed to gradual changes in the behaviour of Central Asian States and improvement in their compliance with international refugee law over the past two decades. While Central Asian States remain concerned about security risks to their political regimes, which motivates them to limit international refugee protection in favour of their self-interest, they equally care about keeping their international reputation and the benefits of being perceived as democracies, which they risk losing by explicitly violating international refugee law.

Thus, the limited value of the Refugee Convention in Central Asia is that, since the early 2000s, it has helped some asylum seekers to acquire legal refugee status and secure official protection from *refoulement*. Further, even when asylum claims have been refused at the final judicial stage, people have been allowed to stay in the country illegally (until they leave to seek asylum elsewhere). It is likely that refugees from Afghanistan, China, and across Central Asia will continue to come to the region because of porous borders, and/or simply not having any other place to flee. The logic is straightforward: even if the protection system is not perfect, some protection is better than none.

Another benefit of ratification of the Refugee Convention is that it has enabled States to withstand pressure from more powerful States demanding extradition of their nationals, confirming the prevalence of international legal norms over bilateral or regional agreements between States and States' political self-interest. Overall, States may prefer to be bound by ratified international law instruments, rather than submit themselves to pressures from bilateral relations with a more politically and economically powerful neighbour.

Despite numerous and serious challenges to achieving good faith compliance with international refugee law in Central Asia, there has been some progress towards this aim. Much more remains to be done, of course, and the progress to date could be extended with further contributions from UNHCR, international and domestic NGOs, and support (and pressure, when needed) from governments outside the region.

CHAPTER 21

REGIONAL REFUGEE REGIMES

East Asia

OSAMU ARAKAKI AND LILI SONG*

1. Introduction

The region of East Asia includes five States and eight jurisdictions: Japan, the Republic of Korea (Korea), the Democratic People's Republic of Korea (DPRK), Mongolia, and China (including the People's Republic of China (PRC),[1] Hong Kong Special Administrative Region (Hong Kong), Macau Special Administrative Region (Macau), and Taiwan).[2] The region is home to nearly 1.7 billion people and the world's second and third largest economies, China and Japan. With the exception of Mongolia, East Asian States/jurisdictions are densely populated, largely homogeneous, and culturally influenced by the philosophy of Confucianism.

East Asia is remarkably diverse in the sense that, despite the relatively small number of States/jurisdictions in the region, it includes both developed and developing economies, both civil law and common law models, and both capitalist and socialist systems. It also is a mix of refugee-receiving and refugee-producing States/jurisdictions. At one end of the spectrum are the developed, refugee-receiving States/jurisdictions of Japan, Korea, Hong Kong,[3] Macau, and Taiwan. At the other end of the spectrum is the

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[1] For the purpose of this chapter, the PRC refers to Mainland China, excluding Hong Kong, Macau, and Taiwan.

[2] UN, 'Classification and Definition of Regions' <https://esa.un.org/MigFlows/Definition%20of%20regions.pdf> accessed 20 September 2019.

[3] But see Suzanne Sataline, 'In a Possible First for Hong Kong, Activists Wanted by Police Gain Protection in Germany', *The New York Times* (21 May 2019) <https://www.nytimes.com/2019/05/21/world/asia/hong-kong-china-germany-activists.html> accessed 26 May 2020.

DPRK, which produces large numbers of refugees and receives hardly any. In between are the PRC and Mongolia. The PRC has been a major source of refugees for decades,[4] but it has been emerging as a destination and transit State for refugees in recent years as its economy prospers. Mongolia receives and generates very few refugees.[5] As the DPRK and Mongolia receive very few refugees and lack legal frameworks addressing refugee issues, they are not discussed in detail in this chapter.

East Asia has not developed its own regional instrument relating to refugees or human rights. Indeed, even compared to Southeast Asia and South Asia, East Asia has neither the institutionalized regional framework of the Association of Southeast Asian Nations (ASEAN) (which provides a venue for regional dialogue on refugees) nor a civil society-driven initiative like the Model Law for Refugees in South Asia.[6] However, East Asian States/jurisdictions do engage in some intra-regional frameworks relating to refugees. For example, all five East Asian States are members of the Asian-African Legal Consultative Organization, and the PRC, Japan, and Korea contributed to the revision of the Bangkok Principles on Status and Treatment of Refugees in 2001.[7] All East Asian States/jurisdictions except Taiwan are members of the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime.[8]

The PRC, Macau, Japan, and Korea are bound by the Refugee Convention, whereas the DPRK, Mongolia, Hong Kong, and Taiwan are not. All East Asian States/jurisdictions (except Taiwan) are bound by at least five of the nine core human rights treaties.[9] Notably, none of the East Asian States/jurisdictions is bound by the Migrant Workers Convention[10] or the Convention on the Reduction of Statelessness.[11] This chapter identifies the convergences and divergences in refugee protection across the region.

[4] UNHCR, 'Global Trends: Forced Displacement in 2018' (2019) 17 <https://www.unhcr.org/statistics/unhcrstats/5d08d7ee7/unhcr-global-trends-2018.html> accessed 20 September 2019.

[5] See UNHCR, 'Population Statistics' <http://popstats.unhcr.org/en/time_series> accessed 29 May 2020; Human Rights Centre to Support Citizens, Centre for Gender Equality, Zorig Foundation, and Child Protection Centre, 'Migrants and Refugees Rights: Mongolia—Stakeholders Submission to OHCHR for UPR' <https://lib.ohchr.org/HRBodies/UPR/Documents/session9/MN/HRCC_HumanRightsCenterforCitizens.pdf> accessed 28 September 2019.

[6] Veerabhadran Vijayakumar, 'A Critical Analysis of Refugee Protection in South Asia' (2001) 19(2) Refuge 6, 14.

[7] Asian–African Legal Consultative Organization (AALCO), 'Final Text of the AALCO's 1966 Bangkok Principles on Status and Treatment of Refugees ("Bangkok Principles")' (24 June 2001) <www.refworld.org/docid/3de5f2d52.html> accessed 28 September 2019.

[8] The Bali Process, 'Membership' <https://www.baliprocess.net/membership/> accessed 29 May 2020.

[9] See UN Treaty Series 'Status of Treaties' for the ICCPR, ICESCR, CAT, CEDAW, CRC, and the Convention on the Rights of Persons with Disabilities <https://treaties.un.org/Pages/ParticipationStatus.aspx?clang=_en> accessed 29 May 2020.

[10] International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3.

[11] Convention on the Reduction of Statelessness (adopted 30 August 1961, entered into force 13 December 1975) 989 UNTS 175.

2. China

a. A Brief History of Refugee Law

Refugee law in China involves four jurisdictions. First, there is the PRC, founded in October 1949 in Mainland China, whose legal system is generally based on the civil law model. Secondly, there is Hong Kong, a British colony from 1842 to 30 June 1997, which remains a common law jurisdiction. Thirdly, there is Macau, under Portuguese administration from 1557 to 19 December 1999, which has a civil law system. Finally, there is Taiwan (also known as the Republic of China), which the PRC claims as a province, but over which it does not exercise actual control. It also has a civil law system.

The PRC acceded to the Refugee Convention and its 1967 Protocol in 1982. Although the PRC received few refugees before the Indochinese arrivals in the late 1970s, all versions of the PRC Constitution empower the State to grant asylum to foreigners.[12] The 1985 Law on the Administration of Entry and Exit of Foreigners, which was superseded in 2012, also contained a similar asylum clause.[13] The Refugee Convention and Protocol were extended to Macau by Portugal in April 1999 and by the PRC in December 1999. Macau did not have any legal provisions specifically governing refugee status or treatment of refugees prior to 2004, although it received tens of thousands of Mainland Chinese escapees in the 1950s through to the 1970s, and about 40,000 Vietnamese refugees during the Indochinese refugee crisis. Although Hong Kong traditionally received more refugees than Macau, neither the Refugee Convention nor the Protocol was extended to Hong Kong (by the UK or the PRC). During the Indochinese refugee crisis, Hong Kong inserted Part IIIA into its Immigration Ordinance relating to Vietnamese refugees, but that part was effectively repealed in January 1998.[14]

Taiwan represented the State of China at the UN until 1971 and participated in the drafting of the Refugee Convention,[15] although Taiwan did not accede to the treaty when it was a member of the UN.[16] Since 1971, Taiwan has not been recognized as a sovereign State by the UN and is thus generally excluded from the UN treaty regime.

[12] Constitution of the People's Republic of China 1954, art 99; Constitution of the People's Republic of China 1975, art 29; Constitution of the People's Republic of China 1978, art 55; Constitution of the People's Republic of China 1982, art 32(2).

[13] Law on the Administration of Entry and Exit of Foreigners 1985, art 15.

[14] Mark Daly, 'Refugee Law in Hong Kong: Building the Legal Infrastructure' (2009) 9 Hong Kong Lawyer 14, 15.

[15] See Sara Davies, *Legitimising Rejection: International Refugee Law in Southeast Asia* (Martinus Nijhoff 2008) 122.

[16] E-Ling Chiu, 'Refugee Cases and Refugee Law in Taiwan' (Hong Kong University presentation) slide 8 <http://www.law.hku.hk/hrportal/wp-content/uploads/file/E-Ling-Chiu.pdf> accessed 20 September 2019.

However, Taiwan has dealt with asylum seekers and stateless persons.[17] In 2006, the Taiwanese administration submitted a draft Refugee Act to the Legislature for deliberation, but it has never been enacted.[18]

b. Law and Practice

i. *Domestic Law*

The PRC has incorporated very few provisions of the Refugee Convention into its domestic law.[19] Article 32(2) of the PRC Constitution provides that the PRC 'may grant asylum to foreigners who request it for political reasons',[20] but people who carry out terrorist activities and members of terrorist organizations are excluded from refugee status according to the 2016 Counter-Terrorism Law.[21] Article 46 of the 2012 Law on Exit–Entry Administration (Exit–Entry Law), which is the first provision on the treatment of refugees and asylum seekers in Chinese law, allows refugees to stay in the PRC and to obtain Chinese identity documents.[22] It also allows asylum seekers, whose asylum application is being processed, to remain in the PRC. Additionally, article 31 of the Exit–Entry Law allows foreigners on short-term visas to apply for residence in the PRC on the basis of humanitarian reasons, thus seemingly leaving room for humanitarian protection for persons who are not refugees but are in need of protection.[23] At the time of writing, the PRC has not established a national refugee status determination (RSD) procedure, although Chinese government departments have been working on a draft national refugee law.[24]

In Macau, the 2004 Legal Regime on the Recognition and Loss of Refugee Status established a comprehensive RSD system, defining a refugee as a person who: (1) qualifies as a refugee according to the Refugee Convention, or (2) falls under the

[17] ibid slides 9–30.

[18] Ann Maxon, 'Lawmakers, Groups Call for Passage of Refugee Act', *Taipei Times* (21 June 2019) <http://www.taipeitimes.com/News/taiwan/archives/2019/06/21/2003717320> accessed 20 September 2019.

[19] International treaties ratified by the PRC government do not automatically become part of Chinese domestic law. See Hanqin Xue and Qian Jin, 'International Treaties in the Chinese Domestic Legal System' (2009) 8 Chinese Journal of International Law 299, 322.

[20] Constitution of the People's Republic of China (as amended 11 March 2018) art 32(2).

[21] Counter-Terrorism Law 2016, arts 2(2), 3.

[22] Law on Exit–Entry Administration 2012, art 46 (Exit–Entry Law).

[23] ibid art 31. For more discussion about the legal framework in the PRC for refugee protection, see Lili Song, *Chinese Refugee Law and Policy* (CUP 2020) ch 3.1.

[24] Committee on the Elimination of Discrimination against Women, 'Consideration of Reports submitted by States Parties under Article 18 of the the Convention on the Elimination of All Forms of Discrimination against Women: Combined Seventh and Eighth Periodic Report of States Parties—China', UN doc CEDAW/C/CHN/7-8 (17 January 2013) para 225; Guofu Liu, *Chinese Refugee Law* (Brill 2019) 81.

mandate of UNHCR.[25] A Refugee Affairs Commission undertakes RSD, although the Head of the Macau government formally grants or refuses status,[26] subject to an appeal to the Macau Court of Second Instance.[27] Recognized refugees have the right to work and are treated as legal residents of Macau.[28] The Regime includes wide inadmissibility grounds, including the circumstances set out in article 1F of the Refugee Convention, and five other disqualifying circumstances, including where the claim is groundless, clearly fraudulent, or constitutes an abusive use of the procedure.[29] The Regime also provides that a decision on admissibility should be made within 48 hours of the date of application.[30] The broad inadmissibility grounds and the short time for decision-making may lead to arbitrary exclusion from protection.

Currently, refugees have no special status under Hong Kong law and are instead subject to general immigration law. In 2014, the Hong Kong government launched a policy known as the unified screening mechanism (USM), under which the Hong Kong immigration authority undertakes assessments of claims for *non-refoulement* protection, including those based on the Refugee Convention, the CAT, and the Hong Kong Bill of Rights.[31]

Taiwan currently has few legal provisions on refugees and no formal RSD mechanism, although the National Immigration Agency is empowered to determine refugee status,[32] and refugees are exempted from certain employment restrictions applicable to foreigners in general.[33] Asylum requests continue to be handled on an ad hoc case-by-case basis.[34]

ii. *Compliance and Gaps with International Refugee Law*

The PRC has been criticized for forcibly repatriating large numbers of displaced North Koreans and ethnic Kachins from Myanmar, despite evidence that many of them are

[25] Legal Regime on the Recognition and Loss of Refugee Status 2004, art 3 (Recognition and Loss Regime).

[26] ibid art 5. [27] ibid art 22.

[28] Committee on the Elimination of Discrimination against Women, 'Consideration of Reports submitted by States Parties under Article 9 of the Convention: International Convention on the Elimination of All Forms of Racial Discrimination: 14th to 17th Periodic Reports of States parties due in 2015: Macao, China', UN doc CERD/C/CHN-MAC/14-17 (3 April 2017) para 35.

[29] Recognition and Loss Regime (n 25) art 14(5).

[30] ibid art 15(1). Decisions on admissibility may be appealed to the Macau Court of Second Instance: art 15(4).

[31] See Kirsteen Lau, *Non-Refoulement Law in Hong Kong* (LexisNexis 2017).

[32] Organisation Act of the National Immigration Agency, Ministry of the Interior 2013, art 2, <https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=D0000135>.

[33] Employment Service Act 2018, art 51, <https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=N0090001>.

[34] Nick Aspinwall, 'Taiwan Says It Will Draft Plan to Help Hong Kongers as National Security Law Looms', *The Diplomat* (29 May 2020) <https://thediplomat.com/2020/05/taiwan-says-it-will-draft-plan-to-help-hong-kongers-as-national-security-law-looms/> accessed 15 October 2020.

refugees.[35] Although the PRC admitted and settled nearly 300,000 Indochinese refugees in the late 1970s and 1980s,[36] since then it has not permitted any refugee identified by UNHCR to settle locally. It does not allow non-Indochinese refugees to work and has not issued Chinese identity documents to them, even though article 46 of the PRC Exit–Entry Law explicitly allows refugees to obtain Chinese identity documents.[37] It is notable that none of the asylum- and refugee-related provisions in PRC law has been litigated. As the PRC has not fully established a rule-of-law system, effective enforcement of refugee rights is likely to remain a long-term challenge.

In Macau, although the 2004 Regime provides that applications should be decided within a year, processing of applications may take as long as eight years.[38] According to UNHCR, Macau has processed less than 15 applications each year since 2009.[39] Nevertheless, that number does not include applications deemed inadmissible, for which no statistics are publicly available. The recognition rate is undoubtedly extremely low. As of June 2019, it was noted that Macau had not recognized any refugees since the 2004 Regime entered into force.[40] The acceptance rate under Hong Kong's USM has also been very low.[41]

As Taiwan is not recognized as a State by the UN, not bound by the Refugee Convention and has limited refugee law, and UNHCR does not currently operate there, refugee protection in Taiwan presents some unique challenges, which are illustrated by recent reports of Hong Kong asylum seekers in Taiwan, and of Taiwan's

[35] Elim Chan and Andreas Schloenhardt, 'North Korean Refugees and International Refugee Law' (2007) 19 IJRL 215; UN Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea, *Report of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea*, UN doc A/HRC/25/63 (7 February 2014) para 43; Benjamin Neaderland, 'Quandary on the Yalu: International Law, Politics, and China's North Korean Refugee Crisis' (2004) 40 Stanford Journal of International Law 143; Matthew Smith, *Isolated in Yunnan: Kachin Refugees from Burma in China's Yunnan Province* (Human Rights Watch June 2012) <https://www.hrw.org/sites/default/files/reports/china0612_forinsertForUpload_0.pdf> accessed 26 May 2020; Lili Song, 'Refugees or Border Residents from Myanmar? The Status of Displaced Ethnic Kachins and Kokangs in Yunnan Province, China' (2017) 29 IJRL 466.

[36] Shuying Liang, *guoji nanmin fa* (translation: International Refugee Law) (Intellectual Property Publishing House 2009) 272.

[37] For more discussion about treatment of UNHCR refugees in China, see Song (n 23) ch 4.1.

[38] Marco Carvalho, 'Why Don't We Bring 100 Refugees to Macau and Help Them?—Paul Pun, President of the Association for Refugees' Welfare', *Oclarim* (21 June 2019) <https://www.oclarim.com.mo/en/2019/06/21/why-dont-we-bring-100-refugees-to-macau-and-help-them-paul-pun-president-of-the-association-for-refugees-welfare/> accessed 28 September 2019.

[39] See UNHCR (n 5) (no statistics are available for 1996–2008).

[40] Carvalho (n 38).

[41] Justice Centre, 'Submission to the Committee on the Elimination of Racial Discrimination' (July 2018) <https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/HKG/INT_CERD_NGO_CHN_31953_E.pdf> accessed 28 September 2019; Raquel Carvalho, 'Hong Kong's Refugee Claim System Leaves Many Tough Questions', *SCMP* (28 February 2016) <https://www.scmp.com/news/hong-kong/law-crime/article/1918025/hong-kongs-refugee-claim-system-leaves-many-tough-questions> accessed 26 September 2019.

agreement to allow Australia to fly asylum seekers from Nauru to Taiwan for medical treatment.[42]

c. Institutions

i. *Judiciary*

In the PRC, there has been no litigation based on any of the refugee- or asylum-related legal provisions. Thus, PRC courts have yet to play a role in refugee protection. In Macau, as mentioned above, the judiciary is empowered to review RSD-related decisions. As of September 2019, Macau's judiciary had considered only a very small number of RSD-related cases and did not appear to have quashed any RSD decision.[43] By contrast, in Hong Kong the judiciary has played an important role in shaping the procedures and standards for processing *non-refoulement* claims. It was in response to a series of judicial decisions that the Hong Kong government established the USM.[44] Judicial review is available to claimants who receive negative decisions under the USM.[45] Notably, the landmark case of *C v Director* was the first comprehensive recognition, by a common law court, of the *non-refoulement* principle as part of customary international law.[46] The Hong Kong judiciary's willingness to protect against *refoulement* and uphold some human rights standards is particularly valuable,[47] given that the Refugee Convention does not apply to Hong Kong, and the Hong Kong government has pursued a firm policy of not officially granting asylum.[48]

[42] Emily Feng, 'Taiwan Grapples with Immigration as Protesters from Hong Kong Look to Seek Asylum', *All Things Considered* (NPR, 25 November 2019) <https://www.npr.org/2019/11/25/782732960/taiwan-grapples-with-immigration-as-protesters-from-hong-kong-look-to-seek-asylu> accessed 27 November 2019; Renée Salmonsen, 'Taiwan Ministry Confirms Secret Deal with Australia to Medically Treat Nauru Refugees', *Taiwan News* (24 June 2018) <https://www.taiwannews.com.tw/en/news/3465219> accessed 27 November 2019.

[43] This is based on search results of judgments published on the official website of the Macao judiciary 'Tribunais da Raem' <http://www.court.gov.mo/zh/> accessed 29 May 2020.

[44] See Lau (n 31) 3.

[45] Hong Kong Legislative Council Secretariat, 'Judicial Review and Non-Refoulement Claims' (Hong Kong Legislative Council 5 December 2018) <https://www.legco.gov.hk/research-publications/english/1819issh11-judicial-review-and-non-refoulement-claims-20181205-e.pdf> accessed 20 September 2019.

[46] Oliver Jones, 'Customary Non-Refoulement of Refugees and Automatic Incorporation into the Common Law: A Hong Kong Perspective' (2009) 58 ICLQ 443, 443.

[47] See generally Kelley Loper, 'Human Rights, *Non-Refoulement* and the Protection of Refugees in Hong Kong' (2010) 22 IJRL 404. On the right to work, see Chapter 53 in this volume.

[48] Hong Kong Department of Immigration, 'Notice to Persons Making a Non-Refoulement Claim' (September 2017) <https://www.immd.gov.hk/pdf/notice_non-refoulement_claim_en.pdf> accessed 26 May 2020, para 6.

ii. *Civil Society and UNHCR*

UNHCR has maintained an office in Beijing since 1980 and has been the sole organization processing refugee status claims in the PRC since that time. The PRC government acknowledges the status of refugees recognized by UNHCR, but the PRC law is silent on the legal effect of such decisions, which are not subject to judicial review. A 1995 China–UNHCR Agreement states that UNHCR may, in consultation and cooperation with the PRC government, have unimpeded access to refugees at any time.[49] However, the PRC has barred UNHCR from accessing displaced North Koreans and displaced Kachins and Kokangs from Myanmar, so these groups have no access to UNHCR's RSD procedure. UNHCR is the main provider of financial support to non-Indochinese refugees in the PRC and arranges third country resettlement for them.[50] UNHCR has advocated for and facilitated the drafting of a national refugee law in the PRC.[51] UNHCR maintains a sub-office in Hong Kong, which conducted RSD for Hong Kong and Macau until March 2014 and 2004 respectively. UNHCR currently plays a monitoring role in Hong Kong and Macau and assists with third country resettlement in Hong Kong. UNHCR does not operate in Taiwan.

The role of civil society in the development of refugee law in the PRC has been limited. Few non-governmental organizations (NGOs) openly advocate for, or assist, refugees in the PRC. In comparison, civil society in Hong Kong, Macau, and Taiwan has played a more active advocacy role with respect to refugee rights. Most notably, through step-by-step strategic litigation, human rights lawyers in Hong Kong have successfully drawn upon human rights law and common law principles to push for better refugee protection.[52] NGOs in Hong Kong also provide free legal advice to refugees and asylum seekers and have advocated for their right to work.[53] In Macau and Taiwan, NGOs such as the Macau Refugee Welfare Association and the Taiwan Association for Human Rights are vocal advocates for refugee rights and supporters of refugees.

3. Japan

a. A Brief History of Refugee Law

Prior to its accession to the Refugee Convention in 1981 and the Protocol in 1982, Japan was often a mere stopover for asylum seekers wishing to seek protection elsewhere

[49] Agreement on the Upgrading of the UNHCR Mission in the People's Republic of China to UNHCR Branch Office in the People's Republic of China (adopted 1 December 1995) 1899 UNTS 61.

[50] UNHCR (Hong Kong), 'Regional Representation in China' (10 March 1999) <www.unhcr.org/hk/en/134-china-2.html> accessed 26 May 2020.

[51] For more discussion on UNHCR's role in China, see Song (n 23) ch 3.4.

[52] See Kelley Loper, 'The Protection of Asylum Seekers in East Asian State Parties to the 1951 Convention relating to the Status of Refugees and its 1967 Protocol' in Ademola Abass and Francesca Ippolito (eds), *Regional Approaches to the Protection of Asylum Seekers: An International Legal Perspective* (Routledge 2014) 347, 368.

[53] Raquel Carvalho, 'Give Hong Kong's Asylum Seekers the Right to Work, NGO Leader Says', *SCMP* (7 July 2018) <https://www.scmp.com/news/hong-kong/hong-kong-law-and-crime/article/2154253/give-hong-kongs-asylum-seekers-and-human> accessed 28 September 2019.

(often the United States). The arrival of Indochinese boat people from the middle of the 1970s, and the intensive international pressure placed on Japan to accept them, partially pushed the then-Japanese government to accede to the Convention. In 1982, the Immigration Control Order[54] was renamed the Immigration Control and Refugee Recognition Act (ICRRA) and introduced provisions to respond to the requirements of the refugee treaties. In 2005, the ICRRA was amended, abolishing the controversial requirement to submit protection claims within 60 days, and reforming the RSD appeal procedure, incorporating experts who are not full-time employees of the Ministry of Justice into the procedure.[55]

b. Law and Practice

i. *Domestic Law*

Under article 98(2) of the Constitution of Japan,[56] treaties can be applied domestically without enacting legislation. The Constitution is superior to Japanese statutes, with laws enacted by the Diet and administrative ordinances following. In this hierarchy, treaties are commonly recognized as being below the Constitution but above statutes.[57]

The ICRRA governs RSD in general, and the Minister of Justice and the Director of a Regional Immigration Bureau have jurisdiction over RSD in practice.[58] The RSD procedure begins upon submission of an application[59] to the relevant Regional Immigration Bureau. A negative first-instance decision may be appealed.[60] According to the ICRRA, the Minister of Justice may appoint Refugee Examination Counsellors (RECs) from amongst those who have reputable character, can make fair decisions on refugee appeals, and hold experience or academic standing in legal or international affairs.[61] The duration of appointment is two years, and reappointment is possible.[62]

Recognized refugees are granted resident status, but there is no domestic law setting out the rights of asylum seekers comprehensively. The situation of their rights depends on their residence status and the policy of the government. In terms of humanitarian and human rights protection, those who are not recognized as refugees may be granted special permission to stay in Japan.[63] Decisions on special permission are made at the discretion of the Minister of Justice, and no reasons for the permission are provided. However, permission may also be granted to people who cannot return to their country

[54] Immigration Control and Refugee Recognition Act (Cabinet Order No 319 of 4 October 1951) (ICRRA).

[55] Osamu Arakaki, *Refugee Law and Practice in Japan* (Ashgate 2008) 59–65.

[56] Constitution of Japan 1946, art 98(2) provides that '[t]he treaties concluded by Japan and established laws of nations shall be fruitfully observed'.

[57] Nobuyoshi Ashibe (revised by Kazuyuki Takahashi), *Kenpo [Constitution]* (6th edn, Iwanamishoten 2015) 13, 384–5.

[58] ICRRA (n 54) arts 61-2, 69-2. Regulation for Enforcement of the Immigration Control and Refugee Recognition Act, art 61-2(1) (xiii).

[59] Ministry of Justice, 'Application for Recognition of Refugee Status' <http://www.moj.go.jp/nyuukokukanri/kouhou/nyuukokukanri03_00091.html> accessed 24 May 2019.

[60] ICRRA (n 54) art 61-2-9.

[61] ibid art 61-2-10(2). [62] ibid art 61-2-10(3). [63] ibid arts 61-2-2(2), 61-2-6(4).

of origin on account of war or armed conflict.[64] In addition, people may not be removed to a State wherein there is a risk of torture as set out in CAT, or to a State where there are substantial grounds for believing that the person would be in danger of being subjected to enforced disappearance.[65]

ii. *Compliance and Gaps with International Refugee Law*

Over the five years from 2014 to 2018, 53,609 applicants for refugee status were recorded. During this period, 128 were recognized as refugees,[66] a refugee recognition rate was less than 1 per cent. States of origin of refugee applicants include Indonesia, the Philippines, Nepal, Myanmar, Iran, Nigeria, and Congo.[67] Various explanations for the low rate and number have been presented,[68] including the high evidential burden on applicants (who are often required to submit clear evidence of individual targeting by a persecutor,[69] which is an unreasonable burden).[70]

In practice, refugees recognized by the Minister of Justice and the Director of a Regional Immigration Bureau can receive a five-year residence permit, which is then reviewed and renewed. This resident status of refugees is a gateway to rights and benefits under law. Despite general convergence with the rights under the Refugee Convention, some gaps exist, in particular as regards public assistance, which the law only makes available for aliens, including refugees, on a discretionary basis.[71] Until 2015, all refugee applicants holding a valid visa were granted a work permit for a limited period. However, the Ministry of Justice then introduced a restrictive policy denying applicants in specific categories such permits, apparently to reduce or deter applicants, claiming that many immigrant workers had manipulated the RSD procedure. This new policy risks excluding refugees from the opportunity to support themselves during the RSD process.[72]

In terms of the right to liberty, Japan's use of detention has been controversial for years. In 2018, approximately 240 of the 342 people in the Higashi-Nihon Immigration

[64] UNHCR (Japan), 'About the Refugee Status Determination Procedure in Japan' <https://www.unhcr.org/jp/j_protection> accessed 14 May 2019.

[65] ICRRA (n 54) arts 53(3)(ii), 53(3)(iii).

[66] The number is based on statistics from 2014 to 2018 in Ministry of Justice, 'Press Releases' <http://www.moj.go.jp/hisho/kouhou/press_backnumber.html> accessed 1 June 2020.

[67] Ministry of Justice, 'About the Number of Refugee Applicants of 2018' <http://www.moj.go.jp/content/001290416.pdf> accessed 23 June 2019.

[68] Arakaki (n 55) 26–43.

[69] ibid 142–8.

[70] See the Japanese admistrative/judicial view and argument of this point in Arakaki (n 55) 157–64.

[71] Ministry of Health, Labor, and Welfare, 'Shakai Hoshou Shingikai Fukushi Bukai: Seikatsu Hogo Seidono Arikatani Kansuru Senmon Iinkai Dai 12 Kai (Heisei 16 Nen 6 Gatsu 8 Nichi) Shiryo 1 Sonota [Appendix 1 Others, the 12th Meeting (8 June 2004), Advisory Committee on the Public Assistance System, Sectional Meeting on Welfare, Social Security Council]' <http://www.mhlw.go.jp/shingi/2004/06/s0608-6a2.html> accessed 3 May 2019. Judgment of the Lawsuit to Request a Decision to Obligate the Start of Paying Public Assistance, the Supreme Court (Petty Bench II) (18 July 2014), cited in (2014) 386 Judicial Precedents of Local Autonomy [*Hanrei Chiho Jichi*] 78.

[72] Ministry of Justice, 'Application for Refugee Recognition Subject to Restrictions on Employment' <http://www.moj.go.jp/content/001251515.pdf > accessed 27 May 2020. For a civil society critique, see Japan Association for Refugees (JAR), 'Are They All "Disguised Refugees" in Japan?' (13 February 2018) <https://www.refugee.or.jp/jar/report/2018/02/13-0002.shtml> accessed 27 May 2020.

Centre were refugee applicants.[73] The ICRRA, which regulates detention,[74] does not exempt asylum seekers from being subject to it, nor does it set any objective criteria for detention. There is no time limit for pre-deportation detention and even asylum seekers may be detained indefinitely on this basis.

c. Institutions

i. *Judiciary*

Asylum decisions are subject to appeal to the District Court, High Court, and the Supreme Court. Although the Japanese judiciary was highly deferential towards administrative decisions for many years, more recently the courts have overturned more decisions. For instance, the Nagoya High Court has concluded in the Nepalese case that the burden and standard of proof generally applied in Japanese administrative law should be modified in RSD.[75] However, in Japanese judicial decisions, the interpretation of the Refugee Convention in light of international human rights law is generally absent.[76]

ii. *Civil Society and UNHCR*

Civil society groups have contributed to efforts to achieve Japanese compliance with international refugee law. In 2012, the Forum for Refugees Japan (FRJ), the Japan Federation of Bar Associations, and the Ministry of Justice signed a tripartite Memorandum of Understanding, agreeing to meet periodically to discuss refugee protection. The members of the FRJ generally work collaboratively on relevant cases. The Japan Association for Refugees (JAR) registers asylum seekers, providing basic counselling on the law and procedures for asylum, but also for daily survival. International Social Service Japan (ISSJ) facilitates social work and counselling on health, welfare, and social integration. Shelters are provided by the Japan Evangelical Lutheran Association, Catholic Tokyo International Centre, and JAR. Lawyers are networked well through the Japan Lawyers Network for Refugees, and a number of smaller lawyer's networks conduct work focusing around specific themes or populations.[77]

[73] JAR, 'Questions and Answers with the Higashi-Nihon Immigration Centre' (9 May 2018) <https://www.refugee.or.jp/jar/report/2018/05/09-0000.shtml> accessed 15 May 2019.

[74] ICRRA (n 54) arts 39–44.

[75] Case of Appeal to Request Cancellation of Decision Not Recognizing Refugee Status, Heisei 27 Nen (Gyo Ko) 71, Nagoya High Court (13 July 2016).

[76] Arakaki (n 55) ch 4.

[77] A number of lawyers networks exist around themes, including an LGBT lawyers group (see Lawyers for LGBT and Allies Network <http://llanjapan.org/en> accessed 29 May 2020), or around specific populations, such as a Burmese lawyers group, a Kurdish lawyers group, and a Falun Gong lawyers group, amongst others.

UNHCR's Representation in Japan provides recommendations on laws, policies, and practices for refugees. Its task for protection includes training and advocacy work. UNHCR provides funding and cooperates with partners to facilitate legal and social support going directly to refugees.[78] JAR and ISSJ, amongst others, are implementing partners of UNHCR.

4. Korea

a. A Brief History of Refugee Law

When Korea faced mass arrivals of Indochinese refugees from the late 1970s to the 1980s,[79] it granted them only temporary protection, seeking to resettle them without enacting any specific domestic refugee laws. Korea ratified the Refugee Convention in 1992, and the following year it joined the UN (along with the DPRK).

Korea commenced RSD in 1993, incorporating new provisions into the Immigration Control Act. This Act was criticized by lawyer groups and NGOs for its lack of detailed provisions on the RSD procedure and the legal status of asylum seekers and refugees.[80] As part of the campaign, the groups prepared a draft Refugee Act, to replace the Immigration Control Act. Remarkably, this draft provided the basis for the Refugee Act enacted by the National Assembly in 2011.[81] Drawing on the constitutional assertion regarding the territorial scope of the Republic of Korea,[82] and relevant Supreme Court decisions,[83] the Refugee Act does not apply to displaced North Koreans since they are considered nationals of South Korea. However, political tension between the two Koreas could bring about a scenario in which North Koreans, whose protection is subject to a separate regime,[84] would be at risk of 'repatriation' to the DPRK.

78 UNHCR, 'Role and Activities' <https://www.unhcr.org/jp/u_protection> accessed 28 May 2019.

79 In Seop Chung, 'Korean Practice on Refugee Reception [Hangugeseoui Nanmin Suyong Silhaeng]' (2009) 16 Seoul International Law Journal [Seoulgukjebeobyeongu] 197, 202–3.

80 Ho-taeg Lee, 'The Processes, Contents, and Remained Issues of Legislation in the Korean Refugee Act' (2012) 2 Refugee Studies Journal <https://www.refugeestudies.jp/Article%20of%20Ho-taeg%20Lee%281109%29.pdf> accessed 21 May 2019.

81 Republic of Korea: Law No 11298 of 2012 (Refugee Act). The backgound of enactment is explained in Lee (n 80).

82 Article 3 of the Constitution of the Republic of Korea 1987 (Korean Constitution) indicates that the 'territory of the Republic of Korea shall consist of the Korean peninsula and its adjacent islands'. Arguably, it recognizes the area of DPRK as territory of South Korea.

83 1996 [Nu]1221(Supreme Court).

84 The Protection of Defecting North Korean Residents and Support of Their Settlement Act (1997). Article 4 sets out a basic principle that the 'Republic of Korea shall provide protected persons with special care on the basis of humanitarianism'. However, there are many exclusions.

b. Law and Practice

i. *Domestic Law*

Under the Korean Constitution, ratified treaties are automatically part of domestic law and have the same legal effect.[85] The Refugee Act is the first domestic law in the East Asian region designed to be independent from the body of legislation controlling immigration. It covers relevant issues concretely and comprehensively, reflecting the requirements of the Refugee Convention, including provisions on the definitions of refugee and other terms (chapter one), RSD (chapter two), the Refugee Committee (chapter three), and treatment of refugees and others (chapter four).

The refugee definition in the Refugee Act reflects elements of the definition in article 1A(2) of the Refugee Convention.[86] The Refugee Act also defines a humanitarian status holder, namely an alien who is not a recognized refugee but for whom there are reasonable grounds to believe that her or his life or personal freedom may be egregiously violated by torture or other inhumane treatment or punishment or other circumstances, and who is given permission to stay by the Minister of Justice.[87]

The RSD procedure is comprised of two stages. At the initial stage, an asylum seeker in the territory of Korea may apply to the Minister of Justice for refugee status.[88] To this end, the relevant immigration officer interviews the applicant, investigates the facts, and reports to the Minister of Justice.[89] The Minister of Justice makes the decision.[90] A refugee status applicant whose application is denied may appeal, and the Minister of Justice is obliged to refer appeal cases to the Refugee Committee[91] within the Ministry of Justice.[92] This Committee consists of, at most, 15 members,[93] appointed by the Minister.[94] Legally, the Committee is a consultative body and the final decision rests with the Minister.[95] The Minister is obliged to cooperate with UNHCR, which may participate in interviews, for example.[96]

The Refugee Act aims to treat recognized refugees in accordance with the Refugee Convention, protecting them against *refoulement*[97] and providing them with the security of a basic livelihood, the guarantee of education, and so on.[98] A provision aims to secure family unity, that is to say, to permit entry into Korea for the spouse and minor

[85] Korean Constitution (n 82) art 6(1). [86] Refugee Act (n 81) art 2(1), (2).
[87] ibid art 2(3). [88] ibid art 5. [89] ibid art 8(1).
[90] ibid art 18(1). [91] ibid art 21(1), (3). [92] ibid art 25(1).
[93] ibid art 25(2). [94] ibid art 26(1).
[95] Jong-chol Kim, Ho-taeg Lee, and Hiroshi Miyauchi, 'Korean Refugee Law and Practice After Its Implementation [Kankoku Nanminho to Sonogono Jitsumu]' (2014) 86(11) Horitsu Jiho [Current Report of Laws] 22, 24.
[96] Refugee Act (n 81) art 29(2). [97] ibid art 3. [98] ibid ch 4.

children of a recognized refugee.[99] Recognized refugees are given F-2 visas to secure their initial residence permits, which allow them to stay and work in Korea.[100]

The Refugee Act's definition of a refugee status applicant includes not only those who are undergoing RSD, but also those who are proceeding with an administrative appeal or administrative litigation.[101] In principle, they are permitted to reside in Korea for six months with a G-1 visa, and extensions of stay will be granted until the RSD procedure is completed. They are able to receive financial aid for living expenses if they are found to be eligible by the Ministry of Justice. They may be permitted to engage in wage-earning employment six months after the date on which the refugee application was received.[102] The Refugee Act provides them with the provision of residential facilities,[103] medical services support,[104] and so on.

ii. *Compliance and Gaps with International Refugee Law*

Since the enactment of the Refugee Act, the number of refugee status applicants has increased rapidly, yet the number of recognized refugees is low. From 1994 to May 2014, 151 Myanmarese, 75 Bangladeshi, and 15 Pakistani people were recognized as refugees.[105] In 2017, out of 9,942 applicants, 121 were recognized as refugees, while 318 were granted humanitarian status. In 2018, although there were 16,173 applicants, only 144 were recognized as refugees, while 514 were granted humanitarian status.[106]

The new legislation has improved Korean refugee law. However, in practice, there is a protection gap. The refugee definition is interpreted narrowly in the Korean RSD procedure, and the standard of proof and approach to credibility are problematic.[107] While the Refugee Act guarantees rights for recognized refugees and applicants for refugee status, there are significant barriers to accessing the RSD process, which in effect excludes many from accessing protection. Those who seek to apply for asylum at airports and ports of entry may be screened out of the RSD system altogether. Although article 6 of the Refugee Act apparently allows for refugee applications at ports of entry, the Minister of Justice decides 'whether to refer the application to the [RSD] procedure'. This power functions as a screening device. Between 2013 and 2016, 42.9 per cent of applications at ports of entry were not referred to the RSD procedure.[108] Those refused

[99] ibid art 37.

[100] Enforcement Decree of the Immigration Act as amended by Presidential Decree No 26311 (15 June 2015) art 23(1), (2).

[101] Refugee Act (n 81) art 2(4). [102] ibid art 40. [103] ibid art 41. [104] ibid art 42.

[105] Kim, Lee, and Miyauchi (n 95) 23.

[106] Statistical data disclosed by the Ministry of Justice can be found in Nancen, 'Statistics: Refugee Situation in Korea (up to 31 December 2018) [Tonggye: Gungnae Nanmin Hyeonhwang (2018.12.31Gijun)]' (28 May 2019) <https://nancen.org/m/1938?category=118980> accessed 2 June 2019.

[107] Jong-chul Kim, 'Note: Degree and Method of Proof, and Understanding of Credibility Assessment in Refugee Cases [hugi]nanminpallyeui ipjeungjeongdowa bangsik geurigo sinbingseong pandan ihae]' (29 November 2014) <http://apil.or.kr/?p=3008&ckattempt=1> accessed 9 June 2019.

[108] Hae-young Lee and Hyeon-deok Pyo, 'For Better Refugee Status Determination and Judicial Procedure (Summary) [(Yoyakbon) Nanmininjeonggwa Jaepan Jeolchaui Gaeseon Bangan]' (2018) 1, 3 <https://jpri.scourt.go.kr/fileDownLoad.do?seq=801> accessed 21 May 2019.

access to RSD are thereby denied all procedural and substantive rights for asylum seekers and refugees.[109]

Another circumstance where refugees could be placed in peril is the 'simplified procedure'. Article 8(5) of the Refugee Act lists categories for which the 'Minister of Justice may omit part of the determination procedure'. These include cases when a refugee status applicant has concealed facts in the application through means that include the submission of false documents or statements.[110] The intention is to deter abusive applications or to eliminate them from the full RSD procedure. So far, there have not been any confirmed cases in which the 'simplified procedure' has been applied.[111] Nevertheless, it still has the potential to exclude refugees from Korea's protection system who may be compelled by their environment to submit false information to protect themselves, or who suffer from post-traumatic stress disorder.

Other concerns in practice include insufficient support for living expenses, practical difficulties in gaining work permits, and the lack of unemployment allowances. There is only limited accommodation for applicants at the refugee centre on Yeongjong Island, and its location is remote.[112] These factors undermine applicants' ability to prove their refugee status. Asylum seekers who have received a non-referral decision tend to be detained for deportation in small waiting rooms with insufficient utilities for weeks, or even months, waiting to be removed or to appeal the decision.[113] The absence of a maximum time limit on the detention of asylum seekers, and the lack of information on detention itself, are monitored by civil society.[114]

c. Institutions

i. *Judiciary*

Statistics show 423 refugee cases in 2014, 1,220 cases in 2015, and 3,161 cases in 2016,[115] such that Korea 'has the biggest volume of judgments made on refugee status in East Asia'.[116] The judiciary has played a role in rectifying the course of administrative actions

[109] Kae-young Choi, 'Reforming Asylum Procedure at Ports of Entry [Daehanminguk Nanminbeobui Hyeonjaewa Mirae : Nanminbohoui Ganghwa]' (International Academic Symposium on Refugee Law: Present and Future to Enhance International Protection, 2 November 2018) 13, 16 <http://apil.or.kr/?attachment_id=11674> accessed 21 May 2019.

[110] Refugee Act (n 81) art 8(5)1. [111] Kim, Lee, and Miyauchi (n 95) 26. [112] ibid 27–8.

[113] Refugee Rights Network, Korean Bar Association, and UNHCR, 'Survey on Refugee Status Applications at Ports of Entry, 2016 [2016 nyeondo Hangugui Gonghang, Geu gyeonggyee Gathin Nanmindeul Gonghangeseoui Nanminsincheong Siltaejosa Bogoseo]' (2016) <https://nancen.org/1536> accessed 21 May 2019.

[114] Global Detention Project, 'Republic of Korea (South Korea) Immigration Detention' (February 2020) <https://www.globaldetentionproject.org/countries/asia-pacific/republic-of-korea-south-korea> accessed in 27 May 2020.

[115] Lee and Pyo (n 108) 5.

[116] Il Lee, 'Critical Analysis of Refugee Case Law in Korea (up to August 2018) [Hanguknanminpanryeui Nanminyogeonbyeol Bipanjeok Bunseok (2018. 8.Seongobunkkaji)]' (International Academic Symposium on Refugee Law: Present and Future to Enhance International Protection, 2 November 2018) 319, 322.

and filling the protection gaps in national legislation. For example, the courts have concluded that it is illegal for the authorities to ask applicants inappropriate questions during interviews, to deny applicants the opportunity to confirm or correct their interview records, and to conduct interviews with minor applicants.[117]

The Seoul High Court has also considered that non-referral decisions should be limited to situations where the applicant has been clearly found to fall within the category of a non-referral reason described in the relevant law, or in abusive cases. If there is any room for doubt, the application should be referred to the RSD process for close examination.[118] In another decision, the Incheon District Court considered a rights issue in which it held that the plaintiff's detention in a deportation waiting room was in conflict with the Habeas Corpus Act.[119]

ii. *Civil Society and UNHCR*

Civil society has played a significant role in promoting refugee protection. Remarkably, civil society led the preparation of the bill that became the Refugee Act 2013, with many elements of its proposal accepted by the Ministry of Justice. Lawyers also visit the refugee centre, giving talks on the RSD process to residents.[120]

Article 29 of the Refugee Act describes exchange and cooperation with UNHCR. It requires the Minister of Justice to cooperate when UNHCR makes requests for information on matters including compliance with the refugee treaties. UNHCR and the Refuge Rights Network, and Korean Bar Association jointly published the 'Report on the Situation of Refugee Status Applicants at Ports of Entry' in 2016.[121]

5. Conclusion: Comparative Summary

The refugee laws in the region of East Asia are diverse. The mode of incorporation of the Refugee Convention varies according to the jurisdictions' constitutional requirements, jurisdictional divisions, and so on. The PRC has incorporated few provisions of the Refugee Convention into its domestic law. Hong Kong and Taiwan are not bound by the Convention and have no or limited refugee law, yet the former has a process grounded in international human rights law for screening applicants. Japan has

117 Lee (n 80); Eunyeong Choi and Je-ho Lee, 'Courts are Harsh Enough to Request Asylum Seekers Who Fled from Their Country to Submit "Documents to Prove Their Refugee Status" [Geuphi Domangwassneunde "Nanmin Ipjeungjaryo Naera"…Gahokhan Beobwon]', *The Hankyoreh* (2 November 2018) <http://www.hani.co.kr/arti/society/rights/868552.html> accessed 21 May 2019.

118 2014 [Nu]52093 (2015) (Seoul High Court of Korea), cited in Lee (n 80).

119 2014 [Inla]4 (2014) (Incheon District Court of Korea), cited in Lee (n 80).

120 Apil, '"You Have to be Careful About This"—After Completing the Lecture at the Immigration Support Center for Foreigners ['Ireongeol Juuihasyeoya Hamnida' — Churipgugoeguginjiwonsenteo Ganguireul Machigo]' (2 September 2015) <http://apil.or.kr/?p=2596> accessed 21 May 2019.

121 Refugee Rights Network, Korean Bar Association, and UNHCR (n 113).

primary legislation reflecting much of the Refugee Convention. Korea and Macau have integrated provisions of refugee protection comprehensively into a refugee-specific legal framework.

The diversity of implementation in domestic law generates a gradation of forms of RSD procedures. On the one hand, reflecting the absence of primary legislation to deal with refugee matters, including RSD, the PRC has not set up an RSD mechanism. The PRC government leaves it to UNHCR to process asylum cases in principle. On the other hand, Macau, Japan, and Korea have each established an RSD body and process based in legislation. The main actor of the RSD procedure for these is the government, and the involvement of UNHCR is limited. Hong Kong is positioned somewhere in the middle of these two poles. Although Hong Kong law gives no special status to refugees, the Hong Kong government processes all *non-refoulement* claims under a policy and refers those who are granted protection on the ground of persecution to UNHCR, which assists with resettlement.

The PRC and Hong Kong do not accept people who are recognized as refugees for local settlement in their territory, and thus they are allowed to stay until resettlement in a third country is offered. By contrast, Macau, Japan, and Korea accept refugees in their jurisdiction, and their rights are generally protected by the application of relevant laws and grants of residence status. As to the rights of asylum seekers, both Japan and Korea have problematic detention practices.

Despite the diversity of refugee laws, a common feature of the region is extremely low refugee recognition rates. This is partially explained by narrow interpretations of the refugee definition. The relevant legal provisions in Japan and Korea reflect the requirements of the Refugee Convention definition, but their administrative authorities generally do not interpret refugee law within the broader context of international human rights law. Consequently, their systems remain formalistic measures which apparently justify restrictive practices. Similarly, Macau has a relatively comprehensive statutory RSD procedure, but it has not recognized a single refugee in the past 15 years.

Several jurisdictions share another tendency. Japan and Korea provide permission or status statutorily, based on humanitarian or human rights considerations other than protection required by the Refugee Convention. Hong Kong's USM covers *non-refoulement* claims based on the CAT and the Hong Kong Bill of Rights. The PRC legislation, if interpreted constructively, leaves room for humanitarian protection for people who are not refugees.

The potential for progress is also a common phenomenon in the East Asian States/jurisdictions. Judiciaries and civil society groups have gradually become driving forces in shaping the refugee framework, and determining the content of refugee law. The judiciaries of Hong Kong and Korea have played critical roles in filling gaps between their national practices and international refugee law. Korean civil society has been vigorous in highlighting human rights factors in refugee law, in their initiative to form the integrated legal framework and thereafter. NGOs in Hong Kong, Macao, Taiwan, and Japan have been active not only in the facilitation of support to refugees, but also in advocacy to improve government policies and the rights of refugees.

Despite the absence of a regional mechanism for refugee protection, it is intriguing that East Asian States and civil society actors have participated in regional initiatives in the wider Asia-Pacific region. Moreover, regional institutions such as the Asia Pacific Refugee Rights Network (APRRN) also collaborate with national civil society actors and advocate for effective implementation of refugee protection, stressing a rights-based approach. These institutions in the region have been key in vitalizing refugee law in their respective States and promoting the idea of human rights norms in refugee law.

Finally, there has been little dialogue between East Asian States/jurisdictions about the future design of refugee protection. With two significant sources of refugees in the region, the DPRK and the PRC, and the ideological, political, and economic differences between and amongst East Asian States/jurisdictions, it would seem naïve to expect them to have a shared approach to refugee protection. However, China, Korea, Mongolia, and Japan have been (or will be) affected to varying degrees as destination and/or transit States by the exodus of North Koreans. Although there seems to be no easy solution to this issue, starting a dialogue in good faith to understand close neighbours' positions would be a plausible first step to address this matter of shared concern.

CHAPTER 22

REGIONAL REFUGEE REGIMES

South Asia

JAY RAMASUBRAMANYAM

1. Introduction

Since the Partition of India in 1947, South Asia has witnessed periods of mass movement.[1] Yet, since none of the States in the region (defined here as India, Pakistan, Bangladesh, Sri Lanka, Nepal, and Bhutan) are parties to the Refugee Convention or its Protocol, this history is not always accounted for in international refugee law scholarship. In seeking to redress this gap, this chapter articulates some of the ongoing challenges in the region and demonstrates the lacunae that persist with respect to conceptualizing displacement there. It examines protection mechanisms that have been established in the region as *ad hoc* alternatives to hegemonic protection norms, given the lack of a formal institutional approach in the region. The chapter also provides some insights into whether a consistent and comprehensive regional approach to refugee protection can be identified based on past practices. As will be evident throughout, a South Asian regime for refugee protection can be conceived largely through individual State practice and through bilateral agreements. In fact, the South Asian Association for Regional Cooperation (SAARC) has construed refugee movement as a matter of bilateral or trilateral relations, and has regarded international agreements as constricting States' freedom of action.[2]

The chapter begins by providing some background of the region, a brief overview of refugee movements there, and some discussion of the 'Eurocentrism' of the global

[1] Pia Oberoi, *Exile and Belonging: Refugees and State Policy in South Asia* (OUP 2006).

[2] Myron Weiner, 'Rejected Peoples and Unwanted Migrants in South Asia' (1993) 28 Economic and Political Weekly 1737, 1745.

refugee regime that led to the establishment of a *de facto* framework of subcontinental defiance. It then examines UNHCR's operational presence in South Asia and its impact on refugee protection. Finally, it considers how national constitutional provisions have been interpreted in a way that provides some protection to refugees.

2. Background

a. The Partition of India, Cartographic Divisions, and the Refugee Regime

The Partition of India, which divided British India into India and Pakistan, constituted a violent end to formal colonialism in South Asia and resulted in mass displacement across newly created international borders—Hindus and Sikhs to India, and Muslims to Pakistan.[3] Both States faced tremendous challenges in responding to the protection needs of the displaced, which led to 'extraordinary interventions'[4] and the groups being pitted against one another.[5] This coincided with the early deliberations for a post-war international refugee treaty. Reflecting on these deliberations during a visit to Europe in 1946, India's Defence Minister, VK Krishna Menon, stated that '[the] outstanding and overall impression left on my mind [is of] very limited reference to our internal problems and difficulties',[6] a matter that coloured both India and Pakistan's engagement with the formal drafting process of the Refugee Convention.

After the Partition, India and Pakistan attempted to engage constructively with the formal drafting process of what was to become the Refugee Convention.[7] A UN General Assembly resolution adopted in January 1946 stated that the 'main task concerning displaced persons [was] to encourage and assist in every way possible their early return to their countries of origin'.[8] At the 77th meeting of the Third Committee on Social, Humanitarian and Cultural Questions, the representative from Pakistan drew attention to that resolution and stated that '[to] avoid disturbing friendly relations between nations, refugees should not be settled in a region in which the majority of the inhabitants

[3] Vazira Fazila-Yacoobali Zamindar, *The Long Partition and the Making of Modern South Asia: Refugees, Boundaries, Histories* (Columbia University Press 2010) 1.

[4] Yasmin Khan, *The Great Partition: The Making of India and Pakistan* (Yale University Press 2017) xxiii.

[5] Zamindar (n 3) 1.

[6] Government of India, External Affairs Department, *Report by V. K. Krishna Menon on Visits to Various European Capitals* (Government of India Press 1946) 41 cited in Oberoi (n 1) 18.

[7] Pia Oberoi, 'South Asia and the Creation of the International Refugee Regime' (2001) 19(5) Refuge 36, 38.

[8] 'The Question of Refugees', UNGA res 8(I) (29 January 1946). See also Constitution of the International Refugee Organization (adopted 15 December 1946, entered into force 20 August 1948) 18 UNTS 3.

were opposed to such resettlement'.[9] The representative noted that the resolution provided that States should be willing to encourage and assist in every possible way the early return of persons of concern to their country of nationality or habitual residence. However, given the unique circumstances of the Partition of India, which created new borders along ethno-religious lines, the idea of returning people to their place of habitual residence or country of nationality could not be considered. At a subsequent Economic and Social Council (ECOSOC) meeting in 1949, India sought to recognize its efforts in assisting refugees during the Second World War. However, from 1947 onwards it had been faced with its own refugee problem, post-Partition, and 'had been unable to give anything more than moral support to the International Refugee Organization'.[10] The Indian representative pointed out that this 'was not from lack of sympathy with its aims, but from lack of resources'.[11]

Despite their initial reluctance, India and Pakistan continued to engage with the formal drafting process of the Refugee Convention. However, both States expressed concerns on various issues, most importantly the definition of a refugee. Noting the option contained in article 1B of the Convention to limit the definition to people displaced on account of 'events occurring in Europe before 1 January 1951', the representative from Pakistan 'was of the opinion that the definition … should not be limited by any territorial boundaries', and furthermore expressed the hope 'that the scope of the definition would be extended by the General Assembly so as to cover unfortunate people both inside and outside the boundaries of Europe'.[12]

In separate meetings of the Third Committee, India and Pakistan's permanent representatives to the United Nations requested that the Convention address racial and religious discrimination directed towards some refugees.[13] They also expressly requested that displacement resulting from the Partition be addressed. However, they were met with resistance, resulting in their disillusionment with both the Convention and UNHCR's mandate.[14] India stated that the 'objections raised confirmed [their] belief that fundamental differences existed'.[15]

[9] Third Committee, Social, Humanitarian and Cultural Questions, Summary Record of the Seventy Seventh Meeting held at Lake Success, New York (6 November 1947), UN doc AC.3/SR.77, 189 (statement of Mrs Hussain).

[10] Economic and Social Council, Summary Record of the Ninth Session, Three Hundred and Twenty-Sixth Meeting (6 August 1949) UN doc E/SR.326, 628 (statement of Mr Desai).

[11] ibid.

[12] Economic and Social Council, Summary Record of the Eleventh Session, Four Hundred and Sixth Meeting (11 August 1950) UN doc E/SR.406, 278 (statement of Mr Amin).

[13] Third Committee, Social, Humanitarian and Cultural Questions, Summary Record of the Seventy Ninth Meeting, held at Lake Success, New York (7 November 1947) UN doc AC.3/SR.79, 200 (statement of Mr Sen). See also Third Committee (n 9) 189 (statement of Mrs Hussain).

[14] Oberoi (n 7) 42.

[15] Third Committee, Social, Humanitarian and Cultural Questions, Summary Record of the Eightieth Meeting held at Lake Success, New York (7 November 1947) UN doc AC.3/SR.80, 211 (statement of Mr Sen).

b. From the League of Nations to the United Nations

India's experience with refugee protection predated post-Partition displacement. A founding member of the League of Nations,[16] India had provided assistance, sanctuary, and identity certificates to Russian refugees[17] and refugees from the Saar.[18] As part of efforts to settle Jewish refugees in India, a Jewish colony was created in the suburbs of Delhi to aid those expelled from Germany.[19]

Despite India's engagement in these processes, it was with mixed sentiments. Some Indian nationalist leaders declared that 'the League of Nations was a fraud and was meant for the perpetuation of imperialism',[20] while a member of India's Council of State, Phiroz Sethna, argued that 'India cannot take her rightful place in international affairs unless she has her right place as a nation'.[21] India subsequently became a full member of the United Nations while it was still under British rule.[22]

c. A Myth of Difference

Refugee movements within South Asia post-Partition resulted both from the direct involvement of Western colonial powers, 'who were also among the founding members of the international refugee regime',[23] and Britain's sudden withdrawal from India, which was coupled with the creation of new international borders resulting in internal strife. In addition to this, South Asian States' disengagement with the global refugee regime can be viewed from the lens of the 'myth of difference'. This contributed to an understanding that 'the nature and character of refugee flows in the Third World

[16] See Lanka Sundaram, 'The International Status of India' (1930) 9(4) Journal of the Royal Institute of International Affairs 452, 455.

[17] See generally File No C1435/331/Rr.401/001/9/33, Distribution of Nansen Stamp—India (30 May 1928) (League of Nations Archives, Geneva). This file contains a series of memoranda and correspondence about Russian refugees in India between representatives of the Economic and Overseas Department of the India Office and the Nansen International Office for Refugees.

[18] Dossier No 20A/22493/19255 (20 February 1936) (League of Nations Archives, Geneva). At the Imperial War Conference of 1917, India was granted special representation on an equal footing with the self-governing dominions and played an important role in various international conferences. See Sundaram (n 16) 454.

[19] Letter from Indian civil servant Badri Prasad Mital to The Right Honourable Edward Fredrick Lindley Wood, Baron Irwin of Kirby Underdale on the 'Proposed Settlement of Jewish Refugees in India' (16 January 1939), in Settlement of Jewish Refugees in India, FO 371/24098/1737, Registry No W 1737/1737/48 (National Archives, London). The request was forwarded by A Dibdin, Esq, India Office to AWG Randall, Esq, Foreign Office (Document No P & J 671/39 in the same file, dated 17 February 1939). The request was subsequently approved by the latter without objection on 23 February 1939, as per a handwritten note in the same document.

[20] RP Anand, 'The Formation of International Organizations and India: A Historical Study' (2010) 23 Leiden Journal of International Law 5, 12.

[21] ibid 13. [22] ibid 17.

[23] Gil Loescher, 'The International Refugee Regime: Stretched to the Limit?' (1994) 47 Journal of International Affairs 351, 360.

were . . . radically different from refugee flows in Europe since the end of the First World War',[24] and as such, there was 'an image of a "normal" refugee' who could be identified as 'white, male and anti-communist—which clashed sharply with individuals fleeing the Third World'.[25] The result was that the Third World developed a very different view of forced migration, premised on the idea that Western conceptions overlooked the role that colonialism played in creating instability and postcolonial anxieties for individuals.

The myth of difference, in addition to historically constrained notions of persecution, was foundational in conceptualizing specific practices of international protection in South Asia.[26] Both India and Pakistan were compelled to contend with millions who were dispossessed as a result of the Partition. They were also confronted with the new geopolitical realities and faced enormous challenges that came with nation-building. And despite their repeated attempts to draw attention to the protection concerns of those displaced as a result of the abrupt and violent end to formal colonialism, the scope of the Refugee Convention was not formally broadened. As a result, South Asian States had to re-examine their role in refugee protection and develop mechanisms that were more aligned with their regional concerns, and practices that were more pertinent to the specific needs of the displaced people they hosted.

3. Examination of Refugeehood in the Subcontinent and Post-Partition Evolution of the 'Refugee' Concept

Despite the 1967 Protocol removing the temporal and spatial constraints, South Asian States remained disillusioned with the Refugee Convention's core objectives. Perhaps for this reason, States in the region have instead chosen to regard refugee protection as matters between States and have reasserted their position that the Convention and Protocol fail to capture the experiences of displacement in the region by not ratifying these instruments. These interventions included, but were not limited to, the implementation of a unique legal and operational concept of refugeehood in some States, which allowed for the right of people to escape ethno-religious violence.[27] Pakistan, for instance, included *muhajir* or refugee as a category in its 1951 census. *Muhajirs* were those who had moved to Pakistan as 'a result of Partition or fear of disturbances connected therewith'.[28] The newly formed government of Pakistan

[24] BS Chimni, 'The Geopolitics of Refugee Studies: A View from the South' (1998) 11 JRS 350, 351.
[25] ibid 351.
[26] Lucy Mayblin, *Asylum After Empire: Colonial Legacies in the Politics of Asylum Seeking* (Rowman & Littlefield International 2018) 30.
[27] Aristide Zolberg, Astri Suhrke, and Sergio Aguayo, *Escape from Violence: Conflict and the Refugee Crisis in the Developing World* (OUP 1989) 132.
[28] ibid.

provided them settlement in urban areas in the province of Sindh. Similarly, India and Pakistan signed the 1950 Nehru-Liaquat Pact whereby the two governments agreed to protect people who had been displaced as a result of violence along religious lines.[29] The pact also guaranteed minorities 'complete equality of citizenship, irrespective of religion, a full sense of security in respect of life, culture, property and personal honour, freedom of movement within each country and freedom of occupation, speech and worship, subject to law and morality'.[30]

South Asian States' responses to mass exodus since the Partition of India show that, in essence, they have adhered to the core principle of *non-refoulement* set out in article 33 of the Convention.[31] A number of *ad hoc* mechanisms have been formulated to provide sanctuary, material assistance, and protection to refugees. Tibetan, Sri Lankan, and Bangladeshi refugees in India, Afghan refugees in Pakistan, Bhutanese refugees in Nepal, and Rohingya refugees in Bangladesh have all been provided with either temporary sanctuary or long-term protection.[32]

a. Relationship with UNHCR

Over time, States in the region have worked closely with UNHCR to extend protection to refugees, including by permitting UNHCR to operate in their territories and by actively participating in the deliberations of its Executive Committee (ExCom).[33] In some cases, on account of the absence of a formal legal framework governing the treatment of refugees and the lack of an administrative framework to determine refugee status, UNHCR undertakes refugee status determination (RSD) itself.[34] For instance, in India, UNHCR is actively engaged in protection activities including the registration of asylum seekers, RSD, and the provision of documentation facilitating their right to stay in India without the risk of deportation or detention.[35] It conducts RSD for certain groups of refugees, whereas others, such as Tibetan and Sri Lankan refugees, are assisted directly by the Indian government. This is an example of how, in India, different refugee groups enjoy different privileges.[36]

[29] Agreement between the Governments of India and Pakistan regarding Security and Rights of Minorities (adopted 8 April 1950) 1 India Bilateral Treaties and Agreements 243 (Nehru-Liaquat Agreement) <https://mea.gov.in/Portal/LegalTreatiesDoc/PA50B1228.pdf> accessed 30 April 2020.

[30] ibid para A.

[31] Veerabhadran Vijayakumar, 'A Critical Analysis of Refugee Protection in South Asia' (2001) 19(2) Refuge 10.

[32] ibid 9. [33] Vijayakumar (n 31) 9.

[34] Sarbari Sen, 'Paradoxes of the International Regime of Care: The Role of the UNHCR in India' in Ranabir Samaddar (ed), *Refugees and State: Practices of Asylum and Care in India 1947–2000* (Sage 2003) 404.

[35] UNHCR, 'Factsheet India' (February 2016) <https://www.unhcr.org/en-au/protection/operations/50001ec69/india-fact-sheet.html> accessed 30 April 2020.

[36] Sen (n 34) 405.

At other times, there is a joint approach involving both the State and UNHCR. For instance, the reception and settlement of Tibetan refugees in Nepal and India has been facilitated by the Central Tibetan Administration (Tibet's government in exile), in collaboration with the governments of India and Nepal.[37] In 1989, Nepal signed a Gentleman's Agreement with UNHCR, which allowed the latter to manage and issue identity certificates to all new Tibetan arrivals.[38]

In yet other cases, UNHCR has undertaken RSD at the insistence of the judiciary.[39] For instance, in *Bogyi v Union of India*, the High Court of Assam stayed the deportation order of an asylum seeker from Burma and directed the UNHCR office in New Delhi to consider his application for political asylum.[40] Similarly, in *Malavika Karlekar v Union of India*, the Supreme Court of India stayed the deportation of 21 Burmese Nationals from the Andaman Islands, pending their RSD by UNHCR.[41]

The subcontinent's adherence to the spirit of international refugee protection norms is also evident from India, Pakistan, and Bangladesh's membership of ExCom. Sen suggests that India's involvement since it joined in 1995 can be attributed to its desire in obtaining successive terms on the UN Security Council: being seen as an active participant in a multilateral body like UNHCR may better its chances.[42] Sen also argues that, given Pakistan's membership of ExCom, India may be concerned that it might agitate against India's national interests.[43]

Chimni notes that despite India's membership of ExCom, the government has neither taken steps to ratify the Refugee Convention nor to pass comprehensive national legislation on refugee protection in India.[44] However, Chimni suggests that if India were to adopt national legislation on refugee protection, this could strengthen its reputation within ExCom and be interpreted as a sign that India takes its membership (and refugee law) seriously. He argues that by neither passing national legislation nor signing the Convention, India's involvement in ExCom hints at opportunism.[45]

b. Regional Initiatives

Given the scale of refugee movements in the subcontinent since the Partition of India, challenges have remained in developing nuanced individualized RSD procedures. As outlined below, States in the region have engaged in coordinated efforts to respond to

[37] Vijayakumar (n 31) 11.

[38] For a detailed explanation of the origin and nature of the Gentleman's Agreement, see *Tibet's Stateless Nationals: Tibetan Refugees in Nepal* (Tibet Justice Center 2002) 88–104 www.tibetjustice.org/reports/nepal.pdf accessed 27 April 2020.

[39] Vijayakumar (n 31) 10.

[40] *Bogyi v Union of India*, Civil Rule No 1847/89, 17 November 1989 (Gauhati High Court, India).

[41] *Malavika Karlekar v Union of India*, Writ Petition (Criminal) No 583 of 1992, 25 September 1992 (Supreme Court of India).

[42] Sen (n 34) 401. [43] ibid.

[44] BS Chimni, 'Status of Refugees in India: Strategic Ambiguity' in Samaddar (ed) (n 34) 459.

[45] ibid 465–6.

refugee movements throughout the last few decades. In many cases, States have engaged in group determination procedures 'whenever numbers [have made] individual status determination impossible'.[46]

There have been several regional initiatives formulated to respond to displacement, some resulting in the adoption of principles or guidelines (albeit not legally binding). These processes show that States in the region are committed to the core objectives of the refugee regime, even if they continue to refuse to ratify the Convention or Protocol.

i. *Asian-African Legal Consultative Organization (AALCO)*

The AALCO, an intergovernmental consultation group comprising 47 Member States in Asia and Africa, adopted the Bangkok Principles on Status and Treatment of Refugees in 1966.[47] Although the principles are not binding, they have provided important guidance on protection norms. This is particularly important in a region that, unlike many others, does not have extensive binding treaties or frameworks on refugee protection. The principles have been modified over time to reflect the experiences of refugees, and were revised in 2001 to reflect an expanded refugee definition, which included persecution based on colour, ethnic origin, and gender.[48]

ii. *Informal Consultations on Refugee and Migratory Movements*

The Informal Consultations on Refugee and Migratory Movements in South Asia were a series of meetings initiated by the former UN High Commissioner for Refugees, Sadako Ogata, in 1994, to discuss strategies and common approaches for strengthening refugee protection and finding durable solutions. An Eminent Persons Group (EPG) was established with representatives from Bangladesh, India, Nepal, Pakistan, and Sri Lanka. The core objective of the consultations was to find ways to reconcile the narrowness of States' power-political interests with their humanitarian and international law responsibilities.[49] The meetings were undertaken with the aim of developing 'a South Asian perspective on the pathways that would lead to a lasting solution'.[50] At the Fourth Informal Consultation, the need for a regional normative framework covering refugees, stateless persons, and the internally displaced was articulated.[51] The Seventh Informal Regional Consultation of the EPG, held in New Delhi in December 2002, concluded with the need for a declaration that would serve as a platform for reinforcing refugee

[46] Marjoleine Zieck, 'The Legal Status of Afghan Refugees in Pakistan, a Story of Eight Agreements and Two Suppressed Premises' (2008) 20 IJRL 253, 254.

[47] Asian-African Legal Consultative Organization (AALCO), 'Final Text of the AALCO's 1966 Bangkok Principles on Status and Treatment of Refugees ("Bangkok Principles")' (24 June 2001) <www.refworld.org/docid/3de5f2d52.html> accessed 22 April 2020. See also Chapters 18, 21, and 23 in this volume.

[48] Andreas Zimmermann and Claudia Mahler, 'Article 1A, Para 2' in Andreas Zimmermann (ed), *The 1951 Convention relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (OUP 2011) 319.

[49] Pia Oberoi, 'Regional Initiatives on Refugee Protection in South Asia' (1999) 11 IJRL 193, 197.

[50] ibid.

[51] Chowdhury Abrar, 'Legal Protection of Refugees in South Asia' (1999) 10 Forced Migration Review 21, 22.

protection principles, reiterate the need for States to enact national refugee legislation, and provide a harmonized approach to refugee protection for the region. Accordingly, the South Asia Declaration on Refugees was adopted by the EPG in January 2004[52] (although there is no evidence that it is being applied in South Asian States). A further significant outcome of the consultations was the idea that such meetings enhanced the potential significance for the future direction of refugee policy in the region.[53]

iii. *Asia Pacific Consultation on Refugee Rights and the Asia Pacific Refugee Rights Network*

Regional initiatives have also been initiated by the Asia Pacific Refugee Rights Network (APRRN), which undertakes consultations on refugee rights on a biannual basis under the auspices of the Asia Pacific Consultation on Refugee Rights (APCRR). The APCRR has positioned itself as a regional network that 'capitalizes on the diversity of its members and the resources within the network to promote collaboration'.[54] Its biannual consultations provide a platform to explore innovative solutions to advance refugee rights and protection in the region. At its 2018 meeting, its South Asia working group identified the need for networking and collaboration with other organizations and agencies to better create viable solutions for refugee protection in the region.[55] The group also discussed the formation of a Rohingya Working Group and suggested a 'comprehensive mapping exercise of Rohingya people in their respective countries'.[56] The prospect of a Rohingya Working Group was followed by the Indian government's decision to begin the deportation and forced repatriation of Rohingya refugees. In August 2017, the government directed Indian authorities to identify 'illegal immigrants', including the Rohingya, and to deport them.[57] A petition was filed in the Supreme Court to stop this,[58] and an *amicus curia* brief by the UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, E Tendayi Achiume, directed the court's attention to India's obligations under international law precluding such removals.[59] In light of India's anti-Muslim and anti-refugee sentiments, Achiume pointed out that this deportation order would violate India's obligations to

[52] The South Asia Declaration on Refugees (adopted January 2004) <https://shodhganga.inflibnet.ac.in/bitstream/10603/28291/17/17_appendices.pdf> accessed 22 April 2020.

[53] Oberoi (n 49) 198.

[54] Asia Pacific Refugee Rights Network, 'Report on the 7th Asia Pacific Consultation on Refugee Rights' (Asia Pacification Consultation on Refugee Rights, Bangkok, 23–25 October 2019) <http://aprrn.info/wp-content/uploads/2019/09/APCRR7-Report-.pdf> accessed 12 February 2020.

[55] ibid 53. [56] ibid.

[57] Krishna N Das and Sankeev Miglani, 'India Says to Deport all Rohingya Regardless of UN Registration', *Reuters* (14 August 2017) <https://www.reuters.com/article/us-myanmar-rohingya-india-idUSKCN1AU0UC> accessed 27 April 2020.

[58] *Mohammad Salimullah v Union of India*, Writ Petition (C) No 79 of 2017, 30 August 2017 (Supreme Court of India).

[59] Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, 'Legal Opinion on India's Obligations under International Law to Not Deport Rohingyas' (12 July 2019) <https://www.ohchr.org/Documents/Issues/Racism/SR/Amicus/AmicusBrieftoIndianSupremeCourt.pdf> accessed 27 April 2020.

international human rights treaties. More importantly, the brief highlighted that India would violate the principle of *non-refoulement* and that such 'evaluations [should be] free from racial discrimination and that racial inequalities in these decisions do not arise directly or indirectly'.[60]

iv. *Summary*

While the regional initiatives above have not resulted in binding legal frameworks, they have helped to provide clarity on some of the core objectives of the global refugee regime by reaffirming the principles outlined in various international frameworks.[61] By bringing States together, they have helped to address 'convergent expectations' with respect to refugee protection.[62] While this may not seem like a high bar, it must be understood within the historical context of displacement in the region. These regional initiatives should therefore not be viewed as inconsistent with the international protection regime, but rather as steps in the right direction, given the region's tumultuous history.

c. State Practice: India

In addition to regional initiatives, individual States in the region have responded to mass refugee movements from neighbouring States and beyond. The next sections provide an overview of their practices.

While India has provided protection to different groups of refugees over time, its practice has not been consistent. As this section explains, while Tibetan refugees were provided with material assistance, land, residence permits, and even settlement areas, for instance, Sri Lankan Tamil refugees and Chakma refugees were settled in camps, with many subsequently repatriated. The following sub-sections illustrate this differential treatment in more detail.

i. *Tibetan Refugees in India*

Soon after the arrival of the Dalai Lama in 1959, India formally granted him asylum—and by extension, to any Tibetan fleeing violence. This policy was initially a response to public opinion and a feeling of kinship.[63] Subsequently, India initiated relief efforts to assist Tibetan refugees. At the peak of the Tibetan refugee movements into India in 1961, the Lok Kalyan Samiti (a Delhi-based NGO) and the Central Relief Committee for Tibetan Refugees were involved in providing aid.[64] The Indian government also welcomed aid from voluntary organizations, and the Central Relief Committee was respon-

[60] ibid 18. [61] Oberoi (n 49) 194. [62] ibid. [63] Oberoi (n 1) 84.

[64] Interoffice Memorandum from Gilbert Jaeger to the High Commissioner on 'Tibetan Refugees in India—Visit of Shri PN Sharma' (6 November 1961), in Tibetan Refugees in India, File No 11/1-15/0/IND/TIB (UNHCR Archives, Geneva).

sible for receiving and coordinating it.[65] In addition to international aid, the Indian government provided Tibetan refugees with 'subsistence money, land to settle, and administrative support upon arrival'.[66] They were also issued with Indian Registration Certificates on a *prima facie* basis, which they could use as an identity document as well as a residence permit.[67]

ii. *Bangladeshi Refugees in India*

India and Pakistan went to war in 1971 over the right of East Pakistan to secede. These geopolitical instabilities were manifestations of postcolonial nation-building and the politics of newfound nationalism.[68] This prompted a mass forced migration into the neighbouring Indian states of West Bengal, Tripura, Meghalaya, and Assam. As Luthra explained at the time, in 'the brief span of seven months upto [sic] the end of October 1971, the influx from East Bengal has been of the order of 9.5 million'.[69] India's position on ensuring the provision of relief for millions of refugees from East Pakistan also reinforced the idea that refugees were 'a matter of bilateral not multilateral relations and that international agreements could constrict their freedom of action'.[70] In August 1973, India and Pakistan signed the Delhi Agreement, which outlined the repatriation of Bengalis from Pakistan to Bangladesh, and the repatriation of non-Bengalis from Bangladesh to Pakistan.[71] India's Ministry of External Affairs was steadfast in preventing refugees from returning, given that the change in regime in East Pakistan (which was now Bangladesh) had not been particularly hospitable to those who had fled deteriorating conditions.[72] The image of a refugee was of one who had the right to asylum and sanctuary solely due to the circumstances of flight, and whose ability to seek protection was not to be constrained by the restrictive elements of the Refugee Convention.[73]

iii. *Sri Lankan Refugees in India*

In 1983, soon after the anti-Tamil riots in Sri Lanka, several thousand refugees arrived in India.[74] By the mid-1980s, many Sri Lankan refugees were living in government-assisted refugee camps, most of which were situated in the southern Indian state of Tamil Nadu. While India's response to the exodus of Tamil refugees was positive initially, over time their presence began to be viewed as a threat to national security. This was the result of the assassination in 1991 of the former Prime Minister of India, Rajiv Gandhi. The state government of Tamil Nadu had imposed rigid restrictions on the movement of Sri

[65] Letter from Kalyan Singh Gupta, General Secretary, The Central Relief Committee (India) to Gilbert Jaeger, Deputy Director Office of the High Commissioner for Refugees (25 January 1962), in Tibetan Refugees in India, File No 11/1-15/0/IND/TIB, Reference No 16(62)-9030 (UNHCR Archives, Geneva).

[66] Oberoi (n 1) 95. [67] ibid. [68] ibid 104.

[69] PN Luthra, 'Problem of Refugees from East Bengal' (1971) 50 Economic and Political Weekly 2467.

[70] Weiner (n 2) 1745.

[71] India–Pakistan: Agreement on Repatriation of Prisoners of War (adopted 28 August 1973) 12 ILM 1080 (1973) (Delhi Agreement).

[72] Oberoi (n 1) 119. [73] ibid 135.

[74] BS Chimni, 'The Legal Conditions of Refugees in India' (1994) 7 JRS 378, 383.

Lankan Tamil refugees after the assassination. The government also initiated repatriation procedures, and many Tamil refugees began to be settled in temporary transit camps in Sri Lanka. The programme was suspended after concerns were raised about their security. This led to UNHCR establishing an office in the southern Indian city of Madras (Chennai), based on a memorandum of understanding between the Indian government and UNHCR.[75] Today, there are still more than 62,000 Tamil refugees living in 107 camps in Tamil Nadu, and around 37,000 refugees living outside of the camps.[76] India has instituted a policy to grant them residence visas and work permits. However, little has been done to enable them to apply for citizenship and many continue to live in a state of limbo.[77]

iv. *Constitutional Provisions and Case Law*

Jurisprudential developments in India have also contributed to refugee protection, often drawing on constitutional law, and at times also on international legal principles. For instance, the case of *National Human Rights Commission (NHRC) v State of Arunachal Pradesh*[78] emerged from a public interest petition filed by the NHRC, seeking to enforce the provisions of article 21 of the Constitution (concerning the right to life and personal liberty). The court stated that the Constitution 'confers certain rights on every human being and certain other rights on citizens. Every person is entitled to equality before the law and equal protection of the laws.'[79] It held that India 'is bound to protect the life and personal liberty of every human being, be he a citizen or otherwise, and it cannot permit anybody or group of persons … to threaten the Chakmas to leave', noting also that the State's institutions must take steps to 'carry out its legal obligations to safeguard the life, health and well-being of Chakmas residing in the state without being inhibited by local politics'.[80]

The case of *Ktaer Abbas Habib Al Qutaifi v Union of India* originated from a special civil application to the High Court of Gujarat, which sought direction to release two Iraqi asylum seekers from detention in the western Indian state of Gujarat.[81] The petitioners sought a stay of deportation, based on the principle of *non-refoulement*, and release from detention. The court noted the Supreme Court's ruling in *NHRC* that the Constitution guarantees certain fundamental human rights to non-citizens,[82] and held that '[the principle of *non-refoulement*] prevents expulsion of a refugee where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion'.[83] The court further stated that this aligned with 'Article 21 of the Constitution, so long as the presence of refugee [sic] is not

[75] ibid 387.

[76] Amaya Silvela, 'Sri Lankan Tamil Refugees in India: Return or Integration?' (2019) 62 Forced Migration Review 13.

[77] ibid.

[78] *National Human Rights Commission v State of Arunachal Pradesh*, 1996 SCC (1) 742 (Supreme Court of India).

[79] ibid para 20.

[80] ibid.

[81] *Ktaer Abbas Habib Al Qutaifi v Union of India*, 1999 CRI LJ 919 (Gujarat High Court, India).

[82] ibid para 10.

[83] ibid para 18.

prejudicial to the law and order and security of India. All member nations of the United Nation [sic] including our country are expected to respect for [sic] international treaties and conventions concerning Humanitarian law.'[84]

d. State Practice: Pakistan

Like India, Pakistan was compelled to deal with post-Partition displacement and has hosted several groups of refugees over the years. Pakistan's disillusionment with the Refugee Convention was rooted in its inability to convince the drafters to expand the refugee definition to include Partition refugees. After the Liberation War of 1971 that saw the creation of the sovereign State of Bangladesh, the Delhi Agreement of 1973 was signed between India and Pakistan.[85] In the aftermath of the Liberation War, the agreement sought: (a) the repatriation of Bengalis from Pakistan to Bangladesh; (b) the repatriation of non-Bengalis from Bangladesh to Pakistan; (c) the repatriation of Pakistani prisoners of war and civilian internees held by India; (d) resolution of the issue of 195 Pakistani prisoners of war whom Bangladesh had charged with the commission of war crimes; and (e) recognition of Bangladesh by Pakistan.[86] Under this agreement, Pakistan received thousands of Bihari/non-Bengali refugees (who shared linguistic proximity to Urdu speaking Pakistanis) as a part of the repatriation effort coordinated by UNHCR.

Since 1979, Pakistan has also hosted millions of Afghan refugees fleeing regime changes.[87] Until 2001, they were recognized *prima facie* as refugees; in August 2001, individual RSD procedures were briefly introduced on account of the government's concern to distinguish those with an international protection need from 'economic migrants'.[88] Even those who were found to have an international protection need were no longer granted 'refugee' status, but were instead designated as 'persons of concern' and entitled only to temporary protection.[89]

After each major political change in Afghanistan, an agreement was concluded between the government of Pakistan and UNHCR (and sometimes also the government of Afghanistan) concerning the voluntary repatriation of Afghan refugees from Pakistan.[90] Zieck suggests that, of these, the 1993 Cooperation Agreement was crucial because

> on the basis of the cooperation it prescribes, in particular its substantive content, it could be argued that the host state is bound to observe a substantive body of refugee law, well beyond anything that could be derived from customary international law, with regard to those who qualify as refugees on the basis of UNHCR's extended mandate.[91]

[84] ibid. [85] Delhi Agreement (n 71).
[86] Howard S Levie, 'The Indo-Pakistani Agreement of August 28, 1973' (1974) 68 AJIL 95, 95–7.
[87] Zieck (n 46) 253. [88] ibid 254, 260, 261. [89] Zieck (n 46) 266 (fn omitted).
[90] ibid 256. [91] Zieck (n 46) 266.

UNHCR conducts RSD in Pakistan in accordance with that agreement, and those in search of asylum, as well as those recognized as refugees, are permitted to remain in Pakistan until a durable solution can be found for them.[92]

In 2007, Pakistan issued Afghan refugees with proof of registration cards, valid for 10 years, authorizing their temporary legal stay, freedom of movement, and an exemption from the application of the Foreigners Act 1946.[93]

e. State Practice: Bangladesh

Bangladesh, being the newest sovereign State in the subcontinent, has also had to deal with the ramifications of instability in neighbouring countries, in particular Myanmar. Soon after the formal end to colonialism in Myanmar in 1948, tensions between the government and the Rohingya population grew. Although there were efforts to integrate the Muslim population of Myanmar into East Bengal (present-day Bangladesh), this was rejected by both sides.[94] A 1977 census in Myanmar regarded the Rohingya as foreigners, which resulted in violence directed towards their communities in Rakhine state. By 1978, some 200,000 Rohingya had fled to Bangladesh.[95] Subsequently, the 1982 Citizenship Law of Burma categorically denied the Rohingya citizenship rights in that country.[96] With increasingly repressive measures and violence against the Rohingya, thousands more fled to Bangladesh. The government responded to this large-scale exodus by setting up refugee camps in Cox's Bazar and the Chittagong Hill Tracts, with assistance from UNHCR.[97]

However, such policies of encampment and denial of freedom of movement have been highly problematic.[98] Furthermore, many Rohingya have been forcibly repatriated despite expressing ongoing concerns about their safety, and notwithstanding Memoranda of Understanding between the Bangladeshi government and UNHCR.[99] The Rohingya's statelessness at home and their inability to access effective protection in Bangladesh reinforce their vulnerabilities.

Most recently, a series of boats carrying hundreds of Rohingya refugees have been denied entry into Bangladesh despite appeals from the international community.[100] The protracted nature of the Rohingya's displacement has been exacerbated by the

[92] UNHCR Pakistan, 'Asylum System in Pakistan' <https://unhcrpk.org/asylum-system-in-pakistan/> accessed 1 May 2020.

[93] ibid.

[94] Eileen Pittaway, 'The Rohingya Refugees in Bangladesh: A Failure of the International Protection Regime' in Howard Adelman (ed), *Protracted Displacement in Asia: No Place to Call Home* (Routledge 2008) 87.

[95] Akm Ahsan Ullah, 'Rohingya Refugees to Bangladesh: Historical Exclusions and Contemporary Marginalization' (2011) 9 Journal of Immigrant & Refugee Studies 139, 143.

[96] Burma Citizenship Law 1982 (Myanmar), MMR-130.

[97] Oberoi (n 1) 175. [98] Pittaway (n 94) 87. [99] Ullah (n 95) 154.

[100] 'UN Rights Chief urges Bangladesh to Accept Rohingya Boats', *Al Jazeera* (27 April 2020) <https://www.aljazeera.com/news/2020/04/rights-chief-urges-bangladesh-accept-rohingya-boats-200427142438774.html> accessed 28 April 2020.

bureaucratic machinations of the governments of Bangladesh, Myanmar, and UNHCR. Internationally, Gambia instituted proceedings in the International Court of Justice against Myanmar for violations of the Convention on the Prevention and Punishment of the Crime of Genocide,[101] resulting in provisional measures that Myanmar shall 'take all measures within its power to prevent the commission of all [genocidal] acts within the scope of Article II of this Convention'.[102]

f. State Practice: Nepal

Nepal has predominantly hosted refugees from Tibet and Bhutan. Around 20,000 were Tibetans who arrived before 1990 and were permitted to remain in Nepal.[103] The largest group were the Lhotsampas, an ethnic minority from Bhutan, who mainly speak Nepali and practice Hinduism (in contrast to Bhutan's Buddhist majority).[104] The exodus of around 100,000 Lhotsampas to Nepal from 1990 onwards was a result of three interrelated factors, according to refugee leaders.[105] First, changes to Bhutan's citizenship law in 1985, followed by a census in 1988, characterized the Lhotsampas as non-citizens and 'illegal immigrants' who were 'a threat to the cultural autonomy and political order of the northern Bhutanese'.[106] Secondly, they were subjected to discriminatory laws and policies; and thirdly, they were denied the right to free expression and protest.[107]

Nepal initially accommodated the Lhotsampas in transit camps, but subsequently allocated land and established eight refugee camps in the Jhapa and Morang districts.[108] It also sought the assistance of UNHCR 'which provided emergency assistance to the swelling numbers of refugees'.[109] The World Food Programme provided basic food rations, while other UN agencies provided 'technical assistance to UNHCR'.[110]

Nepal pursued a three-pronged approach to try to resolve the situation: internationalization of the issue, engaging in bilateral talks with Bhutan, and seeking the involvement of India.[111] First, Nepal engaged in efforts to draw the international community's attention to the issue so that Bhutan might agree to negotiate a solution,

[101] Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1949, entered into force 12 January 1951) 78 UNTS 277.

[102] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)* (Order, 23 January 2020), para 86 <https://www.icj-cij.org/files/case-related/178/178-20200123-ORD-01-00-EN.pdf> accessed 27 April 2020.

[103] UNHCR, *Global Report 2000* (UNHCR 2001) 303.

[104] Ben Saul, 'Cultural Nationalism, Self-Determination and Human Rights in Bhutan' (2000) 12 IJRL 321, 325.

[105] ibid 324. [106] ibid 321. [107] ibid 324.

[108] Rajesh S Kharat, 'Bhutanese Refugees in Nepal: Survival and Prospects' (2003) 38(4) Economic and Political Weekly 285, 285.

[109] Tang Lay Lee, 'Refugees from Bhutan: Nationality, Statelessness and the Right to Return' (1998) 10 IJRL 118, 125.

[110] Kharat (n 108) 288.

[111] Zubia Ikram, 'Bhutanese Refugees in Nepal: An Analysis' (2005) 58 Pakistan Horizon 101, 110.

but interest was minimal.[112] Secondly, despite a series of joint ministerial meetings over a decade, Nepal and Bhutan were unable to reach an agreement.[113] Bilateral talks also took place on the side-lines of the SAARC summit in 1993, but Bhutan refused to acknowledge the Lhotsampas as citizens and the talks failed. Finally, India's intervention was minimal. This left only one option: third country resettlement.[114] In 2007, UNHCR and the International Organization for Migration commenced efforts to facilitate this resettlement process.[115] In conjunction with a number of States, the process of resettlement proved largely successful with over 113,500 Bhutanese refugees resettled in third countries by the end of 2019,[116]

4. Conclusion

The subcontinent's experience of displacement 'has largely gone unexamined because of its peripheral location to post-war international order'.[117] Yet, despite the fact that South Asian States have not ratified the key international treaties on refugees, nor established their own regional protection framework, State practice does reveal respect for the principle of *non-refoulement* and other protection norms. Indeed, each State in South Asia is formally bound by the core international human rights treaties, including the CAT and the ICCPR, which also impose *non-refoulement* obligations.[118] In addition, efforts have been made at both the regional and national levels to standardize protection norms, and States in the region have generally afforded temporary, and sometimes even permanent, sanctuary to groups of refugees over the years. This is why it is crucial to question the narrative of exclusivity that has developed within refugee studies, which has arguably marginalized protection experiences in States that are not parties to the Refugee Convention or Protocol. This chapter has sought to reorient the perspective by analysing the nature of forced migration in South Asia, and who can be identified as a refugee.

[112] ibid 111. [113] Saul (n 104) 323. [114] ibid.
[115] UNHCR, 'Nepal: Start of Resettlement Process for Bhutanese Refugees' (6 November 2007) <https://www.unhcr.org/en-au/news/briefing/2007/11/473055824/nepal-start-resettlement-process-bhutanese-refugees.html
[116] UNHCR, '2019 Year-End Report: Operation: Nepal' (30 July 2020) 4 <https://reporting.unhcr.org/sites/default/files/pdfsummaries/GR2019-Nepal-eng.pdf>.
[117] Zamindar (n 3) 7. [118] CAT, art 3; ICCPR, arts 6, 7.

CHAPTER 23

REGIONAL REFUGEE REGIMES

Southeast Asia

VITIT MUNTARBHORN*

1. Introduction

This chapter focuses on the 10 States that form the Association of Southeast Asian Nations (ASEAN): Brunei Darussalam, Cambodia, Indonesia, Lao People's Democratic Republic (Laos), Malaysia, Myanmar, Singapore, Thailand, the Philippines, and the Socialist Republic of Vietnam.[1] Where relevant, the chapter also refers to neighbouring States of Bangladesh, China, and Timor Leste.

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[1] For general literature on refugees in Southeast Asia, see Sara E Davies, *Legitimising Rejection: International Refugee Law in Southeast Asia* (Brill 2007); Sara E Davies, 'The 1989 Comprehensive Plan of Action (CPA) and Refugee Policy in Southeast Asia: Twenty Years Forward What Has Changed?' in Ademola Abass and Francesca Ippolito (eds), *Regional Approaches to the Protection of Asylum Seekers: An International Legal Perspective* (Ashgate 2014) 325; Martin Jones, 'Moving Beyond Protection Space: Developing a Law of Asylum in Southeast Asia' in Susan Kneebone, Dallal Stevens, and Loretta Baldassar (eds), *Refugee Protection and the Role of Law: Conflicting Identities* (Routledge 2014) 251; Penelope Mathew and Tristan Harley, *Refugee Protection and Regional Cooperation in Southeast Asia A Fieldwork Report* (Australian National University 2014); Susan Kneebone, 'ASEAN and the Conceptualization of Refugee Protection in Southeastern Asian States' in Abass and Ippoliti, ibid 295; Vitit Muntarbhorn, *The Status of Refugees in Asia* (Clarendon 1992); Vitit Muntarbhorn, '"Persons in Need of Protection" and Migration in the Asia-Pacific Region: The Refugee Phenomenon and Beyond' in *Dimensions of Human Rights in the Asia-Pacific Region* (National Human Rights Commission of Thailand 2002). For UNHCR updates, see further UNHCR, 'Regional Office for South-East Asia: Factsheet' (September 2014) <www.unhcr.org/protection/operations/519f67fc9/south-east-asia-fact-sheet.html> accessed 15 November 2019. For recent ASEAN developments see ASEAN, *Annual Report 2017–18* (2018).

A large number of recent refugee influxes both from and within the region pose an *intra*-regional challenge, inviting both regional and international cooperation. There is also an *inter*-regional perspective: at times, there are influxes of refugees from other regions into Southeast Asia, and a concurrent movement of refugees from this region to other parts of the world.[2] The colonial past may complicate matters: minority groups have not always been well accommodated as new States have emerged, and such minorities often become refugees due to lack of societal inclusion.[3]

At the outset, it may be asked: to what extent does the notion of 'asylum' appear in the history of the region, and to what extent are the nomenclature and international concept of 'refugees' accepted by Southeast Asian countries? The practice of granting asylum is not alien to this part of the world; historical records attest to the outflows and influxes of persons seeking asylum dating back centuries.[4] Such practices also had religious and cultural underpinnings, such as the notion of kindness towards others advocated by Buddhism and hospitality for strangers voiced by Islam.[5] The door became less open with the advent of the Indochina War from the late 1950s onwards. The Cold War affected domestic responses towards people seeking asylum and the hospitality from Southeast Asian countries became more constrained.

There has been a tendency by Southeast Asian States to avoid using the term 'refugees' at the national level, even though they have to deal with the term in international fora. Most States in the region do not have specific laws on refugee protection; their legal structure tends to classify people who seek refuge as 'illegal immigrants' under national immigration law. Occasionally, policies allowing asylum seekers to reside temporarily in the country pending durable solutions help to exempt them from the strictures of such laws. Other terms used to describe 'refugees' include 'displaced persons' (referring to cross-border rather than internal cases),[6] 'asylum seekers', 'persons of concern', or 'persons in need of protection'.[7]

[2] Such as the influx of Afghans and Syrians into Southeast Asia and outflows from Southeast Asia to Australia and beyond. Another example of cross-regional links was the case of Hakeem al-Araibi, a Bahraini footballer granted refugee status in Australia and then arrested in Thailand with the threat of *refoulement* to Bahrain. After diplomatic interventions, he was returned to Australia: Helen Davidson and Hannah Ellis-Petersen, 'Hakeem al-Araibi on Flight to Australia after Release in Thailand', *The Guardian* (12 February 2019) <https://www.theguardian.com/world/2019/feb/11/thailand-to-free-bahraini-footballer-hakeem-al-araibi> accessed 26 November 2019.

[3] See Chapter 2 in this volume.

[4] See eg Daniel GE Hall, *History of Southeast Asia* (St Martin's 1976); Bruno Lasker, *Asia on the Move* (Holt and Co. 1945); UN, 'Trends and Characteristics of International Migration since 1950', UN doc ST/ESA/SER.A/64 (1979); Special Issue: Forced Migration in/of Asia (2018) 31(3) JRS 261–425.

[5] See further Ven Phramaha Nopadol Saisuta 'The Buddhist Core Values and Perspectives for Protection Challenges: Faith and Protection' (UNHCR, November 2012); Ahmed Abu El Wafa, *The Right to Asylum between Islamic Shari'ah and International Refugee Law: A Comparative Study* (Naif Arab University for Security Sciences 2009). See Chapters 18 and 22 in this volume.

[6] Official documents in Thailand, for instance, refer to displaced persons and illegal immigrants rather than refugees; see further Muntarbhorn 1992 (n 1) ch 12.

[7] Even so, they may still be seen as illegal immigrants under local immigration law.

The jigsaw of complexity and diversity is a core part of the history of forced migration in the region. From the 1950s until the late 1980s, the main refugee groups were Cambodians, Laotians, and Vietnamese. The situation of the Laotians and Vietnamese was largely resolved by a package of measures adopted by countries of origin, first asylum countries, and resettlement countries through the Comprehensive Plan of Action (CPA) agreed upon in 1989.[8] The Cambodian situation was then settled largely by the peace process in the early 1990s, with large-scale return of Cambodians to their homes.[9] In the latter part of the 1990s, ASEAN was expanded from six States (the original members—Indonesia, Malaysia, Philippines, Singapore, and Thailand—plus Brunei, which joined in 1984) to 10, including former foes Vietnam, Laos, Myanmar, and Cambodia.

There have also been forced movements of groups from Myanmar, a country under military rule for many decades since the end of the Second World War. Large numbers of minorities and other ethnic groups have sought refuge in neighbouring Thailand (with a spillover into China) and a sizeable number remain in the country, awaiting durable solutions. Outflows of Muslim groups from Rakhine State, particularly Rohingyas, have also sought refuge by sea and land in Southeast Asian countries, such as Thailand, Malaysia, and Indonesia. Despite the presence of a civilian government in Myanmar in recent times, a caustic situation has resulted in further massive outflows in the period leading up to 2017 and beyond.[10]

Meanwhile, in recent decades, diverse groups from other parts of the world have moved into (and from) the region (often as individuals or household groups, rather than *en masse*). A variety of people seeking refuge can now be noted in the region, with major caseloads in Malaysia, Thailand, and Indonesia respectively, ranging from people from Africa to West Asia, South Asia, North Asia, and even Europe.[11] They are often referred to as urban refugees, hiding or housed in urban areas, by contrast with large ethnic groups from Myanmar, for instance, situated in camps or encampments in rural areas. Some have sought to travel to other parts of the Asia-Pacific region, including Australia and New Zealand, but have been turned back as a result of deterrence measures.[12] In 2019, the biggest group in the region was the Rohingya in Bangladesh, with over 700,000 people arriving in 2017, on top of an unresolved prior caseload—around 900,000 people altogether.[13]

[8] Muntarbhorn 1992 (n 1) 47–52; Sten A Bronee, 'History of the Comprehensive Plan of Action' (1993) 5 IJRL 534.

[9] See further UNSC, 'Letter dated 30 October 1991 from the Permanent Representatives of France and Indonesia to the United Nations to the Secretary-General', UN doc A/46/608 (30 October 1991).

[10] See further United Nations Office of the Coordination of Humanitarian Affairs, 'Rohingya Refugee Crisis' <https://www.unocha.org/rohingya-refugee-crisis> accessed 15 November 2019.

[11] For recent developments, see Executive Committee of the High Commissioner's Programme, 'Update on UNHCR's operations in Asia and the Pacific' (12 February 2019).

[12] See Chapters 24 and 27 in this volume.

[13] UNHCR, 'Refugee Movements in South-East Asia: 2018–June 2019' (2019) <www.unhcr.org/protection/migration/5d91e2564/refugee-movements-south-east-asia-2018-june-2019.html> accessed 13 October 2019.

Two salient features emerge in the discussion below. First, most Southeast Asian countries are still not parties to the international refugee instruments. Secondly, however, there is an extensive practice within the region of affording temporary refuge to most people seeking asylum, even if local integration or settlement remains the exception rather than the rule.

2. Legal Perspectives

a. International

Only two ASEAN States have ratified the Refugee Convention and Protocol, namely Cambodia and the Philippines, both without reservations.[14] Is the reticence of other States to follow suit on account of the perceived Eurocentrism of those instruments? Or is it because, in keeping their distance from such instruments, those States are steeped in some form of exceptionalism?

The low level of ratification results from various factors, falling between those two stools. States in the region have been generally hesitant to commit to international human rights instruments, and those on refugee protection in particular, despite international encouragement. Several States are non-democratic and wary of human rights advocacy; several produce refugees and receive refugees, sometimes concurrently. They are much attached to the principle of 'non-interference in the internal affairs of the State' as a buffer against outside pressure (as seen below with respect to the evolution of ASEAN instruments and mechanisms). Most significantly, States faced with mass influxes place much emphasis on national security; they do not wish to be bound by international refugee law obligations, which they perceive as inhibiting their ability to exercise discretion. They tend to subsume migration issues—including forced migration—under policy considerations, very much from the angle of how they perceive the impact on the country's sovereignty and national interest (namely, embedded in a security paradigm).

Some of the core human rights treaties have provisions particularly pertinent to refugees and offer channels to raise protection issues in States that are parties to them (even if they are not parties to the Refugee Convention or its Protocol). In particular, article 13 of the ICCPR prohibits the expulsion of aliens without due process of law, which should encourage States in the region to set up a national refugee status determination process in order to avoid *refoulement*, while 6 and 7 prohibit removal to a real risk of being arbitrarily deprived of life or being subjected to cruel, inhuman, or degrading treatment or punishment. Article 3 of CAT precludes *refoulement* to places where an individual faces a real risk of torture. Meanwhile, the CRC contains a specific provision on refugee chil-

[14] See UN Treaty Collection, 'Convention relating to the Status of Refugees' 1–2 <https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20V/V-2.en.pdf> accessed 15 November 2019.

dren (article 22), as well as principles of non-discrimination (article 2) and best interests of the child (article 3), which together bolster the rights to birth registration, education, humane treatment, and nationality acquisition.[15] All ASEAN States are parties to only three of the core human rights treaties: the CEDAW, the CRC, and the Convention on the Rights of Persons with Disabilities.[16]

Those instruments are complemented by the two statelessness treaties.[17] The 1954 Convention advocates non-discrimination for persons without a nationality, guaranteeing a range of human rights. The 1961 Convention opens the door to acquisition of the nationality of the country of birth by persons without a nationality. In the ASEAN region, only the Philippines is a party to the 1954 Convention, while no State is a party to the 1961 Convention.

On another front, under its Charter, the UN has set up various mechanisms that may also cover refugee protection, albeit more generally than under the Refugee Convention and its Protocol. One of the newest mechanisms is the Human Rights Council's Universal Periodic Review (UPR), which provides space for ventilating refugee-related issues in an interactive, dialogue-based process amongst peers.[18]

The rise of global policy 'frameworks' also influences refugee protection, despite not being 'hard law'. Importantly, commitments such as those in the Sustainable Development Goals (SDGs) have enjoyed great 'buy-in' from Southeast Asian States and can be important tools for advocacy, as well as for data systematization based upon UN and national indicators. The SDGs, which were preceded by various Millennium Development Goals, are a case in point.[19] Furthermore, in 2018, the two Global Compacts on Refugees and Migration were adopted by ASEAN States. The former underlines the Comprehensive Refugee Response Framework to uphold refugee right and assist host communities, opening the door to greater international solidarity and inviting more commitments from other actors, such as the World Bank. The Global Refugee Forum, to be held every four years at ministerial level, is a forum in which States and other stakeholders can announce pledges and contributions towards the Refugee Compact's objectives and to consider ways of enhancing responsibility-sharing. This may help to overcome the Refugee Convention and Protocol's lack of a monitoring mechanism and formal periodic review. Meanwhile, the Migration Compact tackles the issue of migration in general, countering such practices as smuggling and trafficking.

[15] CRC, arts 7, 28, 19.

[16] Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3.

[17] Convention on the Status of Stateless Persons (adopted 28 September 1954, entered into force 6 June 1969) 330 UNTS 117; Convention on the Reduction of Statelessness (adopted 30 August 1961, entered into force 13 December 1975) 989 UNTS 175.

[18] See further United Nations Human Rights Council, 'Universal Periodic Review' (2019) <https://www.ohchr.org/en/hrbodies/upr/pages/uprmain.aspx> accessed 15 November 2019.

[19] See further 'Transforming our World: the 2030 Agenda for Sustainable Development', UNGA res 70/1 (21 October 2015); UN, 'Sustainable Development Goals: Knowledge Platform' <https://sustainabledevelopment.un.org/sdgs> accessed 15 November 2019.

Importantly, it is the latter instrument that calls for an end to the detention of children on the move, particularly when it is interlinked with States' immigration laws.[20]

b. Regional

While Southeast Asia has no intergovernmental human rights or refugee protection system in the form of a systematic regional treaty, organization, or court, a variety of developments are of note.

Over the years, there have been efforts to concretize a regional approach and response to refugee movements. The most successful was the 1989 Comprehensive Plan of Action (CPA) between source, first asylum, and resettlement countries. Source countries, particularly Vietnam and Laos, undertook to address clandestine departures, including a dissemination campaign against irregular boat departures.[21] First asylum countries established a screening process (based on the refugee definition in international law) to allow those screened-in not only to stay temporarily, but also to resettle in third countries. Meanwhile, the latter, particularly developed countries, offered more guarantees of resettlement places. While this was an *ad hoc* arrangement, it exemplified a comprehensive regional arrangement for refugee protection which brought together source, transit, and destination countries.

Some Southeast Asian States have been involved in the drafting and adoption of various soft law guiding principles concerning refugees under the Asian–African Legal Consultative Organization (previously, the Asian–African Legal Consultative Committee). In 1966, it produced the Bangkok Principles on the Status and Treatment of Refugees, which were subsequently bolstered by the adoption of principles concerning the right to return (1970) and international solidarity and burden-sharing (1987). In 2001, the Organization officially adopted the final text of the 'Bangkok Principles'.[22]

The Bangkok Principles contain 13 articles, starting with the definition of 'refugee' (article I), which replicates article 1A(2) of the Refugee Convention and the expanded criteria of the OAU Convention.[23] Article II provides that everyone has the right to seek and enjoy asylum from persecution. Article III stipulates that the principle of *non-refoulement* covers non-rejection at the frontier, and notes that provisional asylum is a form of temporary refuge. This has no counterpart in the international refugee

[20] See further IOM, 'Global Compact for Migration' <https://www.iom.int/global-compact-migration> accessed 15 November 2019; Vitit Muntarbhorn, 'The Global Compacts and the Dilemma of Children in Immigration Detention' (2018) 30 IJRL 668.

[21] See further Executive Committee of the High Commissioner's Programme Standing Committee, 'Update on Regional Developments in Asia and Oceania', EC/46/SC/CRP.44 (19 August 1996); Muntarbhorn 1992 (n 1); Bronee (n 8).

[22] Asian–African Legal Consultative Organization, 'Final Text of the AALCO's 1966 Bangkok Principles on Status and Treatment of Refugees' (24 June 2001) <https://www.refworld.org/pdfid/3de5f2d52.pdf> accessed 13 October 2019. See also Chapters 18, 21, and 22 in this volume.

[23] See Chapter 15 in this volume.

instruments, but reflects the region's long-standing practice. Article IV underlines the protection of women and children (also a lacuna in the Refugee Convention), while article VI states that those who seek asylum have an inherent right of return (to the country of origin). In stipulating the voluntary nature of repatriation, they advocate the non-penalization of returnees (article VII). In calling for international cooperation, they highlight the need to address the root causes of displacement (article VIII), with leeway for the right to compensation for the refugee vis-à-vis the country of origin (article IX). They integrate the principle of international solidarity and burden-sharing into the protection framework (article X).

On another front, ASEAN's Constitution, the ASEAN Charter 2007—passed after decades of evolving together as an organization—mandates the establishment of a human rights body.[24] The ASEAN Inter-governmental Commission on Human Rights (AICHR) and the ASEAN Commission on the Rights of Women and of Children (ACWC) were established in 2009. Neither body has the power to consider individual complaints, undertake investigations, or provide remedies geared to accountability. This limitation is greatly influenced by the region's attachment to national sovereignty and the non-interference principle.

The ASEAN Human Rights Declaration was drafted by the AICHR. While it contains some constructive elements, such as the call against discrimination concerning health (particularly HIV cases), parts of the Declaration contain lower standards than international law demands, indicating elements of exceptionalism. There is an ambiguous provision on asylum as follows: 'Every person has the right to seek and receive asylum in another State in accordance with the laws of such State and applicable international agreements.'[25] Given that most ASEAN States are not parties to the Refugee Convention or Protocol, the provision leaves much to be desired as it subjects people to national laws which may provide far less protection than international law. Indeed, the immigration law of most ASEAN States is unresponsive to refugees as a special category needing protection, which is again connected with an emphasis on national security and a suspicion of international refugee law.

There is also a regional treaty on human trafficking,[26] but, in contrast to its international counterpart, it has no saving clause for refugee protection.[27] Since 2002, the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime has provided another forum for regional cooperation.[28] It is a grouping of

[24] Vitit Muntarbhorn, *Unity in Connectivity? Evolving Human Rights Mechanisms in the ASEAN Region* (Brill 2013).

[25] ASEAN Human Rights Declaration: and the Phnom Penh Statement on the Adoption of the ASEAN Human Rights Declaration (AHRD) (February 2013) art 16.

[26] ASEAN Convention against Trafficking in Persons, Especially Women and Children (adopted 21 November 2015).

[27] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 25 December 2003) 2237 UNTS 319, art 14.

[28] See generally 'About the Bali Process'<https://www.baliprocess.net/> accessed 15 November 2019. It was preceded by the Asia Pacific Consultations on Refugees, Displaced Persons, and Migrants.

some 50 States and agencies, chaired by Indonesia and Australia. Many Southeast Asian States are involved and are interlinked with States outside the region to tackle crimes impacting on migration flows, particularly human trafficking. While the Bali Process was initially focused on anti-crime measures, it has evolved into a forum more sensitive to refugee protection, although it is still much affected by national security considerations.

For instance, the 2016 Bali Declaration on People Smuggling, Trafficking in Persons and Related Transnational Crime integrated various elements of refugee protection, including: respect for the principle of *non-refoulement*; acknowledgement of the need for predictable disembarkation options (for those arriving at sea); temporary protection and local stay arrangements for asylum seekers and refugees; alternatives to detention of vulnerable groups; and civil registration to help establish people's identity. It set out a variety of durable solutions, such as resettlement and voluntary return, and also called for action to stem irregular flows, encouraging safety in migration, and collective responsibility and cooperation.[29]

c. National

The two ASEAN States that are parties to the Refugee Convention and Protocol—the Philippines and Cambodia—have some form of implementing law or regulation,[30] but substantive implementation, measured through consistency with universal standards, ranges from constructive to erratic. The Philippines' response is the most developed—in particular, the 2012 Department of Justice, Department Circular No 058, establishing the Refugee and Stateless Status Determination Procedure.[31] It aims to create a fair, speedy, and non-adversarial procedure to identify and protect refugees and stateless persons (who are defined in accordance with international law). It includes the right to counsel and is guided by the principles of family unity, non-detention on account of being stateless or a refugee, *non-refoulement*, and no punishment for illegal entry. There is a Refugees and Stateless Persons Protection Unit, and an administrative process to decide on such status, with access to UNHCR and the possibility to appeal to a court to review the administrative decision.

In Cambodia, the relevant instrument is the 2009 Sub-Decree on Procedure for Recognition as a Refugee or Providing Asylum Rights to Foreigners in the Kingdom of Cambodia.[32] It adopts the international definition of 'refugee' and establishes an

[29] Declaration of the Sixth Ministerial Conference of the Bali Process on People Smuggling, Trafficking in Persons and related Transnational Crime (adopted 23 March 2016) (Bali Declaration).

[30] In terms of neighbouring States, both China and Timor Leste are parties to those instruments.

[31] Department Circular No 058, Establishing the Stateless Status Determination Procedure <www.refworld.org/docid/5086932e2.html> accessed 13 October 2019.

[32] Sub-Decree No 224, on Procedure for Recognition as a Refugee or Providing Asylum Rights to Foreigners in the Kingdom of Cambodia <https://www.refworld.org/topic,50ffbce5220,50ffbce5247,4d81f0172,0,KHM.html> accessed 13 October 2019.

administrative procedure to assess refugee status under the Ministry of the Interior (MOI). Appeal is possible to another administrative panel under the umbrella of the Immigration Department. However, the decree itself contains provisions that could confer excessive discretion on the authorities to deny refugee status. For example, article 11 allows the MOI to reject an application for refugee status if 'the Applicant does not cooperate with the competent official in clarifying accurate information regarding the application'.[33] While the principle of *non-refoulement* is recognized in the text, article 22 provides considerable leeway for executive discretion to expel a refugee where their 'behavior and action endanger national security or public order'.[34]

This law has already been tested and has shown weak protection for persons seeking asylum. In particular, a number of Uighurs were returned to their country of origin, endangering their lives. The fate of a group of Montagnards from Vietnam has yet to be settled.[35] A Memorandum of Understanding between Cambodia and Australia, whereby the former would resettle refugees held by Australia on Nauru, also failed as Cambodia was unable to provide adequately for their protection.[36]

In Southeast Asian States, especially those not party to the Convention or Protocol, the law that confronts asylum seekers most directly on arrival is national immigration law.[37] Even if people have escaped from their country of origin due to persecution or conflict, they are likely to be classified as 'illegal immigrants' or similar when they seek refuge, particularly if they enter without passports, visas, or with false (or no) documents. The threat of detention and prosecution for breaching immigration law looms, although in reality, governments may adopt lenient policies to exempt asylum seekers from the strictures of the immigration law, since there is much discretion on whether to enforce it rigidly.

An interesting development is that, at times, various status determination procedures have been established, allowing screened-in persons to stay temporarily in the country, with the opportunity for resettlement elsewhere. From 1994, for instance, Thailand adopted an *ad hoc* screening procedure for people fleeing Myanmar (especially ethnic groups), using the criterion of 'those fleeing from warfare' as the test for status determination (avoiding the term 'refugee').[38] Those who qualified were allowed to stay

[33] ibid art 11. [34] ibid art 22.

[35] Kaldor Centre for International Refugee Law, 'In Focus: Montagnard Asylum Seekers in Cambodia—Cambodian and International Reactions' <https://www.kaldorcentre.unsw.edu.au/focus-montagnard-asylum-seekers-cambodia-cambodian-and-international-reactions> accessed 28 November 2019.

[36] Kaldor Centre for International Refugee Law, 'Research Brief: The Australia–Cambodian Refugee Deal' (last updated August 2018) <https://www.kaldorcentre.unsw.edu.au/sites/default/files/Research%20Brief_Cambodia_Aug2018.pdf> accessed 28 November 2019.

[37] Muntarbhorn 1992 (n 1); IOM, 'Asia and the Pacific' <https://www.iom.int/asia-and-pacific> accessed 19 November 2019.

[38] The procedure is now dormant. See further Vitit Muntarbhorn, 'Refugee Law and Practice in the Asia and Pacific Region: Thailand as a Case Study' (2004) <www.refugeelawreader.org/en/en/english/section-v-asian-framework-for-refugee-protection/v1-protection-challenges-in-asia/core-readings-140/9456-muntarbhorn-refugee-law-and-practice-in-the-asia-and-pacific-region-thailand-as-a-case-study-1/file.html> accessed 19 November 2019.

temporarily, with the possibility of resettlement in third countries. This procedure later led to more emphasis on family reunion cases in potential resettlement countries. In 2019, Thailand drafted a regulation to create a national screening procedure more generally for people seeking protection. Initial drafts suggested that there was still a tendency to shun the term 'refugee', opting instead for the euphemism 'persons in need of protection'. The final text uses the term 'protected person'.[39]

A catalytic innovation comes from Indonesia: the 2016 Regulation of the President of the Republic of Indonesia No 125 of 2016 concerning Handling of Foreign Refugees.[40] The Regulation follows the international notion of refugee as a person fleeing from persecution (even though Indonesia is not party to the international refugee treaties) and establishes coordination between government agencies to help find, place, safeguard, and supervise such cases (in conjunction with UNHCR). A key outcome is to shift refugees to social welfare shelters rather than keep them detained in immigration detention centres. There is an emphasis on screening by UNHCR (since a person not considered to be a refugee could be placed in detention). Immigration supervision is linked with the need for refugees to report on a monthly basis to the authorities. Resettlement elsewhere is a possibility.

3. Institutional Framework

Within the region there are a number of constituents that are part of the institutional framework related to refugee protection.

UNHCR's presence is essential. In addition to its various country offices, such as in Thailand, Malaysia, Indonesia, and Myanmar, there is a regional office in Bangkok. This regional presence is important as it helps to advocate for refugee protection, especially to underline the importance of *non-refoulement* and the humane treatment of asylum seekers. Operationally, the fact that UNHCR's mandate is based on a UN General Assembly (UNGA) resolution has enabled it to be present in the region for many years.[41]

One of UNHCR's key roles is to determine refugee status in States without a national procedure. At times, even States that are parties to the international refugee instruments may invite UNHCR to undertake this process (or tolerate it). UNHCR's role in

[39] Royal Gazette, vol 136, Special Issue, 314 Ngor (25 December 2562 BE; 2019 AD) 1-8. See generally UNHCR, 'Persons in Need of International Protection' (June 2017) <www.refworld.org/docid/596787734.html> accessed 13 October 2019.

[40] Regulation of the President of the Republic of Indonesia No 125 of 2016, concerning Handling of Foreign Refugees <www.refworld.org/docid/58aeee374.html> accessed 13 October 2019. For a critique, see Antje Missbach and others, 'Stalemate: Refugees in Indonesia—Presidential Regulation No 125 of 2016' (Policy Paper, Centre for Indonesian Law, Islam and Society 2018) <https://law.unimelb.edu.au/centres/cilis/research/publications/cilis-policy-papers/stalemate-refugees-in-indonesia-presidential-regulation-no-125-of-2016> accessed 28 November 2019.

[41] 'Statute of the United Nations High Commissioner of Refugees', UNGA res 428(V) (14 December 1950).

registering asylum seekers and ascertaining their protection claims is most evident in 'persons of concern' (POC) cases—people who are not necessarily refugees but are otherwise in need of protection. In reality, however, even those with a letter stating that they are POC are at times arrested and detained.

The courts can also be a significant actor in securing protection for refugees, as discussed further below. NGOs, human rights defenders, and civil society, too, are critically important, and a vast range of local, national, and international organizations work in the region. For instance, the Committee for Coordination of Services for Displaced Persons in Thailand, dating back to 1975, is constituted by a large number of international and other NGOs helping refugees. Interestingly, there is almost no local Thai organization helping asylum seekers, indicating perhaps that their priority is to help local people instead. On the protection front, the Asia Pacific Refugee Rights Network is a forum for more than 350 civil society organizations and individuals from nearly 30 countries advocating for the rights of refugees and people seeking asylum, including through monitoring and capacity-building, such as by raising individual cases for protection and using media to help leverage governmental responses.[42]

A range of other actors also impacts on refugees in some positive and some less positive ways. Examples of negative relationships include those non-State actors (including armed groups) that persecute refugees, driving them from their homes. Some community groups and individuals (at times religious personnel) also fall into this category, enmeshed with media and social media inciting hatred and violence. By contrast, there are other non-State actors that assist refugees, inspired by a sense of humanitarianism and inclusion. There is also the potentially positive role of media and social media, which can counter discrimination and violence and promote cross-cultural understanding and empathy. Finally, National Human Rights Commissions have an explicit role in promoting and protecting human rights, and there is a global alliance of human rights institutions that acts as a forum for cooperation and peer pressure. They have been helpful in protecting minorities, indigenous peoples, and refugees, exemplified by an initiative to offer bail to those who are detained. The important role of educational and research institutions in information dissemination, education, training, and capacity-building should also be recognized in this context.

4. Challenges

As the foregoing illustrates, there are a number of challenges for refugee protection in Southeast Asia. The following section examines a number of key court cases from the region to demonstrate the need for human-rights responsive judiciaries.

[42] See further Asia Pacific Refugee Rights Network, 'Info' <https://aprrn.info/> accessed 19 November 2019.

a. The Relationship with the International Refugee Instruments and the Principle of *Non-refoulement*

Even if the Refugee Convention and Protocol are cited in litigation, national courts do not accept them as binding if the country is not party to them.[43] This was illustrated in a 2009 first instance decision in Malaysia (before the High Court), concerning a Sri Lankan asylum seeker.[44] The court held that because the Refugee Convention and Protocol were not binding on Malaysia, the asylum seeker's failure to report to the authorities could give rise to prosecution.

However, a number of Southeast Asian States are parties to human rights treaties that mandate the humane treatment of refugees and asylum seekers, and prohibit *refoulement*.[45] While it is almost universally accepted that the principle of *non-refoulement* is customary international law,[46] executive authorities in the region still retain a broad discretion to decide upon the fate of asylum seekers, which could result in *refoulement*. However, once in a while, there is a spark of enlightenment. In 2017, the High Court Division of the Bangladesh Supreme Court not only declared the detention of five Rohingyas unlawful, but also recognized the principle of *non-refoulement* as part of customary international law.[47] As such, 'though Bangladesh has not ratified the refugee convention … Bangladesh was obliged not to violate article 33 by forcing these detenues back to Myanmar'.[48]

In reality, Southeast Asian countries have generally abided by the principle of *non-refoulement*, although they have faltered periodically (as in the case of the Uighurs recently sent back from various first countries of asylum to their countries of origin).[49]

[43] A related issue is whether the State concerned takes a monistic or dualistic approach to the reception of international law.

[44] *Subramaniyam Subakaran v PP* [2007] 1 Current Law Journal 470.

[45] See eg UNHCR, 'Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the 1951 Convention relating to the Status of Refugees and Its 1967 Protocol' (26 January 2007) <https://www.unhcr.org/4d9486929.pdf> accessed 19 November 2019; Nikolas Feith Tan, 'The Rohingya and Refoulement in Southeast Asia', *Middle East Institute* (12 October 2016) <https://www.mei.edu/publications/rohingya-and-refoulement-southeast-asia> accessed 19 November 2019; Redress, 'Mass Refugee Influxes, Refoulement and the Prohibition against Torture' (September 2016) <https://www.refworld.org/pdfid/5800ecd14.pdf> accessed 19 November 2019; Thailand's draft law to implement CAT will include, for the first time in Thai law, the principle of *non-refoulement*, but the law's passage is uncertain: Vitit Muntarbhorn, *The Core Human Rights Treaties and Thailand* (Brill 2016) ch 6; Hong Kong (Province of China) has integrated the CAT into its Immigration (Amendment) Ordinance 2012.

[46] For an overview of the scholarship, see Cathryn Costello and Michelle Foster, 'Non-Refoulement as Custom and *Jus Cogens*? Putting the Prohibition to the Test' (2015) 46 Netherlands Yearbook of International Law 273.

[47] *Refugee and Migration Movements Research Unit (RMMRU) v Government of Bangladesh*, Writ Petition No 10504 of 2016 (Bangladesh Supreme Court, 31 May 2017).

[48] Reported in 'HC Declares Detention of 5 Rohingyas Unlawful', *Migration News* (Dhaka, 2 June 2017) <https://migrationnewsbd.com/news/view/31712/38/HC-declares-detention-of-5-Rohingyas-unlawful> accessed 13 October 2019.

[49] See further Robert Potter, 'Why Thailand Returned the Uyghurs', *The Diplomat* (5 August 2015) <https://thediplomat.com/2015/08/what-thailand-returned-the-uyghurs/> accessed 19 November 2019.

b. Detention

In States that are not parties to the Refugee Convention or Protocol, asylum seekers who enter without the requisite papers are generally classified as 'illegals' and may be detained under domestic immigration law. For instance, in 2018, the Tangerang District Court of Indonesia used local immigration law to override the relatively liberal 2016 Presidential Decree, requiring that two Afghan asylum seekers who had travelled through India before reaching Indonesia be detained.[50] Even in Contracting States, asylum seekers found not to be refugees may be considered to be 'illegal immigrants' and liable to detention. This situation affects many innocent people, including families and children.

Recent judicial developments in Malaysia have shown the way to a more humane path, especially with respect to children in such situations. In 2018, the High Court of Malaya in the State of Kedah Darul Aman considered an application for habeas corpus by seven Rohingya children. The court held that their detention under the Immigration Act 1959/63 was illegal.[51] In referring to both the local child protection law and article 22 of the CRC, it ordered their release and transfer to a shelter, stating that:

> Without deliberating further, the Court is of the view that the continued detention of the Applicants at the Balantik Immigration Detention Centre is a direct violation of their rights as a child pursuant to the CRC and the Child Act 2001 which guarantees protection and assistance to be given to children in all circumstances without regard to race, colour, gender, language, religion or distinction of any kind.[52]

Thailand recently adopted a Memorandum of Understanding between government agencies to avoid detaining children (under 18) in the immigration context.[53] However, there remains a problem of family unity not being respected, since women and children are housed in welfare shelters while fathers are detained in immigration centres. Male children who reach the age of 18 might also be transferred into immigration detention.

c. Inhumane Treatment

Regrettably, people who seek refuge are often subjected to inhumane treatment, ranging from human trafficking to acts of discrimination and violence. Violence against women

[50] *Bemillah Qasemi and Shaqwera Qasdemi* (text provided to author by UNHCR (Bangkok), 18 January 2019).

[51] *Ruwaida Royeda Binti Muhammad Siddiq v Commandant, Immigration Depot Belantik*, Criminal Application NO: KA-44-81-09/2018. See also Rashvinjeet S Bedi, 'Court Orders Release of Seven Rohingya Minors from Immigration Centre in Kedah', *The Star* (18 November 2018) <https://www.thestar.com.my/news/nation/2018/11/18/court-orders-release-of-seven-rohingya-minors-from-immigration-centre-in-kedah> accessed 13 October 2019.

[52] *Muhammad Siddiq* (n 51) para 10.

[53] Vitit Muntarbhorn, 'Time to End the Detention of Children', *Bangkok Post* (29 January 2019) 9.

and children, in particular, is a key concern and now integrated into UN and other programming in the region. In this context, good practices sometimes emerge that fortuitously also benefit refugees. For instance, in recent years there have been scores of cases in Thailand penalizing human traffickers, including those who prey on Rohingyas coming by land and sea into the Southeast Asian region.[54]

On another front, Malaysian courts have prohibited the flogging of asylum seekers for illegal entry into the country. In a 2009 case, an asylum seeker from Myanmar had been sentenced at first instance to 100 days' imprisonment and two strokes of whipping for breaches of the Immigration Act 1959/1963.[55] The High Court of Malaya overturned the decision on the whipping, although it retained the prison sentence, stating that:

> This court is therefore of the firm opinion that asylum-seekers and refugees, if they have not committed acts of violence or brutality, or are habitual offenders, or have threatened our public order, should not be punished with whipping. However, such persons can help themselves by giving documentary proof of their registration with their own community here or with the UNHCR Office in Kuala Lumpur to satisfy the subordinate courts that they are genuine asylum-seekers or refugees who are only waiting to be resettled. This would, hopefully, avert future cases of whipping being imposed as a sentence for similar offences.[56]

d. Birth Registration/Nationality/Statelessness

Under the CRC and the SDGs, children should have their birth registered. This is reflected in the law and policies of countries in Southeast Asia, even though implementation may leave much to be desired. However, the issues of acquisition of nationality and statelessness are more complicated.

In international law, there are several ways of acquiring a nationality. The three most common are by blood (*jus sanguinis*), by birth in a particular country (*jus soli*), or by naturalization. ASEAN States generally recognize acquisition of nationality by blood without discriminating between the father and mother, but there is the occasional exception. Brunei still follows the paternal line, not yet opening the door to acquisition from the mother. There are further complications when the parents are not married.[57] Malaysian courts treat the latter situation as one where the child's nationality follows that of the mother.[58] However, this can become complicated for the child if the mother is a foreigner and difficult to trace, and at times may even result in the child becoming *de facto* stateless.

[54] Agnes France-Presse, 'Thai General Among Officials Jailed for Human Trafficking', *The Nation Thailand* (19 July 2017) <https://www.nationthailand.com/national/30321238> accessed 19 November 2019.

[55] *Tun Naing Oo v PP* [2009] 6 Current Law Journal 490.

[56] ibid.

[57] Brunei Nationality Act (1962) ss 4–5.

[58] See further Gemma Iso, 'Children Born Out of Wedlock in Malaysia: Malaysian Citizens or Not?', *The Independent* (31 March 2019) <http://theindependent.sg/children-born-out-of-wedlock-in-malaysia-malaysian-citizens-or-not/> accessed 19 November 2019.

There is still some hesitation in the ASEAN region about automatic acquisition of nationality by reason of birth in the country. For example, whereas Thailand's original nationality law recognized this, it was later undermined by other laws limiting such acquisition of nationality. This resulted in the children of illegal immigrants not acquiring Thai nationality automatically, even if they were born in Thailand.[59]

However, there has been some progressive legislation to overcome statelessness. An example is Vietnam's Decree No 78/2009/NC-CP of 2009, guiding the law on Vietnamese nationality. Article 17 opens the door to Vietnamese nationality for 'a child born in the Vietnamese territory whose parents are both stateless persons with a permanent residence in Vietnam', as well as for 'abandoned newborn and children found in the Vietnamese territory whose parents are unknown'.[60] Interestingly, Laos, China, and the Philippines have similar provisions concerning abandoned babies or 'foundlings'.[61]

Philippine courts have stepped in to deal with nationality and statelessness in a constructive manner. As early as 1948, the Supreme Court of the Philippines had to deal with the issue of a former Russian national who later became a stateless refugee and then applied for Philippine citizenship.[62] The court enabled his naturalization as a Philippine citizen.[63] Following the Philippines' accession to the Refugee Convention and Protocol, there were a number of cases concerning the nationality of Iranians who had sought refuge and who were married to Filipinas. In *Republic v Karbasi*, the Supreme Court confirmed the person's refugee status and cited articles 6 and 34 of the Refugee Convention as offering a gateway to naturalization, thus enabling the applicant to acquire Philippine nationality.[64] More recently, in 2016, the Supreme Court found that Senator Poe-Llamanzares—a foundling on the territory of the Philippines—was a natural-born citizen of the country and not a naturalized citizen.[65]

[59] Vitit Muntarbhorn, 'Refugees and Asylum in Thailand' (1994) II Thailand Yearbook of International and Comparative Law 102, 106–7.

[60] Decree No 78/2009/ND-CP of 22 September 2009, Detailing and Guiding a Number of Articles of the Law on Vietnamese Nationality <www.refworld.org/docid/4b470b2d2.html> accessed 13 October 2019.

[61] Decree No 35/PO of 15 June 2004, Law on Lao Nationality, art 13 <https://www.refworld.org/docid/3ae6b4f014.html>; Filomeno V Aguilar, 'Report on Citizenship Law: Philippines' (Global Citizenship Observatory: Robert Schuman Centre for Advanced Studies, January 2017) <https://cadmus.eui.eu/bitstream/handle/1814/45147/GLOBALCIT_CR_2017_01.pdf?sequence=1&isAllowed=y> accessed 13 October 2019; Tetch Torres-Tupas, 'Chief Justice: PH Adoption Laws Recognize Foundlings as Filipino Citizens', *Inquirer.Net* (26 January 2016) <https://newsinfo.inquirer.net/758967/chief-justice-ph-adoption-laws-recognize-foundlings-as-filipino-citizens> accessed 13 October 2019.

[62] GR No L–1812 *Kookooritchkin v The Solicitor General* (Supreme Court, 27 August 1948) <http://www.chanrobles.com/scdecisions/jurisprudence1948/aug1948/gr_l-1812_1948.php> accessed 13 October 2019.

[63] This was followed by a 1951 case concerning another Russian applicant: GR No L–3323 *Bermont v The Republic of the Philippines* (Supreme Court, 18 July 1951) <http://www.chanrobles.com/scdecisions/jurisprudence1951/jul1951/gr_l-3323_1951.php> accessed 13 October 2019.

[64] GR No 210412 *Republic of the Philippines v Karbasi* (Supreme Court, 29 July 2015) <www.lawphil.net/judjuris/juri2015/jul2015/gr_210412_2015.html> accessed 13 October 2019.

[65] GR No 221538 *David v Senate Electoral Tribunal and Mary Grace Poe-Llamanzares* (Supreme Court, 20 September 2016) <http://www.chanrobles.com/cralaw/2016septemberdecisions.php?id=834> accessed 13 October 2019.

e. Other Rights

The linkage between refugee protection, temporary refuge, and human rights calls for further consolidation on the basis that rights should be afforded without distinction. For instance, families and children in detention, such as in urban areas, face more obstacles in accessing the basics of life, including education. Pursuant to the CRC, ASEAN States generally recognize the child's right to free and compulsory primary education, without distinguishing between refugee children and nationals. However, although education is available, its quality and outreach fluctuate.

With respect to the right to marry, decades ago, Thailand's Supreme Court recognized the right of all persons to marry, irrespective of their immigration status.[66] Thus, Thais and 'illegal immigrants'—alias refugees—should not be prevented from marrying.

A particularly challenging issue is that asylum seekers are generally not allowed to work, even where they benefit from temporary refuge and protection. There are some interesting exceptions, however. In Thailand, under the human trafficking law, victims of trafficking (including asylum seekers) can work.[67] Malaysia has experimented with allowing Rohingya refugees to work, but this is no longer the case. Nevertheless, labour laws in the region typically guarantee protection for all employees, irrespective of their immigration status. This was illustrated in the case of *Ali Salih Khalaf v Taj Mahal Hotel*, where the Industrial Court of Malaysia in 2014 found that the 1967 Industrial Relations Act benefited a UNHCR-recognized refugee who had been fired and was seeking relief under the law.[68]

f. Accountability

A key development in the past few years has been the issue of accountability. A case in point is the responsibility of those who were involved in causing the Rohingya outflows from Myanmar in recent years. The UN Fact Finding Commission and its extensive report called for accountability, directly naming a number of Myanmar Generals who should be prosecuted for genocide, crimes against humanity, and war crimes.[69] An investigation is now underway before the International Criminal Court (ICC).[70] At the end of 2018, the pre-trial Chamber of the ICC ruled that the court had jurisdiction to consider the case, as Bangladesh is a party to the Rome Statute of the ICC, even though

[66] Muntarbhorn (n 59).

[67] See further Cristina Liebolt, 'The Thai Government's Response to Human Trafficking: Areas of Strength and Suggestions for Improvement (Part 1)' (2014) 17 Thailand Law Journal 1, 4.

[68] Text was provided to Vitit Muntarbhorn by UNHCR (Bangkok) (18 January 2019).

[69] See eg UN Human Rights Council, 'Independent International Fact-Finding Mission on Myanmar' <https://www.ohchr.org/en/hrbodies/hrc/myanmarffm/pages/index.aspx> accessed 19 November 2019.

[70] Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of Myanmar, Case No ICC-01/19 (Pre-Trial Chamber III, 14 November 2019).

Myanmar is not.[71] 'Deportation' is an international crime in the ICC Statute; the court can thus examine the trans-frontier situation to cover misdeeds occurring originally in Myanmar, but then extending their reach and impact into Bangladesh.

g. Temporary or Longer Stay

Temporary stay in a country of first asylum can sometimes prove to be very long. This challenge is made more complicated by the fact that, in most cases, Southeast Asian States still reject long-term asylum or local settlement—notwithstanding the fact that such States are becoming more developed and economically stronger. Their reticence is due to a variety of factors, ranging from fear of the impact of mass influxes on national security, mistrust of minorities and cross-border migrants, compassion fatigue, the lack of finality to temporary stay, and fluctuating international solidarity in offering long-term solutions. Third country resettlement is dwindling, while voluntary repatriation also has to be dealt with carefully; there should be no repatriation unless there are sufficient guarantees for people's safe and dignified return, as well as for their effective reintegration, with monitoring and safeguards. This is currently the dilemma in the Rohingya situation. There is now a bilateral 2017 Memorandum of Understanding between Myanmar and Bangladesh concerning the group's potential return, but conditions remain precarious and uncertain.[72] The preferred arrangement should be of a trilateral nature, involving UNHCR as a monitoring body and a check and balance. In Myanmar itself, there is also a 2018 Memorandum of Understanding between the UN Development Programme, UNHCR, and the government to address the large number of internally displaced persons and others who need help in Rakhine State.[73]

5. Directions

What, then, is the preferred Southeast Asian way? While the call for a permanent, systematic, intergovernmental, regional framework in the form of a treaty, reflecting the experience of the CPA and perhaps based on the 'Bangkok Principles' above, may offer a key option for the region, the more realistic approach at this point in time is a multi-

[71] Decision on the 'Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute', Case No ICC-RoC46(3)-01/18 (Pre-Trial Chamber I, 6 September 2018).

[72] Human Rights Council (n 69); Radio Free Asia, 'Myanmar, UN MOU Will Ease Rohingya Repatriation: Bangladeshi Official' (1 June 2018) <www.refworld.org/docid/5bb72dbfa.html> accessed 13 October 2019.

[73] UN Development Programme, 'UNHCR and UNDP Sign MOU with Myanmar to Support the Creation of Conditions for the Return of Refugees from Bangladesh' (6 June 2018) <www.undp.org/content/undp/en/home/news-centre/news/2018/UNDP-UNHCR-MOU-Myanmar.html> accessed 13 October 2019.

pronged strategy with a range of components, linking the national, regional, and international levels. It should address conditions leading to the forced movement of people, effective protection of those who seek asylum (ensuring at least temporary refuge), responsive provision of assistance and remedies (while not forgetting the affected local populations of asylum countries), and facilitation of a range of solutions anchored in multistakeholder partnerships.

There remains the pervasive conundrum: how to encourage Southeast Asian States to become parties to the international refugee instruments? The answer lies in the need to sustain a patient dialogue, as well as networking and capacity-building, with key actors to underline the value that these treaties add, and their relevance today. Those instruments offer a degree of certainty in terms of who 'refugees' are, and their rights and duties. They offer predictability by opening the door to national screening mechanisms (respectful of the State's sovereignty to set up processes for refugee identification), providing justification for equitable measures, and entrenching checks and balances through international vigilance. Importantly, they provide an umbrella for international cooperation and solidarity and highlight refugee protection as a shared responsibility, circumventing perceptions of Eurocentrism and exceptionalism, while offering a pathway to universalism.

CHAPTER 24

REGIONAL REFUGEE REGIMES

Oceania

MICHELLE FOSTER AND ANNA HOOD*

1. Introduction

At first glance, the inclusion of a chapter on refugee law in Oceania might seem unusual. No regional refugee law system exists in Oceania and ratification rates of the key international refugee law instruments are low. Further, there has been very little academic attention paid to refugee law across the region. When refugee scholars have turned their minds to this part of the world, they have tended not to examine Oceania's approach to refugee law specifically, but rather the dynamics of refugee law in the Asia-Pacific region more generally.[1] Most have focused on the situation in Asia and Australia, with only a cursory nod to what happens in Pacific Island States.[2] Combined, these factors create the impression that the region has little to offer refugee law scholarship.

A closer examination, however, reveals that there is much to learn from studying refugee law and related displacement issues in this part of the world. To start with, the region's low level of engagement with the international refugee law regime provides insights into assumptions and limitations embedded in international refugee law treaties. Further, if Oceania's approach to displacement is considered on its own terms, a

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[1] See eg Anja Klug, 'Enhancing Refugee Protection in the Asia-Pacific Region' [2013] Proceedings of the Annual Meeting (American Society of International Law) 107, 358; Guy S Goodwin-Gill, 'The Global Compacts and the Future of Refugee and Migrant Protection in the Asia Pacific Region' (2018) 30 IJRL 674.

[2] Klug (n 1); Goodwin-Gill (n 1).

number of other narratives emerge. These have the potential to shift the way that refugees and other displaced people are conceptualized, as well as the kinds of legal responses that may be developed as a result. Finally, paying attention to refugee law and displacement dynamics in Oceania may have effects beyond the parameters of refugee law. Specifically, they may generate new understandings of the region itself and the relations that exist between the State and civil society actors within it.

This chapter examines three of the most prominent approaches to refugee law and displacement issues in Oceania and analyses what they might reveal about the field of refugee law and the region of Oceania. None of the approaches has been adopted universally across the region, but each is significant in its own way. Section 2 analyses the role of international refugee law in the region. While adherence to international refugee law treaties is relatively low, it is not non-existent. Section 3 considers the approach to refugee law of the traditional regional hegemon: Australia. For decades, Australia has worked to encourage its regional neighbours to adopt policies that complement its own approach to refugee matters. Although Australia has had some success in obtaining support for its refugee policies from Pacific Island States, there have also been pockets of strong resistance. Section 4 considers some of the approaches to displacement adopted by Pacific Island States. The focus is on their resistance to the imposition of labels such as 'climate refugee' and concomitant assumptions about displacement as inevitable, as well as their determination to control future policy responses to the adverse impacts of climate change. The chapter concludes with some overall reflections.

Before commencing the substantive discussion, it is necessary to set out the key terms and temporal parameters of this chapter. Historically, the idea of Oceania as a 'region' was controversial, since the concept of Oceania was constructed in the nineteenth and twentieth centuries by European powers to serve their colonial interests.[3] Over time, however, the States, territories, and peoples of Oceania have come to own the idea that they are part of a regional bloc.[4] This change has been strengthened by research in recent decades that reveals a long, pre-European history of trans-Pacific links and relationships.[5] Consequently, today, the main controversy is not about whether Oceania is a region, but rather what its boundaries are.[6]

The key points of contention are whether Australia and New Zealand should be understood as part of the region, whether the dependent territories in the Pacific should be included in regional discussions, and what role civil society should have in conceptions of Oceania. For the purposes of this chapter, all States, dependent territories, and civil society actors that come within Polynesia, Micronesia, Melanesia,

[3] Greg Fry, *Framing the Islands* (ANU Press 2019) 1; Stephanie Lawson, 'Regionalism, Sub-Regionalism and the Politics of Identity in Oceania' (2016) 29 The Pacific Review 387, 387, 388.

[4] Lawson (n 3) 387, 395; Tim Bryar and Anna Naupa, 'The Shifting Tides of Pacific Regionalism' (2017) 106 The Round Table 155, 156.

[5] See eg Lana Lopesi, *False Divides* (Bridget Williams Books 2018).

[6] See eg Helen Lesli and Kirsty Wild, 'Post Hegemonic Regionalism in Oceania: Examining the Development Potential of the New Framework for Pacific Regionalism' (2018) 31 The Pacific Review 20, 22; Fry (n 3) 276.

Australia, and New Zealand are regarded as part of Oceania.[7] The rationale for including the States and dependent territories is that these groups make up one of the most significant and long-standing institutions in the region, the Pacific Islands Forum (PIF).

One significant limitation in relying on the PIF's membership to determine the scope of Oceania is that it does not encompass civil society organizations in the region. Recent literature in regional studies stresses the importance of including civil society actors in regional research, since policies and knowledge in a region are constructed by both State and non-State actors.[8] Additionally, Pacific leaders have emphasized the importance of encompassing all Pacific voices and not just those of government leaders.[9] In light of this, while the composition of the PIF is used to set the geographical bounds of Oceania in this chapter, the chapter examines the activities and practices of both State and non-State actors.

In this chapter, the term 'refugee' refers to those who meet the definition of a refugee in article 1A(2) of the Refugee Convention (read in conjunction with the 1967 Protocol). The term 'international refugee law regime' refers to the matrix of instruments that has developed over time to protect refugees and other persons of concern to UNHCR (such as stateless people), as well as UNHCR's role as the primary international institution vested with responsibility for their protection. 'Persons who have been displaced' refers to people who move from their homes involuntarily or because of coercion.

The temporal focus of the study is the twenty-first century. It is not possible in a chapter of this length to provide a fuller picture of refugee law in the region, but where a historical event, law, or practice is directly relevant to understanding something that has occurred since 2000, it is discussed.

Finally, we are conscious that we are two white, Western scholars writing about a region that contains an array of different racial, ethnic, national, and cultural groups. There are currently limited sources about refugee law matters written by Pacific scholars or practitioners. Consequently, we are acutely aware that there will be important perspectives, narratives, and ideas about refugee law in Oceania that we have not captured or appreciated. Our hope is that future scholars will have opportunities to address these in greater depth and draw on a wider variety of materials.

2. International Refugee Law in Oceania

At the heart of the modern international refugee law regime lies the Refugee Convention and its Protocol. The Convention sets out a range of rights that together constitute

[7] The States and dependent territories in the region are: Australia, the Cook Islands, the Federated States of Micronesia, Fiji, French Polynesia, Kiribati, Marshall Islands, Nauru, New Caledonia, New Zealand, Niue, Palau, Papua New Guinea, Samoa, the Solomon Islands, Tonga, Tuvalu, and Vanuatu. The term 'civil society actors' is used broadly in this chapter to refer to non-government and non-commercial groups, including community groups, non-government organizations, women's groups, faith-based organizations, professional associations, and advocacy groups.

[8] Fry (n 3) 29.

[9] ibid 276.

refugee status, the most fundamental being protection from *refoulement*.[10] Since the treaty's adoption in 1951, international legal instruments addressing displacement have evolved. The Convention relating to the Status of Stateless Persons accords almost identical rights to *de jure* stateless persons who are not also refugees.[11] Additionally, protection against *refoulement* is provided explicitly in the CAT[12] and has been read into certain provisions in the ICCPR so as to afford individuals protection from being removed to States where they face a real risk of torture,[13] cruel, inhuman, or degrading treatment or punishment,[14] or arbitrary deprivation of life.[15]

This section analyses the extent to which the international refugee law regime has been adopted in Oceania. It begins by considering which States have ratified and implemented the relevant treaties, before turning to consider whether, and if so how, civil society actors in the region have engaged with the regime.

a. Oceanic States and the International Refugee Law Regime

As noted in the Introduction to this chapter, the extent to which States in Oceania have engaged with the international refugee law regime is limited but not non-existent. Of the 16 States with treaty-making ability,[16] eight have ratified the Refugee Convention and Protocol.[17] With respect to the statelessness treaties, three States have ratified the 1954 Stateless Convention and three have ratified the 1961 Convention on the Reduction of Statelessness.[18] With regard to the ICCPR and CAT, until the first decade of the twenty-first century, the only Oceanic States that had ratified both treaties were Australia and New Zealand. Since 2008, however, several Pacific Island States have done so and today seven States are parties to the ICCPR[19] and eight to the CAT.[20]

In order to obtain a more complete picture of the extent to which Oceanic States have engaged with the international refugee law regime, it is useful to consider also the domestic legislative measures adopted. The picture that emerges is mixed. At one end of the spectrum, New Zealand has enacted substantive and procedural laws that align relatively closely with the obligations in the international system, with only a small

[10] Refugee Convention, art 33.

[11] Convention relating to the Status of Stateless Persons (adopted 28 September 1954, entered into force 6 June 1960) 360 UNTS 117.

[12] CAT, art 3. See generally Chapter 36 in this volume.

[13] CAT, art 3; ICCPR, art 7.

[14] ICCPR, art 7.

[15] ICCPR, art 6.

[16] There are 18 PIF members but two are dependent territories without treaty-making ability (French Polynesia and New Caledonia).

[17] Australia, Fiji, Nauru, New Zealand, Papua New Guinea, Samoa, the Solomon Islands, and Tuvalu.

[18] Australia, Fiji, and Nauru have ratified the Convention relating to the Status of Stateless Persons. Australia, Kiribati, and New Zealand have ratified the Convention on the Reduction of Statelessness (adopted 30 August 1961, entered into force 13 December 1975) 989 UNTS 175.

[19] Australia, Fiji, the Marshall Islands, New Zealand, Papua New Guinea, Samoa, and Vanuatu.

[20] Australia, Fiji, Kiribati, the Marshall Islands, Nauru, New Zealand, Samoa, and Vanuatu.

number of inconsistencies.[21] At the other end of the spectrum lie Samoa, the Solomon Islands, and Tuvalu, which have not passed any domestic implementing legislation or regulations.[22]

In between these extremes are four States—Australia, Fiji, Nauru, and Papua New Guinea (PNG)—which have taken some legislative steps to ensure that their domestic legal systems are consistent with their international obligations, but where some significant gaps or weaknesses remain. Australia provides strong legal protection to people who are found to be refugees after arriving lawfully.[23] Those, however, who arrive without prior authorization (generally by boat) are either sent to offshore processing centres (whose facilities and processes have given rise to significant human rights concerns)[24] or, if permitted to stay in Australia, are subjected to a range of deterrence measures, including immigration detention, processing through an inferior system of refugee status determination (RSD), and denial of permanent protection. Although Fiji has legislation establishing a RSD process, the grounds for exclusion go far beyond what the Refugee Convention permits, and there is no ability for decisions to be reviewed by a court.[25] Since 2012, Nauru has built a refugee law framework that, on paper, appears to satisfy international requirements.[26] However, UNHCR has expressed concern that it does not provide a 'fair, efficient and expeditious system for assessing refugee claims'.[27] PNG's legislation has very wide exclusion clauses, does not provide for judicial review, and does not provide express protection against *refoulement*.[28]

[21] See Global Detention Project, 'New Zealand Immigration Detention Profile' (June 2016) <https://www.globaldetentionproject.org/countries/asia-pacific/new-zealand> accessed 14 May 2020.

[22] Lili Song, 'Refugee Status Determination by South Pacific Island Countries: Legal Overview, Recent Developments, and a Brief Critique' (June 2018) <http://www.reflaw.org/refugee-status-determination-by-south-pacific-island-states-legal-overview-recent-developments-and-a-brief-critique/> accessed 14 May 2020. Note that the Solomon Islands drafted a Refugee Status Determinations Bill in 2010 along with some regulations concerning refugee status determination, but it did not become law. See further UNHCR, 'Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report Universal Periodic Review: 2nd Cycle, 24th Session The Solomon Islands' (June 2015) <https://www.refworld.org/country,,UNHCR,,SLB,,5a12da0c0,0.html> accessed 14 May 2020.

[23] See Migration Act 1958 (Cth) s 36.

[24] See ibid ss 46A, 189, 198AD. For an overview of human rights concerns related to offshore detention centres see Human Rights Law Centre, 'Offshore Detention on Manus and Nauru' <https://www.hrlc.org.au/timeline-offshore-detention> accessed 14 May 2020.

[25] UNHCR, 'Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report—Universal Periodic Review: The Republic of the Fiji Islands' (2014) <https://www.refworld.org/country,,UNHCR,,FJI,,5541db4a4,0.html> accessed 14 May 2020; Song (n 22). The decision determining that the Minister's decision could not be judicially reviewed was *Arfaoui v Director of Immigration* [2017] FJHC 519 (14 July 2017).

[26] Song (n 22).

[27] UNHCR, 'UNHCR Monitoring Visit to the Republic of Nauru 7 to 9 October 2013' (26 November 2013) <https://www.unhcr.org/en-au/58117b931.pdf> accessed 14 May 2020.

[28] Madeline Gleeson, 'Refugee Status Determination on Manus Island' (Research Brief, Andrew & Renata Kaldor Centre for International Refugee Law August 2018) <https://www.kaldorcentre.unsw.edu.au/sites/default/files/Research%20Brief_ManusRSD_Aug2018.pdf> accessed 14 May 2020; Song (n 22).

It is worth noting that even though it is not party to the Convention or Protocol, Vanuatu has enacted refugee legislation. It partially complies with international refugee law requirements: its refugee definition accords with that in the Refugee Convention, but its exclusion provisions are more extensive, and it allows for *refoulement* in circumstances which are not authorized by international law.[29]

In terms of institutional oversight, UNHCR's regional office is based in Canberra, Australia, with responsibility for 16 States. For those Pacific Island States without national RSD systems, UNHCR 'may assist to assess claims for refugee status' should they receive protection claims,[30] and UNHCR 'provides assistance to national officials to undertake refugee status determination procedures'[31] in Fiji, PNG, and Vanuatu. There is little academic examination of UNHCR's role in Oceania, although Glazebrook's research in PNG—where UNHCR devised and helped to implement policy in relation to West Papuan refugees from the mid-1990s—is a valuable exception.[32] In the early 2000s, UNHCR was involved in RSD in Nauru pursuant to the first incarnation of Australia's offshore processing scheme,[33] a scheme that also included PNG and was widely condemned as inconsistent with basic principles of refugee law.[34] Notably, UNHCR explicitly distanced itself from any involvement in the second phase of that scheme,[35] and has been highly critical of Australia's policy in that regard.[36] Much of UNHCR's regional focus in recent years has been on monitoring Australia's policies both onshore and offshore; indeed, its reporting and monitoring of conditions in PNG and Nauru have provided an important source of information and oversight of Australia's practices and an important counterpoint to the views of the Australian government.

b. Civil Society in Oceania and the International Refugee Law Regime

Looking at what States have done to comply with international refugee law provides only a partial view of the extent to which Oceania engages with the international refugee

[29] Section 73(2) of the Immigration Act 2010 (Vanuatu) provides that 'prohibited immigrants'—including people who have been deported from other countries and who breach conditions on their visas in Vanuatu (s 50)—may be removed.

[30] UNHCR, 'UNHCR in the Pacific' <https://help.unhcr.org/pacific/> accessed 11 May 2020.

[31] ibid.

[32] Diana Glazebrook, 'If I Stay Here There is Nothing Yet if I Return I Do Not Know Whether I Will Be Safe: West Papuan Refugee Responses to Papua New Guinea Asylum Policy 1998–2003' (2004) 17 JRS 205.

[33] Savitri Taylor, 'The Pacific Solution or a Pacific Nightmare? The Difference Between Burden Shifting and Responsibility Sharing' (2005) 6 Asian-Pacific Law & Policy Journal 10.

[34] ibid.

[35] See Ben Packham, 'UN Won't Work with Labor on Asylum-Seeker Processing on Nauru and Manus Island', *The Australian* (24 August 2012) <https://www.theaustralian.com.au/national-affairs/immigration/un-wont-work-with-labor-on-asylum-seeker-processing-on-nauru-and-manus-island/news-story/3d56e9aadb46d313b46e247ee5fa43d3> accessed 14 May 2020.

[36] Azadeh Dastyari and Maria O'Sullivan, 'Not for Export: The Failure of Australia's Extraterritorial Processing Regime in Papua New Guinea and the Decision of the PNG Supreme Court in *Namah* (2016)' (2016) 42 Monash University Law Review 308, 312–13.

law regime. In Oceania, there are a number of civil society organizations that observe and examine how States implement international law, and they seek to enhance States' compliance with it through their activism and advocacy. Almost all of them, however, are based in Australia and New Zealand, rather than Pacific Island States.

This is apparent if regard is had to the composition of the most prominent network of civil society organizations working on international refugee matters in the Asia-Pacific region: the Asia Pacific Refugee Rights Network (APRRN).[37] It is currently comprised of 434 civil society organizations and individuals.[38] Of those, 52 are based in Oceania: 36 organizations come from Australia, 15 from New Zealand, and only one from PNG.[39]

Further evidence of the dominance of Australian and New Zealand civil society organizations within Oceania is apparent if regard is had to the agenda of the APRRN's working group for Australia, New Zealand, and the Pacific. All of the goals set down by the working group are focused on initiatives that can be undertaken within Australia and New Zealand; none refers to activities or priorities for Pacific Island States.[40]

c. Reflections on the Extent to which States and Civil Society Engage with the International Refugee Law Regime

It is interesting to reflect on the fact that international refugee law principles have not been widely embraced across the region. One way of interpreting this is to see Oceania as a weak, unreliable link in the global refugee system. However, the picture begins to change if regard is had to the fact that very few people who meet the international refugee definition seek protection in Pacific Island States.[41] Where refugees have sought protection in the region it has generally constituted intra-regional flight rather than flight from further afield. For example, in the early 1980s thousands of West Papuans sought protection in PNG, where a significant number are reported to remain today.[42] However, even in relation to intra-regional flows, Australia is the more likely destination

[37] See Savitri Taylor, 'Growing Pains: The Asia Pacific Refugee Rights Network at Seven Years' (2016) 8(2) Cosmopolitan Civil Societies Journal 1; Alice Nah, 'Networks and Norm Entrepreneurship amongst Local Civil Society Actors: Advancing Refugee Protection in the Asia Pacific Region' (2016) 40 The International Journal of Human Rights 223; Susan Kneebone, 'The Bali Process and Global Refugee Policy in the Asia Pacific Region' (2014) 27 JRS 596.

[38] Asia Pacific Refugee Rights Network, 'Info' <https://aprrn.info/> accessed 14 May 2020.

[39] Asia Pacific Refugee Rights Network, 'Current Members' <https://aprrn.info/members/current-members/> accessed 14 May 2020; Consultative Implementation and Monitoring Council <http://www.cimcpng.net/index.php/committees/fsvac> accessed 14 May 2020.

[40] Asian Pacific Refugee Rights Network, 'Australia New Zealand and the Pacific Working Group' <https://aprrn.info/our-work/geographic-working-groups/australia-new-zealand-the-pacific/> accessed 14 May 2020.

[41] For example, UNHCR statistics show that in 2014 in Fiji there were only five refugees and nine asylum seekers: UNHCR (n 25) 1.

[42] Glazebrook (n 32). See also Diana Glazebrook, *Permissive Residents: West Papuan Refugees Living in Papua New Guinea* (ANU Press 2008). In 2006, Australia (controversially) granted refugee status to 42 West Papuans: David Palmer, 'Between a Rock and a Hard Place: The Case of Papuan Asylum-Seekers' (2006) 52 Australian Journal of Politics and History 576.

country. For example, tens of thousands of East Timorese fled persecution in the decades following Indonesia's invasion in 1975, primarily to Australia.[43] More recently, Australia has recognized a small number of women from PNG, fleeing domestic violence as refugees.[44]

Hence, despite some specific (and largely historical) examples of refugees seeking protection in Pacific Island States, it remains the case that the numbers today are extremely low. Moreover, the Refugee Convention definition fails to capture a large number of people who are at risk of displacement in the Pacific, considered further in section 4. In addition, since the Refugee Convention applies only to those who have crossed borders, it does not apply to internally displaced persons. This is despite the fact that in 2019, twelve disasters, most of them volcanic eruptions, triggered more than 31,000 new internal displacements in PNG alone.[45]

When these facts are coupled with the reality that many Oceanic States have very limited resources, the low levels of engagement with the international refugee law regime begin to make sense. Indeed, they suggest that instead of criticizing States and civil society organizations in the region for failing to engage with international refugee law instruments, we should be asking whether the refugee law regime is fit for purpose in the Pacific, and whether the conditions in Oceania reveal certain shortcomings in it.

3. The Refugee Laws and Policies of Oceania's Regional Hegemon: Australia

The second body of refugee law present in Oceania is the one that contains the approaches and practices of the region's traditional hegemon, Australia. Throughout most of the twentieth and twenty-first centuries, Australia has assumed this role, seeking to impose its will and views on many aspects of life in the region.[46] It is perhaps unsurprising, then, that in the last two decades, Australia has sought to encourage Pacific Island States to adopt laws and policies that conform with and support its own approach to asylum. This section begins by briefly setting out how Australia has sought to do this via the Bali Process and offshore detention and processing,[47] before reflecting on the broader implications.

[43] Penelope Mathew, 'Lest We Forget: Australia's Policy on East Timorese Asylum Seekers' (1999) 11 IJRL 7.

[44] See eg *1512766 (Refugee)* [2017] AATA 591 (22 March 2017).

[45] Internal Displacement Monitoring Centre (IDMC), *GRID 2020: Global Report on Internal Displacement* (IDMC 2020) 43.

[46] At times, New Zealand has also occupied a hegemonic role in the region: Fry (n 3) 312–14.

[47] See also Emma Larking, 'Controlling Irregular Migration in the Asia Pacific: Is Australia Acting in Its Own Interests?' (2017) 4 Asia & The Pacific Policy Studies 85.

a. Australian Influence in Oceania

Although Australia is a party to all the treaties that constitute the international refugee law regime, it has a history of securitizing refugees,[48] seeking to deter asylum seekers, and shifting the responsibility for protecting refugees on to other States. Efforts by Australian governments to securitize refugees began prior to the twenty-first century but became particularly prominent from 2001 onwards.[49] Since the policies have been well-documented and critiqued elsewhere,[50] the focus in this chapter is on offshore processing—an attempt both to deter asylum seekers and to transfer the obligation of providing refugee protection to other States by relocating them to Nauru and PNG for processing.[51]

Throughout the first two decades of the twenty-first century, Australia worked to encourage other States in Oceania to adopt policies that would complement, and assist with, its goals of securitizing and deterring refugees, as well as shifting its protection responsibilities on to others. To this end, it established the Bali Process in 2002, and offshore detention and processing programmes in Nauru and PNG from 2001–08 and then again from 2012 onwards. This section briefly analyses how these initiatives sought to further Australia's refugee policies, and assesses the extent to which they succeeded in instilling Australian approaches to refugee law and policy across Oceania.

i. *The Bali Process*

Australia established the Bali Process in 2002 to bring States together to address people smuggling, human trafficking, and irregular migration in the Asia-Pacific region.[52] It provides a forum for ministers and senior government officials to meet periodically to develop norms, share information, and participate in capacity-building measures.[53]

From the outset, the Bali Process served as a mechanism for Australia to disseminate its refugee policies across the region. In documents developed through the Bali Process, refugees have been cast as irregular migrants and securitized,[54] with States' international protection obligations given only perfunctory attention.[55] For example, while some Bali Process statements have contained cursory references to ideas such as 'the legitimate

[48] Securitization is 'a process wherein an issue becomes constructed as a security threat through discursive choices and is then adopted as the primary frame of reference by the audience': Melissa Curley and Khalia Vandyk, 'The Securitisation of Migrant Smuggling in Australia and its Consequences for the Bali Process' (2017) 71 Australian Journal of International Affairs 42, 47.

[49] Matt McDonald, 'Deliberation and Resecuritization: Australia, Asylum-Seekers and the Normative Limits of the Copenhagen School' (2011) 46 Australian Journal of Political Scientists 281, 285.

[50] Andreas Schloenhardt and Colin Craig, 'Turning Back the Boats: Australia's Interdiction of Irregular Migrants at Sea' (2015) 27 IJRL 536, 536. Matthew Cameron, 'From "Queue Jumpers" to "Absolute Scum of the Earth": Refugee and Organised Criminal Deviance in Australian Asylum Policy' (2013) 59 Australian Journal of Politics and History 241, 243; Curley and Vandyk (n 48) 47.

[51] Larking (n 47) 87. See generally, Madeline Gleeson, *Offshore: Behind the Wire on Manus and Nauru* (NewSouth Publishing 2016).

[52] See Larking (n 47) 88; Kneebone (n 37) 599–601.

[53] Kneebone (n 37) 596–610.

[54] Curley and Vandyk (n 48) 47.

[55] Kneebone (n 37) 598–610; Curley and Vandyk (n 48).

rights of genuine refugees to seek and enjoy asylum',[56] there has been no effort to put in place measures that would ensure these rights are protected. Further, there has been a strong emphasis on persuading States in the region to criminalize people smuggling and human trafficking, and to enact stronger border controls.[57] These initiatives aim not only to deter people from seeking asylum, but also to shift responsibility for them from Australia to the States from which they have originally come and through which they have transited en route to Australia.

While it is apparent that Australia views the Bali Process as a means to spread its approach to refugee issues, the extent to which it has succeeded in doing this in Oceania is open to question. Assessing the impact of the Bali Process is difficult since there is relatively little academic work on it, and amongst the work that does exist, most is focused on the significance of the Bali Process in Asia and Australia. There is a need for more work in this area before any firm conclusions can be drawn. However, it is worth observing that only 11 States in Oceania are part of the Bali Process,[58] and only two (Australia and New Zealand) are involved in the main leadership and operational groups.[59]

Further, it is unclear from the literature how many of the substantive ideas encouraged by the Bali Process have been implemented in practice in Oceania. One of the few achievements that is commonly touted in the literature is that 18 States in the Asia-Pacific region adopted model people smuggling legislation drafted by Australia and China in 2003.[60] It is unclear, however, how many (if any) of these States were in the Pacific region.

ii. *Offshore Detention, Processing, and 'Settlement'*

A second way in which Australia has sought to draw Pacific Island States into its refugee policies has been through the development of offshore detention and processing arrangements. Beginning in 2001, Australia entered into bilateral agreements with PNG and Nauru, which provided that each of them would accept asylum seekers who had attempted to reach Australia by boat, in exchange for significant monetary compensation. The asylum seekers were detained in camps until they were processed and then resettled in third States. The programmes were briefly suspended in 2007 but

[56] 'Co-Chairs Statement' (Bali Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime, Bali, 26–28 February 2002), as cited in Kneebone (n 37) 602.

[57] Larking (n 47) 88–9, 95.

[58] The States are Australia, Fiji, Kiribati, Nauru, New Caledonia, Palau, New Zealand, Papua New Guinea, Samoa, the Solomon Islands, and Tonga. See generally Declaration of the Sixth Ministerial Conference of the Bali Process on People Smuggling, Trafficking in Persons and related Transnational Crime (adopted 23 March 2016) (Bali Declaration).

[59] The Bali Process, 'Ad Hoc Group' <https://www.baliprocess.net/ad-hoc-group/> accessed 14 May 2020.

[60] Larking (n 47) 88; Caroline Millar, '"Bali Process": Building Regional Cooperation to Combat People Smuggling and Trafficking in Persons' (*DFAT*, 29 July 2004) <https://dfat.gov.au/news/speeches/Pages/bali-process-building-regional-cooperation-to-combat-people-smuggling-and-trafficking-in-persons.aspx> accessed 14 May 2020.

reinstated in 2012.[61] In the second incarnation, however, the scheme was designed such that asylum seekers would ultimately settle in PNG and Nauru.

The programmes were an important part of Australia's efforts to shift responsibility for refugee protection on to other States, and central to deterring asylum seekers from making their way to Australia by boat. This deterrence strategy was bolstered by the fact that conditions in the detention facilities in PNG and Nauru were extremely harsh and the asylum seekers and refugees housed there were subject to a range of serious human rights abuses.[62]

There is no denying that by procuring bilateral agreements through the promise of a large amount of aid, and financially underwriting the offshore scheme, various Australian governments were able to implement controversial policies yet largely avoid legal responsibility by claiming that human rights violations were the responsibility of the sovereign nations of Nauru and PNG, and not Australia.[63] It is important to appreciate, however, that there has been strong resistance to Australia's offshore refugee scheme in certain parts of the region. For example, when Australia first started to search for possible States with which it could collaborate, Fiji refused to entertain the idea of participating in the programmes, declaring that Australia's actions were 'a shameful display of cheque book diplomacy'.[64] Further, the Supreme Court of PNG ruled in 2016 that PNG's detention facilities violated the constitutional right to personal liberty.[65] Additionally, many civil society organizations in Australia and New Zealand have repeatedly condemned the programmes in the strongest terms. Thus, similarly to the Bali Process, the offshore programmes can only be deemed to have been a partially successful mechanism for imposing Australia's refugee policy on the region.

iii. *Reflections on Australia's Efforts to Encourage Oceanic States to Adopt Laws and Policies Complementing Its Own Approach to Refugee Matters*

Australia's efforts to encourage other Oceanic States to support its refugee laws and policies raise a number of interesting points. First, there is a clear need for more information to be gathered about the role, views, and involvement of Pacific Island States in regional protection debates and policy. As detailed above, most studies of the Bali Process have

[61] Dastyari and O'Sullivan (n 36).

[62] Curley and Vandyk (n 48) 51–2; Larking (n 47). See Human Rights Council, *Report of the Special Rapporteur on the Human Rights of Migrants on his Mission to Australian and the Regional Processing Centre in Nauru*, UN doc A/HRC/35/25/Add.3 (24 April 2017).

[63] In *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42, the High Court of Australia rejected a challenge to the unlawful detention of refugees in Nauru on the basis that Australian officials were not responsible in Australian law. Australia remains responsible under international law, but the lack of enforcement (eg through a regional human rights mechanism) is absent.

[64] Senate of Australia, *Report of the Senate Select Committee on a Certain Maritime Incident* (23 October 2002) 294 <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Former_Committees/maritimeincident/report/index> accessed 14 May 2020.

[65] *Namah v Pato* [2016] PGSC 13.

focused on the roles of Australia and Asian States, with little consideration of the involvement of Pacific Island States. This means there is a very limited picture of how the Pacific has responded to, and been affected by, an array of measures, and that picture has largely been constructed by non-Pacific Islanders. It is not possible to understand how refugee law operates in the region with such an impoverished account.

Beyond the relevance for how refugee law is studied, the refugee law issues discussed in this section have implications for how Australia's role as a regional hegemon is to be understood. Australia's approach to PNG and Nauru is clearly hegemonic in nature: it used its political and financial power to convince them to detain, process, and later settle asylum seekers. Scholars have also pointed to the neo-colonial elements of the bilateral agreements.[66] Historically, Australia was a colonial power in the Pacific and exercised a large degree of political control over both PNG and Nauru. Although both States are now independent, the money offered to the two governments in exchange for offshore processing was tied to particular projects and required officials to implement policies dictated by Australia, such as the privatization of numerous State-owned enterprises.[67] Indeed, PNG even amended its constitution in an (ultimately unsuccessful) attempt to ensure the constitutional validity of the detention of asylum seekers transferred from Australia.[68]

However, while in some respects Australia's actions appear to have reinforced its role as the regional hegemon, the fact that some States and civil society organizations have pushed back against its approach suggests that it may no longer enjoy unlimited power across the region. The existence of strong pockets of resistance fits into, and develops, work that is emerging around the idea that the Pacific may be entering a post-hegemonic phase in which Australia no longer has the ability to dictate the region's agenda.[69] Further work in this area may well generate greater insights into the changing scope and limits of Australia's role in Oceania.

4. Pacific Approaches to Displacement

Sections 2 and 3 of this chapter have established that the extent to which Pacific Island States have engaged with the international refugee law regime and the agenda of the regional hegemon is mixed. However, the Pacific Island States' relative lack of support for these approaches by no means tells the whole story of their participation in protection frameworks and agendas. If the international and Australian refugee law

[66] Michael Grewcock, 'Australian Border Policing: Regional "Solutions" and Neocolonialism' (2014) 55(3) Race & Class 71.

[67] ibid; Larking (n 47) 89.

[68] See *Namah* (n 65).

[69] See generally Helen Leslie and Kirsty Wild, 'Post-Hegemonic Regionalism in Oceania: Examining the Development Potential of the New Framework for Pacific Regionalism' (2018) 31 The Pacific Review 20. See also Fry (n 3) 312.

lenses are removed, and regard is had instead to what Pacific leaders and peoples see as important in the displacement/protection space, a very different picture emerges.

a. Climate-related Displacement in the Pacific

The potential for the impacts of climate change to contribute to displacement, migration, and relocation has become a major policy and scholarly focus over the past decade.[70] While some scholarship has focused on the notion of 'sinking islands',[71] engaging case studies from the Pacific as prototypical (hypothetical) examples,[72] it is now well understood that the reality is far more complex. There is no question that, as the Intergovernmental Panel on Climate Change explains, people who live close to the ocean or depend directly on its resources for livelihoods 'are particularly exposed to climate change impacts and hazards'.[73] Yet, while such impacts may lead to movement—after all, migration has been an adaptive strategy for millennia[74]—to date there is 'limited evidence of [cross-border] migration occurring directly as a consequence of impacts associated with environmental change generally and [sea-level rise] specifically'.[75] Further, there are two key limitations on the simplistic 'sinking island nations' analysis. First, any future movement is likely to occur well before the 'disappearance' or 'sinking' of island States, given the nature of slow-onset degradation and the likelihood of resources being depleted before land becomes uninhabitable.[76] Secondly,

[70] See Nansen Initiative on Disaster-Induced Cross-Border Displacement (Nansen Initiative), 'Agenda for the Protection of Cross-Border Displaced Persons in the context of Disaster and Climate Change: Vol 1' (December 2015); Platform on Disaster Displacement <https://disasterdisplacement.org/> accessed 14 May 2020; see Chapter 46 in this volume. We note that displacement, migration, and relocation are different phenomena, yet much of the literature discussed in this section uses these terms somewhat interchangeably. We use 'movement' where possible in order to describe the broad phenomenon, although recognize that this encompasses a spectrum of voluntary/involuntary and planned/unplanned movement.

[71] Marissa S Knodel, 'Wet Feet Marching: Climate Justice and Sustainable Development for Climate Displaced Nations in the South Pacific' (2012) 14 Vermont Journal of Environmental Law 127.

[72] Selma Oliver, 'A New Challenge to International Law: The Disappearance of the Entire Territory of a State' (2009) 16 International Journal on Minority and Group Rights 209; Tiffany TV Duong, 'When Islands Drown: The Plight of Climate Change Refugees and Recourse to International Human Rights Law' (2010) 31 University of Pennsylvania Journal of International Law 1239. See also Jenny Grote Stoutenburg, *Disappearing Island States in International Law* (Brill 2015). For a critique, see Carol Farbotko, 'Wishful Sinking: Disappearing Islands, Climate Refugees and Cosmopolitan Experimentation' (2010) 51 Asia Pacific Viewpoint 47.

[73] Intergovernmental Panel on Climate Change (IPCC), 'Special Report on the Oceans and Cryosphere in a Changing Climate' (September 2019) 91, this is a prediction with 'very high confidence'.

[74] Michele Klein Solomon and Koko Warner, 'Protection of Persons Displaced as a Result of Climate Change: Existing Tools and Emerging Frameworks' in Michael B Gerrard and Gregory E Wannier (eds), *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* (CUP 2013) 244.

[75] IPCC (n 73) 396.

[76] Jane McAdam, 'Swimming Against the Tide: Why a Climate Change Displacement Treaty is Not *the* Answer' (2011) 23 IJRL 2, 8.

the causes of any such movement will always be mixed, since the impacts of climate change operate as a threat multiplier rather than a sole cause of movement.[77]

Concern about the impacts of environmental degradation, resource scarcity, and overpopulation has understandably been on the Pacific agenda since well before the start of the twenty-first century. In recent decades the focus has centred more specifically on the potential impact of climate change because of its particular threat to the habitability of parts of the Pacific. Yet, the extent to which existing international protection frameworks can and should apply to potential movement linked to the adverse impacts of climate change has been controversial. First, there is a question about the applicability of the Refugee Convention, and the appropriateness and feasibility of developing new frameworks to respond to the challenge. Secondly, and more fundamentally, the fact that many proposals for reform have been posited by developed States and/or scholars from the Global North has given rise to a neo-liberal critique in which the need for autonomy, agency, and self-determination of affected States and communities in the Pacific is emphasized.

b. Climate-related Movement and Traditional Refugee Frameworks

The extent to which the international refugee regime is capable of accommodating refugee claims based on harm linked to the adverse impacts of climate change has long been debated in the scholarship.[78] However, case law is relatively recent and is being driven by claims originating in the Pacific region.

The most prominent context in which such claims have arisen is a series of cases adjudicated in New Zealand, in which the Immigration and Protection Tribunal (IPT) considered both the refugee and complementary protection (human rights law-based) claims of individuals from Fiji,[79] Kiribati,[80] and Tuvalu.[81] In each of these cases, the protection claims were rejected.[82]

Importantly, however, in *AF (Kiribati)*, the IPT acknowledged the inappropriateness of categorically rejecting refugee claims involving climate-related harm on the basis that a nexus to a Convention ground could never be established, explaining instead that 'the

[77] ibid. As the IPCC notes: 'There is robust evidence of disasters displacing people worldwide, but limited evidence that climate change or sea level rise is the *direct* cause.' IPCC (n 73) 396 (emphasis added).

[78] See Sanjula Weerasinghe, 'In Harm's Way: International Protection in the Context of Nexus Dynamics between Conflict or Violence and Disaster or Climate Change', UNHCR Legal and Protection Policy Research Series, PPLA/2018/05 (December 2018) <https://www.unhcr.org/5c1ba88d4.pdf> accessed 14 May 2020.

[79] *BG (Fiji)* [2012] NZIPT 800091.

[80] *AF (Kiribati)* [2013] NZIPT 900413.

[81] For a discussion of earlier case law, see Jane McAdam, 'The Emerging New Zealand Jurisprudence on Climate Change, Disaster and Displacement' (2015) 3 Migration Studies 131.

[82] See Chapter 46 in this volume.

relationship between natural disasters, environmental degradation, and human vulnerability to those disasters and degradation is complex'.[83] Yet, in *AF (Kiribati)*, the IPT found (*inter alia*) that any risk was 'faced by the Kiribati population generally'.[84] Likewise, the complementary protection claim was rejected on the basis that the applicant had not established that his return to Kiribati entailed a real risk of arbitrary deprivation of life, since any climate change-related harms were assessed as being insufficiently 'present'.[85]

The applicant in that case, having subsequently exhausted domestic remedies in New Zealand, brought an individual communication against New Zealand to the UN Human Rights Committee, claiming that New Zealand had violated his right to life by removing him to Kiribati. The decision by the Committee represents the first international 'judgment' on the protective potential of international human rights law in the context of climate change-related displacement. Indeed, while this particular claim was not successful, the Committee stated that:

> without robust national and international efforts, the effects of climate change in receiving states may expose individuals to a violation of their rights under articles 6 or 7 of the Covenant, thereby triggering the *non-refoulement* obligations of sending states.[86]

This case signals that the existing international protection framework may be capable of providing some protection to those who are displaced in the context of climate change, and that individuals fleeing Pacific Island States are pushing the normative boundaries of existing frameworks. However, as in the case of calls for new treaties or instruments to accommodate climate change-related movement,[87] the push to expand protective mechanisms has been critiqued as assuming that migration or relocation is inevitable and/or is a strategy that is desired by, or optimal for, Pacific peoples.

c. New Perspectives on Displacement in the Pacific

As foreshadowed above, the policy and scholarly debates concerning movement linked to the adverse impacts of climate change have been subjected to a neo-colonial analysis in recent years.

[83] *AF (Kiribati)* (n 80) para 57. See further Matthew Scott, *Climate Change, Disasters and the Refugee Convention* (CUP 2020); UNHCR, 'Legal Considerations regarding Claims for International Protection Made in the Context of the Adverse Effects of Climate Change and Disasters' (1 October 2020) para 5 <https://www.refworld.org/docid/5f75f2734.html>.

[84] *AF (Kiribati)* (n 80) para 57.

[85] See Adrienne Anderson, Michelle Foster, Hélène Lambert, and Jane McAdam, 'Imminence in Refugee and Human Rights Law: A Misplaced Notion for International Protection' (2019) 68 ICLQ 111, 133.

[86] *Teitiota v New Zealand*, UN doc CCPR/C/127/D/2728/2016 (24 October 2019) para 9.11.

[87] These are set out, and then critiqued, in McAdam (n 76).

Commenting on the predominance of scholars from the Global North in this field, Meyer, for example, opined that '[t]his combination of a concentration of research capacities in the north and a phenomenon concentrated in the south is a dangerous cocktail for othering and other post-colonial structures of thought'.[88] Barnett and Campbell's conclusion, following extensive empirical work in the Pacific Islands, is damning: they conclude that knowledge gaps are being filled by 'speculation and hyperbole', failing to recognize people's agency, and 'ignor[ing] the significant scope for adaptation to defer or avoid climate impacts'.[89]

However, there is now a growing body of scholarship that examines the phenomenon of climate-related movement from the perspective of Pacific Island States.[90] Such research has revealed that although there is not one homogeneous view within the Pacific,[91] that perspectives have waxed and waned, and that domestic politics is as integral to this debate as international politics, a number of Pacific Island States reject movement as a primary or sole adaptation strategy and prefer to prioritize the actions of developed States to reduce emissions and limit future climate change impacts. Important work by McNamara and Gibson surveyed and analysed documents from the UN, NGOs, and media that 'construct people from Pacific small island states as potential climate refugees', concluding that the subtext of this message is that 'the people of affected Pacific Island States are weak, passive victims with little internal resilience to fight for much more than relocation'.[92] By contrast, their empirical research revealed strong resistance to being categorized as 'climate refugees'; indeed it was in some cases 'considered offensive'.[93] Instead their interviewees asserted 'cultural and political arguments about identity, place and human rights to self-determination'.[94]

Subsequent academic research has drawn similar conclusions in relation to Tuvalu,[95] Vanuatu,[96] and the Marshall Islands.[97] The important work of the Nansen Initiative, which involved extensive consultation with governments and affected communities in the Pacific, likewise affirmed that Pacific leaders' perspective is that movement is the

[88] Benoît Mayer, 'Environmental Migration: Prospects for a Regional Governance in the Asia Pacific Region' (2013) 16 Asia Pacific Journal of Environmental Law 77, 88.

[89] Jon Barnett and John Campbell, *Climate Change and Small Island States: Power, Knowledge and the South Pacific* (Earthscan 2010) 175.

[90] Tanja Dreher and Michelle Voyer, 'Climate Refugees or Migrants? Contesting Media Frames on Climate Justice in the Pacific Environmental Communication' (2015) 9 Environmental Communications 58.

[91] See in particular the excellent work of Barnett and Campbell (n 89) 178.

[92] Karen Elizabeth McNamara and Chris Gibson, ' "We Do Not Want to Leave Our Land": Pacific Ambassadors at the United Nations Resist the Category of "Climate Refugees" ' (2009) 40 Geoforum 475, 476. See also Rebecca Hingley, ' "Climate Refugees": An Oceanic Perspective' (2017) 4 Asia & The Pacific Policy Studies 158.

[93] McNamara and Gibson (n 92) 481. [94] ibid 482. [95] McAdam (n 76).

[96] Nikita Parumal, ' "The Place Where I Live is Where I Belong": Community Perspectives on Climate Change and Climate-Related Migration in the Pacific Island Nation of Vanuatu' (2018) 13 Island Studies Journal 45, 46.

[97] Autumn Skye Bordner, 'Climate Migration & Self-Determination' (2019) 51 Columbia Human Rights Law Review 183.

'least preferred option',[98] with concerns that cross-border movement would impact negatively on 'nationhood, control over land and sea territory, sovereignty, culture and livelihoods'.[99] Participants instead expressed a preference for climate change mitigation and 'adaptation measures to prevent displacement and avoid the need for relocation'.[100]

These insights, in turn, have led to calls for 'enhanced international support for adaptation and capacity building' in States particularly vulnerable to the adverse effects of climate change,[101] in part based on obligations of international cooperation imposed by international human rights and climate change law.[102] Bordner argues that throughout Oceania, colonial legacies have 'induced climate vulnerability and impeded effective adaptation'.[103] Drawing on climate justice theory, she posits a novel approach whereby 'international human rights and decolonization norms vest colonial powers with moral and legal obligations to assist their former colonies with self-determination-preserving adaptation strategies'.[104]

In practice, Pacific Island States are defiantly resisting the imposition of extraneous labels and policy settings, instead formulating endogenous responses to the threat of climate change. They have roundly and emphatically rejected specific proposals emanating from Australia and New Zealand, labelling, for example, a former Australian Prime Minister's suggestion that Australia should offer citizenship to residents of Tuvalu, Kiribati, and Nauru in exchange for control of their seas, Exclusive Economic Zones, and fisheries as 'imperial thinking'.[105] Such proposals also need to be understood against the long history of colonial powers relocating populations in the Pacific in order to exploit resources. As McAdam's seminal work on this topic highlights, the relocation of whole island communities is not a 'novel, futuristic idea'.[106]

Strategies adopted in the region reflect an emphasis on self-determination and autonomy, such as the purchase of land by Kiribati in 2014 on Vanua Levu, the second largest island of Fiji, 'with the purpose of economic development and food security'.[107] Where relocation is becoming necessary, some Pacific nations are taking an active, pre-emptive approach by managing their own internal relocations.[108] In Fiji, for example, the government notes that it has taken 'the initiative of developing its own people-centred relocation guideline that advocates for and plans and pre-empts individual and community

[98] Nansen Initiative, 'Human Mobility, Natural Disasters and Climate Change in the Pacific: Outcome Report' (May 2013) 7.

[99] ibid. [100] ibid.

[101] Margaretha Wewerinke-Singh and Tess Van Geelen, 'Protection of Climate Displaced Persons under International Law: A Case Study from Mataso Island, Vanuatu' (2018) 19 Melbourne Journal of International Law 666, 694.

[102] ibid. [103] Bordner (n 97) 183. [104] ibid 184.

[105] Anthony Stewart, 'Tuvalu PM Slams Kevin Rudd's Proposal to Offer Australian Citizenship for Pacific Resources as Neo-Colonialism', *ABC News* (18 February 2019) <https://www.abc.net.au/news/2019-02-18/tuvalu-pm-slams-kevin-rudd-suggestion-as-neo-colonialism/10820176> accessed 14 May 2020.

[106] Jane McAdam, 'Historical Cross-Border Relocations in the Pacific: Lessons for Planned Relocations in the Context of Climate Change' (2014) 49 The Journal of Pacific History 301, 302.

[107] IPCC (n 73) 396. [108] ibid.

needs' in order to ensure that any relocation 'protects and upholds the rights and dignities of the people involved'.[109] Vanuatu's new National Climate Change and Displacement Policy has been described as 'one of the world's most progressive policies on climate-driven displacement'.[110] In other words, the reality challenges the image of passive victims of climate change awaiting an externally devised (cross-border relocation) solution.

d. Reflections on Climate Change and Regionalism

Over the past decade, the PIF has had a concerted focus on strengthening and deepening regionalism in the Pacific.[111] However, the issue of climate change—and specifically the failure of the regional hegemon, Australia, to commit to international standards in relation to climate mitigation policy—is threatening to fracture the PIF's strategic vision of cementing and deepening regional frameworks for responding to current and future challenges. Yet, a lack of uniform commitment to the key challenges and priorities of the region, notably from the most economically dominant State, has not impeded progress. Indeed, following an annual meeting in which Australian interventions on climate issues were deemed 'neocolonial' and 'condescending',[112] Pacific leaders adopted the Kainaki II Declaration in which they 'reaffirmed climate change as the single greatest threat to the livelihoods, security and wellbeing of the peoples of the Pacific'.[113] The Declaration's focus is not on migration, but on the 'Forum's leadership and moral authority' to engage the UN on global responsibility to take action on climate change,[114] building climate disaster resilience in the Pacific,[115] and recognizing and strengthening Pacific Island States' rights in relation to maritime boundaries and zones.[116] A subset of Pacific Island States has exhibited a willingness to break away from Australia and New Zealand and advocate as a smaller bloc in the UN,[117] thus forging their own vision of regionalism that is dominated by their priorities, concerns, and best interests, marked by a strong sense of self-determination and autonomy.

[109] Nazhat Shameem Khan (Republic of Fiji Ambassador to the UN), 'United Nation [sic] High Commissioner for Refugees Executive Committee Meeting: General Debate' (4 October 2017) <https://www.unhcr.org/59d531fa7.pdf> accessed 14 May 2020.

[110] Wewerinke-Singh and Van Geelen (n 101) 682.

[111] PIF, 'The Framework for Pacific Regionalism' (July 2014) <http://www.forumsec.org/wp-content/uploads/2017/09/Framework-for-Pacific-Regionalism.pdf> accessed 14 May 2020.

[112] Kate Lyons, 'Fiji PM Accuses Scott Morrison of "Insulting" and Alienating Pacific Leaders', *The Guardian* (17 August 2019) <https://www.theguardian.com/world/2019/aug/16/fiji-pm-frank-bainimarama-insulting-scott-morrison-rift-pacific-countries> accessed 14 May 2020.

[113] PIF Secretariat, 'Forum Communiqué' (50th Pacific Islands Forum, Funafuti 13–16 August 2019) para 14.

[114] ibid para 15.

[115] ibid paras 17–22.

[116] ibid paras 24–7. See Chapter 46 in this volume.

[117] Fry (n 3) 287.

5. Conclusion

This chapter has established that although there is little refugee law scholarship on Oceania as a region, analysis of emerging issues and trends has much to offer refugee law scholars. Oceania is a region that has undergone significant geopolitical change as many Pacific Island States have emerged relatively recently from colonialism, and have sought to redefine their relationship with the region's hegemon, Australia, and, to a lesser extent, with New Zealand. While Australia has sought to enlist its neighbours in the implementation of its highly controversial refugee policies, under the guise of regionalism, this has received strong resistance from certain quarters. An even more concerted resistance is evident in the rejection of labels and policy approaches that assume that movement away from the Pacific is an inevitable consequence of the adverse effects of climate change, with a strong preference instead for policies that enable self-determination and autonomy.

This chapter has highlighted the need for more research and scholarship into the policies and practices of refugee protection in Oceania, and, in particular, greater support for scholarship from States within the region that are most likely to be impacted by rising sea levels and other damaging consequences of climate change. While research that seeks to draw out the voices and perspectives of affected communities is important and should be welcomed, there is a need to support and facilitate academic work from *within* those communities in order to ensure that scholarship on refugee law and displacement is truly global.

PART IV

ACCESS TO PROTECTION AND INTERNATIONAL RESPONSIBILITY-SHARING

CHAPTER 25

THE SHARING OF RESPONSIBILITIES FOR THE INTERNATIONAL PROTECTION OF REFUGEES

MADELINE GARLICK*

1. Introduction

The question of how responsibility for the international protection of refugees should be distributed amongst States has been debated at international level since the inception of the modern refugee protection regime. It is arguably a more pressing question today than at any other point in history.

Throughout the twenty-first century, the vast majority of refugees have been hosted in the developing world, in countries with limited national resources to respond to refugees' needs. UNHCR reported that at the end of 2018, 84 per cent of the world's refugees were hosted in developing regions, including one-third in Least Developed Countries.[1] These imbalances are not redressed alone by the contributions that refugees can bring to their host societies, although these may be very significant in many cases.[2] Strains on the hosting capacity of less well-resourced countries can undermine the effectiveness of responses to refugees, reduce or preclude access to comprehensive durable solutions to

* The views in this chapter are those of the author, and do not necessarily reflect the position of UNHCR or the United Nations.

[1] UNHCR, 'Global Trends: Forced Displacement in 2018' (2019) 18 <https://www.unhcr.org/uk/statistics/unhcrstats/5d08d7ee7/unhcr-global-trends-2018.html> accessed 28 January 2020.

[2] Alexander Betts, Louise Bloom, Josiah Kaplan, and Naohiko Omata, *Refugee Economies: Forced Displacement and Development* (OUP 2016).

displacement, and create or exacerbate tensions between States. In such cases, the international legal order, relations between States and host communities' well-being risk being undermined by significant imbalances in the distribution of the costs and benefits associated with hosting refugees. The resulting gaps may also threaten the freedoms and futures of refugee individuals and families whose lives, liberty, and other basic rights may go unprotected.

Challenges associated with large refugee numbers, and the protracted nature of many refugee situations, have triggered renewed calls for strengthened responsibility-sharing arrangements amongst States. By providing more predictable and sustainable support to States with limited capacity, such arrangements would aim to ensure that protection, assistance, and solutions can be provided more effectively, equitably, and systematically to refugees. This imperative was clearly articulated by the UN General Assembly in the 2016 New York Declaration for Refugees and Migrants, adopted after intense political and media attention focused on challenges associated with significant refugee and migration movements in some parts of the world.

The need for a strong, clearly defined framework for more equitable sharing of responsibility has been referred to as the 'perennial gap' in the international refugee protection regime.[3] Although international, regional, and national legal instruments establish obligations for States to protect refugees in their territory or subject to their jurisdiction, they do not define explicitly the nature of the duties States owe to each other, or to refugees in the territory or under the jurisdiction of other States.

While many States contribute significantly to financial assistance and resettlement for refugees outside their territory on a voluntary basis, there is no clearly defined international mechanism to ensure responsibility-sharing on more equitable, predictable, and comprehensive terms. Initiatives in the past have sought to catalyse responsibility-sharing efforts, including at regional level and under UN coordination and leadership, yet they have tended to be *ad hoc*, situation-specific, and limited in duration and impact.[4] The Global Compact on Refugees, endorsed by the General Assembly in December 2018, sought to move beyond those limitations and establish a firmer basis for responsibility-sharing on an ongoing and global basis.

This chapter critically examines the principle and practice of responsibility-sharing amongst States, defined broadly as efforts to achieve a more equitable distribution of responsibilities to provide refugees with protection and solutions and of associated costs and benefits.[5] It analyses the legal and conceptual underpinnings of the concept, its

[3] Volker Türk, 'The Promise and Potential of the Global Compact on Refugees' (2018) 30(4) IJRL 575, 581.

[4] The Comprehensive Plan of Action for refugees in South-East Asia in the 1970s to 1980s is amongst the best-known of these. See Penelope Mathew and Tristan Harley, *Refugees, Regionalism and Responsibility* (Edward Elgar 2016) 143–61.

[5] For different approaches to defining responsibility-sharing, see eg James C Hathaway and R Alexander Neve, 'Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection' (1997) 10 Harvard Human Rights Journal 115, 144–5; Alexander Betts, Cathryn Costello, and Natascha Zaun, *A Fair Share: Refugees and Responsibility-Sharing* (Delmi 2013) 19–22; Ann Vibeke Eggli, *Mass Refugee Influx and the Limits of Public International Law* (Brill 2002).

treatment in scholarship, and its increasing prominence in international declarations and discussions among States. It will consider several initiatives at international level which have aimed to give it practical effect in contemporary refugee situations, including in Africa and the Americas, based on the Global Compact on Refugees, and examine how this may provide a firmer normative and institutional basis for responsibility-sharing in the future.

There is increasing recognition that responsibility-sharing, involving more predictable, substantial, and systematic support to States hosting large refugee populations, is a necessary precondition to the continued effective functioning of the international protection system. This chapter maintains that in addition to strengthened action by States, recognition is required of the role of other actors, including civil society and private entities, faith-based and other actors, as well as refugees themselves, whose engagement has potential further to strengthen responses to the needs of refugees, notably in large and protracted situations.

2. Legal Foundations and Conceptual Basis

a. International Legal Sources

The Convention relating to the Status of Refugees explicitly acknowledges the need for international cooperation amongst States to address the collective challenges posed by refugee movements. Paragraph 4 of the preamble states 'that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of the problem of which the UN has recognized the international scope and nature cannot be achieved without international cooperation'. Beyond this, however, the Convention does not indicate the form that such cooperation should take, or the circumstances that trigger the obligation for States to address this need.

While the concept of responsibility-sharing is not defined explicitly in international law, it is frequently associated with related concepts in international instruments, including international cooperation, solidarity, and burden-sharing. The duty of States to cooperate was expressed in article 1(3) of the Charter of the United Nations (UN Charter), indicating that international cooperation in solving 'international problems of an economic, social or humanitarian character' is among the UN's overarching purposes.[6] Articles 55 and 56 further commit UN Member States to 'take joint and separate action in cooperation' with the UN to solve international economic, social, and related problems.[7] Goodwin-Gill and McAdam note that these provisions

[6] Charter of the United Nations (adopted 24 October 1945) 1 UNTS XVI (UN Charter), art 1(3).
[7] ibid arts 55, 56.

establish a specific obligation of cooperation in the refugee context, given the inherently international character of flight across borders and of refugees' claims for protection by other States.[8]

Some regional refugee instruments refer to burden- and responsibility-sharing, international cooperation, and solidarity in more directive terms. The OAU Convention provides that 'where a Member State finds difficulties in continuing to grant asylum to refugees, [it] may appeal directly to other Member States and through the OAU, and such other Member States shall in the spirit of African solidarity and cooperation take appropriate measures to lighten the burden' of the Member State granting asylum.[9] In the EU, article 80 of the Treaty on the Functioning of the European Union requires that the EU's policies on asylum and their implementation 'shall be governed by the principle of solidarity and fair sharing of responsibility'.[10] These provisions, based on their plain wording, can be understood to require States in those regions to take positive steps to redress imbalances, and otherwise ensure that responsibility for refugee protection is not disproportionately borne by a few States unaided.[11]

The need for international responsibility-sharing and cooperation, including addressing the 'burdens' associated with the presence of refugees, is also recognized in over 30 conclusions of UNHCR's Executive Committee (ExCom). Amongst these, ExCom in 1978 '[r]eaffirmed the principle of international solidarity as a primary condition for the practice of liberal asylum policies and for the effective implementation of international protection in general',[12] while in 2005, it 'underline[d] the importance of burden and responsibility sharing at all stages of a refugee situation, including ensuring access to protection in responding to the assistance needs of refugees as well as in addressing and facilitating durable solutions'.[13] In 2016, ExCom 'reaffirm[ed] its commitment to international solidarity and responsibility- and burden-sharing involving all members of the international community, . . . recalling the importance of international cooperation, in particular to support communities and countries hosting large refugee populations, in ensuring protection and assistance and achieving solutions for refugees'.[14] In these pronouncements, States have unequivocally acknowledged the importance of responsibility-sharing, and have elaborated further on concrete measures which can and should be taken to achieve it.[15] The positive formulations in the ExCom conclusions have nevertheless concealed divisions between States over existing distributions of costs and demands. Representatives of India and Pakistan in 1997 argued in ExCom that

[8] Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, OUP 2007) 502.

[9] OAU Convention, art 2(4).

[10] Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C115/47, art 80.

[11] Madeline Garlick, *Solidarity Under Strain* (OUP forthcoming).

[12] UNHCR ExCom Conclusion No 11 (LXIV) (1978) para (e).

[13] ExCom Conclusion No 102 (LVI) (2005) para (k).

[14] ExCom Conclusion No 112 (LXVII) (2016) preambular para iv.

[15] This includes numerous references to resettlement: see ibid; ExCom Conclusion No 90 (LII) (2001) para (k). See also UNHCR, *A Thematic Compilation of Executive Committee Conclusions* (2014) 42–69.

developing countries 'should not be left alone in bearing the burden of absorbing refugees' and that 'burden-sharing…implied that developed countries had to accept their responsibilities under international refugee law and refrain from unilateral practices…that could contribute to a complete collapse of the international regime'.[16]

The term 'burden-sharing' has often been preferred by countries hosting large refugee populations which have pointed to the very significant financial demands and perceived negative impacts associated with their presence. In 1983, Fonteyne posited that 'burden-sharing' was an emerging norm of international law, flowing from the UN Charter's obligation for States to maintain international peace and security, as one of the purposes of the UN. He argued that peace and security could be threatened by large-scale refugee arrivals in certain circumstances.[17] However, some commentators have taken issue with the negative connotations of refugees portrayed exclusively as a 'burden'. Vibeke Eggli argued that the term suggests asylum seekers have 'lost all human value and have become negotiable and transferable commodities, leaving the individual with no will or say'.[18] Consequently, the term 'responsibility-sharing' has gained wider acceptance, highlighting the legal obligations and responsibilities of States towards refugees as rights holders, and towards each other, under the Refugee Convention, regional refugee law instruments, and the international human rights framework. As a notion that implicitly looks beyond the negative costs or 'burdens' for States hosting refugees, and recognizes their agency, as well as their positive social, economic, and cultural contributions, responsibility-sharing is the preferred formulation for some States and writers, as well as UNHCR and civil society.[19] Nevertheless, some large host countries that emphasize the actual or perceived negative impact of refugees on their societies have continued to use and insist on 'burden-sharing' in international policy discussions, alongside 'responsibility-sharing' or alone.

b. Approaches to Responsibility-sharing

Responsibility- and burden-sharing practices have been critically analysed by numerous academic experts over time. Amongst these practices, Noll identified three broad categories: (1) harmonized norms or laws ('sharing norms'); (2) financial contributions ('sharing money'); and (3) physical responsibility-sharing ('sharing people').[20]

[16] Quoted in Agnès Hurwitz, *The Collective Responsibility of States to Protect Refugees* (OUP 2009) 162.

[17] JPL Fonteyne, 'Burden-Sharing: An Analysis of the Nature and Function of International Solidarity in Cases of Mass Influx of Refugees' (1983) 8 Australian Yearbook of International Law 162, 184.

[18] Vibeke Eggli (n 5) 36.

[19] Betts, Costello, and Zaun (n 5) 19; Martin Gottwald, 'Burden Sharing and Refugee Protection' in Elena Fiddian-Qasmiyeh, Gil Loescher, Katy Long, and Nando Sigona (eds), *The Oxford Handbook of Refugee and Forced Migration Studies* (OUP 2014) 525.

[20] Gregor Noll, *Negotiating Asylum, the EU Acquis, Extraterritorial Asylum and the Common Market of Deflection* (Kluwer 2000).

'Sharing norms' aims to reduce the unequal distribution amongst States of asylum seekers and refugees by harmonizing standards and thereby reducing the perceived incentive for people to move towards States with more favourable provisions. Common standards need to reflect international norms, including under the Refugee Convention and human rights law. However, as efforts to establish common asylum standards in the EU demonstrate, such harmonization may not of itself achieve an equitable geographical distribution of refugees across countries. This suggests that common norms may not be effective in redistributing responsibility, notably where their implementation is inconsistent and, in some cases, undermined by a lack of political will.[21]

'Sharing money' refers to the provision of financial assistance or other resources to States hosting large refugee populations. Donor States have contributed significantly to humanitarian aid and emergency assistance budgets for refugee situations over many decades. Multilateral funding mechanisms have developed in scale and complexity, enabling international cooperation between donor States through joint funding arrangements, such as regional funds, multi-donor trust funds or UN pooled funding, and joint appeals. However, providing funds is generally voluntary and difficult to predict. Some initiatives aimed at establishing structured mechanisms to achieve more dependable funding have had limited success. For example, the International Conferences on Assistance to Refugees in Africa (ICARA I and II)[22] and the International Conference on Central American Refugees (CIREFCA) process in Latin America[23] saw funding shortfalls and mismatched expectations on the part of donor States and host countries. Furthermore, Anker, Fitzpatrick, and Shacknove have pointed to the risk that financial support for countries in regions of origin could be motivated by 'containment' strategies, aimed at 'warehousing' refugees in region of origin.[24] This is seen to arise particularly where increased financial support coincides with the explicit aim of limiting refugee arrivals; or where it is linked to restrictive measures, which could effectively limit access to territory or asylum in donor countries.[25]

Nevertheless, the protection and well-being of millions of refugees continues to depend upon the provision of financial support to States that host large refugee populations. This is needed not only to ensure refugees' basic needs are met, but also to preserve asylum space by encouraging receiving countries to continue to welcome and host refugees. At the same time, refugee-hosting countries have argued that their non-financial contributions to refugee protection through accommodating large populations—

[21] See eg Francesco Maiani, 'The Dublin III Regulation: A New Legal Framework for a More Humane System?' in Vincent Chetail, Philippe De Bruycker, and Francesco Maiani (eds), *Reforming the Common European Asylum System: The New European Refugee Law* (Brill 2016).

[22] Alexander Betts, *Protection by Persuasion: International Cooperation in the Refugee Regime* (Cornell 2019); Mathew and Harley (n 4) 162–5.

[23] Mathew and Harley (n 4) 175–88; Betts (n 22).

[24] Deborah Anker, Joan Fitzpatrick, and Andrew Shacknove, 'Crisis and Cure: A Reply to Hathaway/Neve and Shuck' (1998) 11 Harvard Human Rights Journal 295.

[25] See Steve Peers, 'The Final EU/Turkey Refugee Deal: A Legal Assessment' (*EU Law Analysis*, 18 March 2016) <http://eulawanalysis.blogspot.com/2016/03/the-final-euturkey-refugee-deal-legal.html> accessed 27 January 2020.

sometimes perceived to be at considerable social, infrastructural, and environmental cost—needs wider recognition at the international level.[26]

The 'sharing money' category also extends to resource provision, for example through technical assistance designed to enhance national capacity to receive and manage refugee arrivals, presence, and protection needs. Many States undertake capacity development or 'twinning', on a bilateral or regional basis, offering expert personnel or training to assist other States in building institutional and legal frameworks and capacity to receive and protect refugees. However, technical assistance may only contribute in limited ways to lasting solutions for refugees, which often depend on the willingness of host country political leadership or external factors, such as the improvement of conditions in countries of origin. Further, capacity development support may not always be welcomed by host countries that harbour reservations about being seen to signal openness to receiving more refugees.

Physically relocating refugees and asylum seekers—or 'sharing people', through resettlement, humanitarian admission, and other legal pathways—has been described as the 'most effective but controversial way to address disparities in refugee burdens'.[27] Resettlement, in particular, is widely seen as an important humanitarian gesture by receiving countries, which can provide solutions to particularly vulnerable refugees, including those with medical or other needs that may be costly for first host countries to address. Beyond exclusively State-supported resettlement, community sponsorship can increase the number of resettlement places for refugees who benefit from valuable community support and personal networks upon arrival.

Resettlement and other forms of physical redistribution undertaken with the consent of refugees are effective in building trust in responsibility-sharing amongst States, by demonstrating that wealthier States are not merely ready to pay for refugees to be protected elsewhere, but are also prepared to welcome them into their own territories. Yet resettlement has traditionally benefited only a fraction of the world's refugees, at less than 1 per cent of refugees under UNHCR's mandate.[28] Resettlement programmes thus offer important routes to international protection for individuals and symbolic contributions to global efforts, rather than a means to rebalance numerically the uneven distribution of refugees worldwide.

Furthermore, some arrangements for 'sharing people' may raise concerns about sustainability and respect for refugees' rights and agency, if they do not take account of individuals' intentions and links to family or otherwise in the countries concerned.[29] In

[26] See UNHCR, 'Measuring the Costs and Impact of Refugee Protection in Host Countries' (Background Paper, 26 February 2018). See also Sarah Deardorff Miller, 'Assessing the Impact of Hosting Refugees' (2018) World Refugee Council Paper No 4/2018 <https://www.cigionline.org/sites/default/files/documents/WRC%20Research%20Paper%20no.4.pdf> accessed 27 January 2020.

[27] Eiko R Thielemann, 'Editorial Introduction: Special Issue on European Burden-Sharing and Forced Migration' (2003) 16(3) JRS 225, 232.

[28] UNHCR, 'Not Enough Resettlement Solutions for Refugees Worldwide, says UN' (*UN News*, 18 February 2019) <https://news.un.org/en/story/2019/02/1033061> accessed 27 January 2020.

[29] See eg Francesco Maiani, 'The Reform of the Dublin System and the Dystopia of "Sharing People"' (2017) 24(5) Maastricht Journal of European and Comparative Law 622.

the 1990s, Hathaway and Neve called for the establishment of cooperation frameworks amongst States to share people, providing for distribution of refugees based on quotas, with places in the quota being 'tradeable' between States under UNHCR's supervision.[30] Other authors, including Anker, Fitzpatrick, and Shacknove,[31] emphasized the primary responsibilities of States towards refugees who claimed asylum in their territories, and advocated for greater account to be taken of refugees' choices as regards their countries of asylum.[32]

Responsibility-sharing through quotas and distribution arrangements, based on defined numerical and capacity-related criteria, including Gross Domestic Product and current refugee population, have been implemented in the EU context, in relocation measures endorsed by the European Council in 2015.[33] These saw limited success in practice, however, due in part to limited readiness by EU States to accept their allocated quotas and receive asylum seekers.[34]

Arrangements to reallocate responsibility for asylum seekers, which are not based on individuals' consent or preferences, have attracted significant critique. Based on the 'safe third country' concept, the EU's Dublin system has been criticized by commentators and asylum advocates for causing significant hardship for asylum seekers, while failing to ensure access to fair and effective asylum determinations. Its operation has also been held to violate human rights standards by European regional courts in several landmark cases.[35]

Notwithstanding these controversies, however, recent years have seen increasing recognition of the importance of the contributions made by a wide range of actors in supporting refugees. Beyond central State authorities, the place of municipalities, as actors called upon to respond directly to refugees' day-to-day needs, has received greater prominence in international fora, funding, and policy discussions. Faith leaders and communities also play important roles, including in encouraging States to admit refugees and to adopt humanitarian policies, but also in welcoming and offering direct support. The actions of these entities cannot replace the actions of States, nor in any way alter States' legal obligations towards refugees. However, they can and do in practice fill

[30] Hathaway and Neve (n 5).

[31] Anker, Fitzpatrick, and Shacknove (n 24).

[32] Gibney observed that arrangements that failed to do so appeared to treat refugees as if they were 'toxic waste': Matthew J Gibney, 'Forced Migration, Engineered Regionalism and Justice between States' in Susan Kneebone and Felicity Rawlings Sanaei (eds), *New Regionalism and Asylum-Seekers: Challenges Ahead* (Berghahn 2007) 57–78.

[33] European Council Decision (EU) 2015/1601 of 22 September 2015 Establishing Provisional Measures in the Area of International Protection for the Benefit of Italy and Greece [2015] OJ L248/80. For the conceptual background to the EU quota discussion, see Jesus Fernandez-Huertes Moraga and Hillel Rapoport, 'Tradable Refugee Admission Quotas and EU Asylum Policy' (2014) CESinfo Working Paper 5072.

[34] See Elspeth Guild, Cathryn Costello, and Violeta Moreno-Lax, 'Implementation of the 2015 Council Decisions Establishing Provisional Measures in the Area of International Protection for the Benefit of Italy and Greece' (Study for the LIBE Committee PE.583.132, European Parliament 2017).

[35] European Court of Human Rights, *MSS v Belgium and Greece*, Application No. 30696/09; judgment of 21 January 2011; Court of Justice of the European Union, *NS v Secretary of State for the Home Department* and *ME and others v Refugee Applications Commissioner and others*, Joined cases C-411/10 and C-439/10, 21 December 2011.

gaps in States' responses, exert public pressure on States to maintain rights-compliant policies and laws, and achieve significant impact in human—and sometimes, material—terms. These contributions merit recognition where they serve to maintain or expand protection space and uphold standards of treatment for refugees.

c. Rationales and Disincentives to Engage in Responsibility-sharing

In considering the effectiveness and limits of arrangements on responsibility-sharing, it is important to examine States' perceived self-interest in participating, as well as the reasons they might feel dissuaded from doing so.

There are convincing arguments for States to be involved in responsibility-sharing measures. These include norm-based imperatives, linked not solely to domestic priorities, but to wider benefits for the international community at large. States recognize that refugee protection constitutes a global public good,[36] offering benefits to the international community. Ensuring respect for the rights of refugees and upholding the international protection regime will be seen by some as an incentive to support such measures.

It can also be argued that responsibility-sharing is a 'functional necessity'[37] for the operation of the refugee protection regime. In cases of mass influx, international cooperation and solidarity may be required to ensure States can respond to refugee arrivals at their borders. Further, a lack of protection in a first country of arrival may also compel refugees to move onward to seek protection and adequate standards. Desire to avoid the duplication, inefficiencies, delays, and tensions between States that can result from refugees claiming in multiple countries *en route* can itself motivate States to support improvement of conditions in first arrival countries. However, UNHCR and others have cautioned that such support must be undertaken in ways that strengthen access to protection in all concerned countries, without increasing strains on countries in regions of origin: effectively sharing, rather than shifting, burdens and responsibilities.[38]

States may also see responsibility-sharing as a form of 'insurance' against exposure to future risks—namely the possibility of being left unassisted by other States in the case of possible future arrivals. If a State accepts additional responsibilities for refugees hosted by others, it may subsequently be in a better position to request help if faced with refugee movements beyond its capacity in the future. Suhrke maintains that the insurance logic also provides 'a reasonable guarantee that the institution of asylum will be kept intact, since States are more likely to offer protection if they can share the burden'.[39]

[36] See A Suhrke, 'Burden-sharing during Refugee Emergencies: The Logic of Collective versus National Action' (1998) 11(4) JRS 396; Alexander Betts, 'Public Goods Theory and the Provision of Refugee Protection: The Role of the Joint-Product Model in Burden-Sharing Theory' (2003) 16(3) JRS 274.

[37] Fonteyne (n 17) 175.

[38] See UNHCR, 'Guidance on Responding to Irregular Onward Movement of Refugees and Asylum-Seekers' (September 2019) para 25.

[39] Suhrke (n 36) 398.

This argument might be less persuasive in cases where States might consider, based on their geography or restrictive border control policies, that they are unlikely to receive overwhelming arrivals. Similarly, if they judge that they have the capacity to take unilateral action to address such a threat more effectively than through a collective scheme[40]—effectively 'self-insure'—the motivation to participate may be weaker.

One potentially dissuasive element is the lack of clear legally binding norms. In addition, States may rely on arguments based on sovereignty to claim they are not bound by any measure that might limit their right to determine who enters and stays in their territory. Some experts also point to the likelihood of 'free riding'—namely, the risk they will be left with a significant share of the costs, while other States—which have not contributed at the same level or at all—will also receive the benefits.[41] Additionally, States may feel disinclined to participate in responsibility-sharing arrangements if these are seen to have little measurable impact on the scale of displacement worldwide. However, this argument overlooks the importance of protection in individual cases and the potential effect of cumulative responsibility-sharing measures taken by numerous States in coordinated fashion.

In sum, beyond legal principles, persuasive arguments appealing to States' interests are likely to be important in encouraging sustained and impactful engagement in responsibility-sharing.

3. The Global Compact on Refugees

Against a backdrop of evident need, imprecise legal norms, and varying approaches to the concept, the UN General Assembly in 2016 expressed its clear commitment to the principle of responsibility-sharing for refugees. In the New York Declaration, it unanimously stated: '[t]o address the needs of refugees and receiving States, we commit to a more equitable sharing of the burden and responsibility for hosting and supporting the world's refugees, while taking account of existing contributions and the differing capacities and resources among States', seeking 'to translate this long-standing principle' of responsibility-sharing 'into concrete and practical action'.[42]

The Global Compact on Refugees (GCR), affirmed in December 2018, expressed UN Member States' commitment to responsibility-sharing in unequivocal terms. Recognizing that refugees are a 'common concern of humankind', it is described as 'emanating from fundamental principles of humanity and international solidarity', which 'intends to provide a basis for predictable and equitable burden- and responsibility-sharing among all UN Member States, together with other relevant stakeholders as

40 Anker, Fitzpatrick, and Shacknove (n 24) 301.
41 Suhrke (n 36) 400; Betts (n 22) 25; Betts (n 36) 276.
42 New York Declaration para 68.

appropriate'. As a non-legally binding document, it avowedly did not purport to define new norms or create new obligations; but rather to provide a basis for operationalizing key international legal principles, including international cooperation.[43]

The GCR articulated four objectives, namely to: (1) ease pressures on host countries; (2) enhance refugee self-reliance; (3) expand access to third country solutions; and (4) support conditions in countries of origin for return in safety and dignity.[44] To achieve these, it called for efforts to 'broaden [the] base of support' for refugee protection, and establish arrangements for more equitable, sustained, and predictable contributions to responsibility-sharing. These include the Global Refugee Forum, to be convened every four years, inviting UN Member States at Ministerial level to 'announce concrete pledges and contributions towards the objectives of the Global Compact'[45] and subsequently take stock of progress.

Recognizing the importance of national leadership, the GCR provides that host countries may create situation-specific national arrangements to support responsibility-sharing 'to coordinate and facilitate the efforts of all relevant stakeholders working to achieve a comprehensive response'.[46] A 'Support Platform' may be activated at the request of a host country to mobilize context-specific support for refugees and host communities in the case of a large-scale or complex refugee situation. It may galvanize political efforts to prevent displacement and reinforce protection, or bring in financial and technical assistance, resettlement places, and complementary pathways to solutions.[47]

Some analysts have observed that the framing of the GCR's support arrangements offers grounds for progress beyond previous achievements and deadlock. Gilbert has highlighted the importance of measuring its outcomes through targeted indicators,[48] while Cantor has posited that 'however modestly within the "politics of the possible" . . . [the GCR's provisions address] the notion of "fairness" in global refugee policy', seen as a step forward from previous approaches to inter-State dealings on refugees.[49]

The GCR's approach to large-scale and protracted situations aims to achieve more systematic support than past efforts, promoting linkages between refugee responses and development, and mobilizing a broader range of solutions, which together correspond to more comprehensive systems thinking.[50] Jobs and livelihoods are approached more proactively in the GCR than past multilateral refugee frameworks. The GCR emphasizes the value of economic opportunities for refugees to improve self-reliance and reduce dependence on State or international humanitarian assistance during displacement, as well as a means to improve refugees' prospects of solutions, whether in host countries, third countries, or on return to their countries of origin. It calls for

[43] Global Compact on Refugees para 2.
[44] ibid para 7. [45] ibid para 17.
[46] ibid paras 20–1. [47] ibid paras 22–7.
[48] Geoff Gilbert, 'Indicators for the Global Compact on Refugees' (2018) 30(4) IJRL 635.
[49] David Cantor, 'Fairness, Failure and Future in the Refugee Regime' (2018) 30(4) IJRL 627, 628.
[50] See Gottwald (n 19) 527, 536.

expanded job creation and entrepreneurship programmes for host communities as well as refugees,[51] incentivizing host States to relax limitations on refugees' rights to work and self-reliance.

The multistakeholder approach adopted in the GCR recognizes that civil society, the private sector, academia, and others have expertise, experience, and access to information that are not always at the immediate disposal of States. The Compact calls for an active role for those entities in strengthening reception, solutions, livelihoods, and support to host communities. This can be pursued by capitalizing on the extensive field presence, operational experience, and protection focus of many national and international non-governmental organisations (NGOs), all of which equip them particularly well in contributing to comprehensive responses. Civil society's strong interest in supporting GCR implementation[52] can be harnessed productively to improve coordination, transparency, and impact. In addition, religious communities and faith leaders have also been recognized as particularly influential actors that can mobilize host societies and governments to enhance acceptance and inclusion of refugees.[53] The potential of these and other non-State stakeholders to contribute to promoting more effective sharing of responsibilities—between and within countries—is significant.

4. The Comprehensive Refugee Response Framework in Africa

On the African continent, support for reinforced responsibility-sharing efforts has come from the Comprehensive Refugee Response Framework (CRRF), forming part of the GCR. As of mid-2019, the CRRF was being applied in eight African States, namely Chad, Djibouti, Ethiopia, Kenya, Rwanda, Somalia, Uganda, and Zambia, as well as in the long-standing Somali refugee situation in the East and Horn of Africa.

The New York Declaration called for a CRRF for situations involving large movements of refugees, based on the principles of international cooperation and on burden- and responsibility-sharing, to ensure more effective protection and assistance for refugees and support for host States and communities.[54] Further, the Declaration foresees a shift from reliance by refugees on humanitarian assistance, provided through parallel support systems established by humanitarian agencies, to inclusion of refugees in

[51] Global Compact on Refugees para 73.

[52] See eg 'NGO Intervention on the Final Draft of the Global Compact on Refugees' (Towards a Global Compact on Refugees, Formal Consultations, 3–4 July 2018) <https://www.unhcr.org/events/conferences/5b4f45ebd2/ngo-statement-global-compact-refugees.html> accessed 28 January 2020.

[53] See eg 'Faith Actors call for Global Solidarity' (*UNHCR*, 20 June 2019), <https://www.unhcr.org/protection/conferences/5d0a2c444/faith-actors-call-for-global-solidarity.html> accessed 28 January 2020.

[54] New York Declaration, annex I, para 1.

national services. Such services, including health and education, are to be reinforced by funding and technical support from the international community.

Facilitated by UNHCR, but with an evident need for agreement and positive engagement of States, the CRRF aims to enlist the efforts of a wider group of stakeholders, including national and local authorities, international financial institutions, regional bodies, civil society organizations, the private sector, and refugees themselves.

Development actors and multilateral financial institutions—carrying significant leverage with many refugee-hosting countries—have also been engaged to support GCR implementation. These efforts gained momentum in 2018, when the International Development Assistance (IDA) programme of the World Bank Group established a $US2 billion financing sub-window for refugees and local communities, designed to help host governments address longer-term socio-economic challenges associated with refugee arrivals. Four of the seven countries that qualified for funding under this sub-window were CRRF countries in Africa (Chad, Ethiopia, Djibouti, and Uganda), where the funding has provided important support to the CRRF's implementation.

Subsequent developments in three of these illustrate the potential of such targeted support to bring about measurable progress in relatively short timeframes. The CRRF's implementation in Chad exemplifies the stakeholder-driven and development focus of the GCR. In mid-2018, Chad hosted close to 500,000 refugees, the highest number relative to population amongst all countries in Africa. Chad's government in 2016 had pledged to improve access to education, land, and birth certificates for refugees, commitments to the GCR goal of enhancing refugee self-reliance. A $US50 million IDA 18 grant supported expansion of education opportunities, enabling 108 schools located in refugee camps and settlements to be declared Chadian schools, permitting Chadian and refugee children to attend and receive State support.[55] In 2018, it was announced that Chad's legislature would draft a new refugee law.[56] These steps are promising for a country whose legal and institutional framework previously limited scope for refugee protection and solutions.

In Ethiopia, significant steps in 2018 included the adoption of a Refugee Proclamation, which relaxed prohibitions on refugees' free movement and labour rights. In addition, the enrolment of refugee children in primary school increased significantly over the two years to mid-2018, bringing the figure of enrolled school-aged refugee children to 72 per cent. New administrative arrangements also allowed refugees to register births, deaths, and marriages, using national civil documentation that was made available to refugees. The Ethiopia Jobs Compact project has also received extensive support from the World Bank, funding the establishment of industrial parks and providing productive employment opportunities for Ethiopians and refugees to further their self-reliance.

[55] UNHCR, 'Two Year Progress Assessment of the CRRF Approach: September 2016–September 2018,' UN doc ES/2018/07 (December 2018) <https://www.unhcr.org/5c63ff144.pdf> accessed 28 January 2020.

[56] UNHCR, 'Applying Comprehensive Responses (CRRF) in Africa' (August 2018) <https://www.unhcr.org/publications/operations/5a8fcfff4/applying-comprehensive-responses-crrf-africa.html> accessed 28 January 2020.

Uganda has received and granted land usage rights to many refugees, enabling them to undertake income-generating activities. In 2018, it also included refugees in national development plans through the Settlement Transformative Agenda, aimed at enhancing livelihood opportunities for refugees and host communities. Uganda further adopted a national Education Response Plan for 2018–21, targeting 675,000 children from refugee and host communities. Donors supported vocational training for refugees and capacity development for local authorities. The IDA 18 programme further provided loans and grants for national infrastructure, and water management and development.

CRRF support for the Somali refugee situation went to major receiving countries for Somalis in the region, together hosting some 836,000 refugees as of March 2018. While many refugees contribute to economic activity in countries of asylum, some representatives of these countries have expressed concerns about unemployment, perceived security threats, and the social and environmental impacts of the refugees' presence. The CRRF sought to promote self-reliance for Somalis, including through environmentally sustainable activities, and to boost efforts to achieve solutions, including notably voluntary return to Somalia where this is viable. In this way, amongst other objectives, the CRRF has aimed to counter negative perceptions and reinforce host country support for refugee protection.

In the Somali situation, the CRRF has also sought to harness the potential of regional processes collectively to address displacement challenges. In March 2017, IGAD[57] heads of State and government met and agreed on the Nairobi Declaration and Plan of Action, committing to accelerate solutions in Somalia by creating conditions conducive to voluntary and sustainable return, while maintaining protection space in countries of asylum and strengthening sub-regional cooperation.[58] In the subsequent Djibouti Declaration, States hosting Somali refugees further agreed to improve their access to education, including by providing more places for refugee children in local schools, and incorporating refugees into national education systems by 2020.[59] Durable solutions and reintegration of refugees was enshrined for the first time in Somalia's own national development plan, as well as a draft National Policy Plan on Durable Solutions.

In a 2018 evaluation of the CRRF,[60] UNHCR observed advances in each of the participating countries, including through mobilization of unprecedented resources and political support for refugee protection and solutions. Some donors have aligned their funding programmes with CRRF objectives, providing a strong incentive to government and other actors to engage. Furthermore, on free movement—seen as a crucial

[57] The Intergovernmental Authority on Development (IGAD) is an eight-country bloc of African States including Djibouti, Eritrea, Ethiopia, Kenya, South Sudan, Sudan, Somalia, and Uganda.

[58] IGAD, 'Nairobi Declaration on Durable Solutions for Somali Refugees and Reintegration of Returnees in Somalia' (25 March 2017) <https://www.refworld.org/docid/5971c7cf4.html> accessed 19 February 2020.

[59] IGAD, 'Djibouti Declaration on Regional Conference on Refugee Education in IGAD Member States' (14 December 2017) <https://igad.int/attachments/article/1725/Djibouti%20Declaration%20on%20Refugee%20Education.pdf> accessed 19 February 2020.

[60] UNHCR (n 55).

contributing factor in promoting refugee self-reliance—substantial progress occurred in some countries. Along with changes to labour and documentation legislation, these have the potential substantially to improve the situation of refugees in key host countries. The engagement of development actors and processes in displacement, bringing in larger funding envelopes and longer-term planning horizons, should also provide a basis for more effective and consistent approaches to improving refugee self-reliance while supporting host communities.

By contrast, on the other two GCR objectives—return and resettlement to third countries—UNHCR's evaluation found that progress and impacts were more limited. Ongoing violence combined with drought in parts of Somalia has meant that conditions have remained unfavourable for large-scale return, with global resettlement places declining sharply in 2019, undermining the prospect of durable solutions still further for many refugees. Such outcomes highlight the value of caution and transparency, in avoiding risks in raising expectations.[61] Thus, while advances may improve the situation of refugees in some protracted and new displacement situations in Africa, without redoubled international support and further progress on local integration they will not be able to solve them in a durable and comprehensive way.

5. North and Central America: MIRPS

In a major regional initiative to strengthen responsibility-sharing under the rubric of the GCR, six countries in the North and Central Americas agreed in late 2017 to work together to develop a 'Comprehensive Regional Protection and Solutions Framework', known by its Spanish acronym 'MIRPS'.[62] The arrangement was defined in the San Pedro Sula Declaration, adopted by Belize, Costa Rica, Guatemala, Honduras, Mexico, and Panama, as a regional cooperation framework amongst countries of origin, transit, and destination. Its aims included establishing mechanisms for sharing responsibility, strengthening protection, and facilitating solutions for refugees, as well as promoting wider respect in practice for the rights of asylum seekers, internally displaced persons (IDPs), and returnees. The arrangement was developed consultatively amongst States and regional entities, notably the Organization of American States and the Central American Integration System, together with UN agencies, civil society, private sector actors, academia, and development banks. Its terms envisaged UNHCR support for the six initiating governments, but also support from other partners, including 10 additional countries that agreed through the MIRPS to offer technical cooperation and financial assistance.

[61] Randall Hansen, 'The Comprehensive Refugee Response Framework: A Commentary' (2018) 31(2) JRS 131.

[62] 'San Pedro Sula Declaration as a Regional Contribution to the Comprehensive Refugee Response Framework' (San Pedro Sula, 26 October 2017) <https://www.acnur.org/5b58d75a4.pdf> accessed 28 January 2020; UNHCR (n 55).

National Action Plans were developed for each of the MIRPS participating countries, defining measures to strengthen domestic refugee protection systems and promote comprehensive and sustainable solutions. The plans span four pillars, broadly corresponding to those in the CRRF, covering reception and admission, immediate and persistent needs, support to host countries and communities, and durable solutions. They contain baseline measures for national actions, including improved collection of data, disaggregated by age, sex, nationality, and needs. Also foreseen is the necessity for reinforced protection systems for women and girls—a critical need in a region where gender-based violence, discrimination, and femicide are widespread and devastating. Emphasis is placed on ensuring participation of displaced populations in needs assessment and response design.

A noteworthy aspect of the MIRPS is the character of the movements it addresses. Displacement in North and Central America is driven by complex factors, including in many cases persecution, generalized violence, and insecurity perpetrated by organized criminal gangs, against whom States have been unable to protect their citizens. At the same time, poverty and dysfunctional economies have prompted many people in the region to move across borders. In addition to refugee status under the Refugee Convention, and the wider ambit of the Cartagena Declaration—which includes people fleeing circumstances seriously disturbing public order—national forms of status based on humanitarian and other grounds have been applied in many countries in the region. States have granted other rights to stay to many people moving for reasons other than fear of persecution, serious harm, or public order disruption. By providing effective responses for people within mixed movements who are not refugees, such approaches have the potential to reduce pressure on developing asylum systems.

From approximately 2010, the numbers of people seeking asylum in the region rose significantly, and nascent State asylum systems sought support, including capacity development through technical assistance. Refugee movements and State responses were central themes in discussions amongst Latin American and Caribbean States, leading to the adoption of the Brazil Declaration and Plan of Action in 2014.[63]

While expressing positive intentions, a number of the commitments in these documents remain unfulfilled. Asylum and protection systems in the region continue to need reinforcement, notably as movements in 2018–19 saw increasing numbers of people in need of protection, including from resurgent gang violence in Honduras, and from the developing crisis in Venezuela. In May 2019, UNHCR issued guidance indicating that the majority of those fleeing Venezuela and seeking protection in neighbouring countries should be recognized as refugees under the Cartagena Declaration, or under the Refugee Convention.[64] The MIRPS has an important role to play in ensuring that access

[63] 'A Framework for Cooperation and Regional Solidarity to Strengthen the International Protection of Refugees, Displaced and Stateless Persons in Latin America and the Caribbean and Brazil Plan of Action' (Brasilia, 3 December 2014) (Brazil Declaration) <https://www.acnur.org/fileadmin/Documentos/BDL/2014/9865.pdf?file=t3/fileadmin/Documentos/BDL/2014/9865> accessed 28 January 2020.

[64] UNHCR, 'Guidance Note on International Protection Considerations for Venezuelans—Update I' (May 2019) <https://www.refworld.org/docid/5cd1950f4.html> accessed 19 February 2020.

to, and operation of, asylum processes are reinforced, so that national and regional capacity to cope with large-scale movements is not overwhelmed.

Amongst the concrete results of the MIRPS, Costa Rica established a system of documentation for asylum seekers, which provided access to the local e-payment systems, as well as social services and a national poverty reduction programme.[65] Guatemala expanded the provision of health services to assist some 15,000 refugees, as well as members of the host community. In Honduras, efforts under the MIRPS have included developing legislation on internal displacement, to be followed by a protocol on refugee status determination. In this way, a legal framework is being developed to address the displacement continuum, including support and solutions for IDPs, which may reduce the compulsion to cross borders in order to seek protection.

In sum, it would appear that a regionally specific framework or model, such as the MIRPS, or the Somalia CRRF, could lend additional impetus to global approaches to responsibility-sharing. Provided outcomes remain consistent with high international standards and principles, the MIRPS and African CRRF rollouts demonstrate the value of initiatives by States to take ownership of the CRRF and tailor it to regional needs and dynamics.

6. A Basis for Progress?

This chapter has sought to examine the legal and conceptual foundations of responsibility-sharing, as well as insights from its application in specific refugee settings. These demonstrate that while there is no perfect or generally applicable method of encouraging States to engage in responsibility-sharing, several factors may strengthen such arrangements, including under the GCR.

First, it can be argued that the vocal and increasingly active engagement of large host countries in debates around refugee protection and burden- and responsibility-sharing can be both positive and productive. Large host countries, including some non-parties to the Refugee Convention, take part in UNHCR's ExCom and other formal structures, which decide on key operational questions around refugee issues, in ways that bring realism and immediacy to the debates. Evidence of productive engagement in this context includes not only the GCR, but also ongoing work by UNHCR, requested by ExCom Member States, on measuring the impact of hosting refugee populations.[66]

Secondly, recent years have highlighted the need for national structures to work across governmental divides. The GCR supports a multistakeholder and 'whole of government' approach, which is needed to ensure coordination and consistent messaging between foreign affairs, humanitarian aid, home affairs, and development cooperation.

[65] UNHCR, 'Global update on the Comprehensive Refugee Response Framework' (September 2018).

[66] See UNHCR (n 26). See also ExCom Conclusion No 112 (n 14); ExCom Conclusion No 113 (LXVII) (2016); ExCom Conclusion No 114 (LXVIII) (2017).

Effective coordination can reduce duplication, wasted resources, and risks of tension, confusion, and unproductive parallel action. While the impact of this wider cross-governmental approach is yet to be tested fully in the GCR context, it appears to have yielded positive early results in more holistic planning and programming.

Thirdly, there is now wider acceptance of the need to forge or strengthen linkages between humanitarian and development strategies and programmes. In the past, some States might have seen efforts to include refugees' needs in development programming as inappropriately diverting funds that should have exclusively benefited citizens. This concern can be addressed through 'additionality'—where donors are ready to affirm that funding to address development challenges associated with refugee populations is additional to, and not in place of or deducted from, development funds supporting nationals. It may be that the presence of refugees can even serve to mobilize funding that would not otherwise have been available. Moreover, where development funding can be applied in ways that harness the potential contributions of refugees, rather than approaching them as a problem to be overcome, this may help some segments of host communities to appreciate more readily the benefits of receiving and protecting refugees.

Finally, there is increasing recognition of the importance, not only of consulting refugees and other displaced persons in the course of planning and implementing interventions, but of involving them in making and implementing decisions affecting their well-being. UNHCR's community-based protection approach and participatory assessments, including with a focus on age, gender, and diversity, were developed to provide platforms for refugees to express views, and to respond to their insights and proposals. Refugees and other displaced people have the right to be consulted; but apart from the rights-based rationale, the imperative to facilitate their involvement comes also from recognizing that refugees and other displaced persons have skills, knowledge, and insights, all of which are useful for protecting others and reinforcing systems to maintain their well-being. This need for participation—which must extend beyond symbolic consultation and avoid the risks of tokenism, or worse, instrumentalization of displaced persons—is reflected in the GCR, and other UNHCR documents and policies.

Ensuring refugees and other displaced people are involved in decision-making and the design of assistance, protection, and solutions programmes may prove challenging in practice. Arrangements for doing so need to make the most of people's skills, knowledge, and insights, without patronizing them or raising expectations that cannot be fulfilled. They need to take account of the situation of people of all ages, genders, and diverse backgrounds, and that needs to be done in cost-effective ways, to ensure ongoing donor support. At the same time, it is increasingly recognized that refugee participation is crucial for ensuring that assistance programmes, protection measures, and efforts to promote solutions will be better informed by the experiences and perspectives of people who have experienced displacement.[67] Such people have invaluable first-hand insights

[67] See Kate Pincock, Alexander Betts, and Evan Easton-Calabria, *The Global Governed? Refugees as Providers of Protection and Assistance* (CUP 2020).

that can complement and, where necessary, reorient standard institutional approaches. Involving persons of concern in programme design also concretely recognizes their rights and agency, to which many international and national administrations are committed on paper, but which may require greater efforts and innovative approaches to realize in practice.

7. Conclusion

Discussions and initiatives on responsibility-sharing for refugee protection, at policy and academic levels, have broadened in conceptual scope over recent years. These now extend beyond the concept's legal dimensions, possibly reflecting the limited application in State practice of provisions in international and regional legal instruments on responsibility-sharing to date. The increasingly pressing need to find more systematic and predictable mechanisms to support States receiving large numbers of refugees has nonetheless been acknowledged in multilateral and regional fora. The New York Declaration and the GCR provide new impetus to the issue and a framework for States to pursue responsibility-sharing in concrete ways through the UN. Responsibility-sharing could thus be seen as acquiring a stronger institutional basis through the GCR's provisions and support mechanisms, which will enable States experiencing large-scale arrivals and strained protection capacity to bring their needs to global attention.

By taking a multistakeholder approach, the GCR has broadened the categories of actors who can and do support refugee protection, assistance, and solutions. From large NGOs through to philanthropic foundations to faith actors, they are called upon to play a greater role in responding to large influxes and protracted situations. This approach has the potential to mobilize practical and material assistance in more flexible arrangements, reflecting the potential of non-State actors to contribute substantially to enhancing refugee protection, and pressing States to do more.

In the absence of binding obligations, responsibility-sharing arrangements are likely to continue to face challenges in enlisting contributions from reticent States. Even at the regional level, some decline to take part.[68] By contrast, others will see alternative geopolitical considerations and strategic benefits in engagement, based on a multilateralist approach.[69] It is argued that this selective participation does not undermine or refute the importance, value, and potential of responsibility-sharing efforts. Rather, leadership shown by a limited group of States and stakeholders may

[68] See, for example, the objections by a number of Central European States to relocation of asylum seekers in the EU as a responsibility-sharing measure, challenged unsuccessfully in the Court of Justice of the EU: Joined Cases C-643/15 and C-647/15, *Slovakia and Hungary v Council* [2017] OJ C 374/4.

[69] See, for example, the work of the Core Groups on Resettlement, comprised of resettlement countries committed to working together to identify and meet resettlement needs: UNHCR, 'Core and contact Groups' <https://www.unhcr.org/core-and-contact-groups.html> accessed 28 January 2020.

provide an important starting point for broader efforts over time. Examples of concrete efforts made in South America and in African countries taking part in the CRRF demonstrate strong interest in investing in cross-border cooperation and peer-to-peer arrangements, which can strengthen protection, assistance, and solutions. In this context, there are grounds for optimism, but further work still needs to be done to ensure that the responsibility-sharing arrangements under the GCR will succeed in establishing a framework for more systematic cooperation and support and strengthened responses to displacement in the future.

CHAPTER 26

PROTECTION AT SEA AND THE DENIAL OF ASYLUM

VIOLETA MORENO-LAX

1. Introduction

MARITIME migration in search of refuge has a long history.[1] The exodus of Vietnamese 'boat people' in 1979 is a well-known example.[2] Since then, the oceans increasingly have become the theatre of forced movement, putting the fundamentals of State sovereignty and the international protection regime under strain, undoing 'classic' understandings of State jurisdiction and fundamental rights.[3] There is widespread recognition that the duty to rescue, in customary and treaty law,[4] is part of the most 'elementary considerations of humanity'.[5] Yet, in recent years, the overwhelming global trend has been for destination States (the ones asylum seekers try to reach) to engage in interdiction,[6] blocking 'boat migrants' *en route*.[7] Examples extend from the Mediterranean to the Asia-Pacific region, the Caribbean, the Gulf of Aden, and the Bay

[1] Irial Glynn, *Asylum Policy, Boat People and Political Discourse* (Palgrave Macmillan 2016).

[2] Itamar Mann, *Humanity at Sea* (CUP 2016) 56–101.

[3] Violeta Moreno-Lax, 'The Architecture of Functional Jurisdiction: Unpacking Contactless Control' (2020) 21 German Law Journal 385; Thomas Gammeltoft-Hansen and Rebecca Adler-Nissen, 'An Introduction to Sovereignty Games' in Thomas Gammeltoft-Hansen and Rebecca Adler-Nissen (eds), *Sovereignty Games* (Springer 2008) 1.

[4] Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS), art 98; International Convention for the Safety of Life at Sea (adopted 1 November 1974, entered into force 25 May 1980) 1184 UNTS 278 (SOLAS Convention); International Convention on Maritime Search and Rescue (adopted 27 April 1979, entered into force 22 June 1985) 1405 UNTS 119 (SAR Convention).

[5] *The Corfu Channel Case (UK v Albania)* [1949] ICJ Rep 4, 22, para 215.

[6] See generally, Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea* (CUP 2009); Efthymios Papastavridis, *The Interception of Vessels on the High Seas* (Hart 2012).

[7] UNHCR, 'Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach', EC/50/SC/CRP.17 (9 June 2000).

of Bengal and the Andaman Sea.[8] Although statistics show that the vast majority of people attempting these perilous voyages come from refugee-producing countries, sympathy has given way to indifference, resulting in mass drownings, pushbacks, and abandonment at sea.[9] Global cross-border deaths have reached nearly 40,000 since 2014, with almost half the total recorded in the Mediterranean.[10] The perception of 'boat migrants' as threats to national security has reinforced responses of prevention and deterrence.[11]

States' modalities of interdiction have evolved over time, often justified on purported humanitarian grounds, such as the benevolent effect of 'stopping the boats' as a mechanism to 'save lives'.[12] Presumably in a bid to circumvent legal responsibilities, while maintaining high levels of control, they have become ever more secretive and sophisticated.[13] There has been a shift from direct to indirect forms of interdiction, increasingly performed by third countries or private actors at the behest of destination States. These modalities of interdiction are based on expansive interpretations of State powers in the different jurisdictional areas in which the oceans have been divided, as explained in Section 2. They are also substantiated by self-serving notions of rescue obligations, addressed in Section 3, including by reference to intersecting norms of human rights and refugee law that do not cease to apply in the maritime context.

This chapter identifies two competing yet complementary dynamics. First, while destination States *inflate* their policing competence through reliance on rescue rhetoric and intervene beyond prerogatives explicitly recognized in the law of the sea, they tend to maintain minimalistic constructions of the associated concepts of 'distress' or 'place of safety' to reduce the scope of their legal responsibilities. Thus, secondly, they *deflate* their rescue duties and detach them from their international protection obligations,[14]

[8] Violeta Moreno-Lax and Efthymios Papastavridis (eds), *'Boat Refugees' and Migrants at Sea* (Brill 2016); Bríd Ní Ghráinne, 'Left to Die at Sea: State Responsibility for the May 2015 Thai, Indonesian, and Malaysian Pushback Operations' (2015) 10 Irish Yearbook of International Law 109.

[9] Tugba Basaran, 'The Saved and the Drowned: Governing Indifference in the Name of Security' (2015) 46 Security Dialogue 205.

[10] International Organization for Migration (IOM), 'Missing Migrants' (19 May 2020) <https://missingmigrants.iom.int/> accessed 25 May 2020.

[11] Natalie Klein, 'A Maritime Security Framework for the Legal Dimensions of Irregular Migration by Sea' in Moreno-Lax and Papastavridis (n 8) 35; Natalie Klein, *Maritime Security and the Law of the Sea* (OUP 2011) 8–11.

[12] Violeta Moreno-Lax, 'The EU Humanitarian Border and the Securitization of Human Rights: The "Rescue-through-Interdiction/Rescue-without-Protection" Paradigm' (2018) 56 Journal of Common Market Studies 119.

[13] To palliate the scarcity of data, see *SAROBMED: The Search and Rescue Observatory for the Mediterranean* <https://sarobmed.org/> accessed 25 May 2020; 'BOb: Border Crossing Observatory' (*Monash University*) <https://www.monash.edu/arts/border-crossing-observatory/home> accessed 25 May 2020.

[14] Mapping this trend in the Mediterranean, see Violeta Moreno-Lax, 'Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea' (2011) 23 IJRL 174.

either by deflecting them to third countries or neglecting them through different strategies. Section 4 explores this phenomenon by examining the US Caribbean interdiction programme,[15] the 'Pacific Solution' in Australia,[16] and the *mare clausum* approach favoured in the Mediterranean.[17] The ultimate effect, as Section 5 concludes, is one that paradoxically converts rescue itself into an interdiction tool that impedes access to international protection for 'boat migrants'.

2. State Interdiction Powers at Sea

The maritime context is not 'an area outside the law'.[18] Precisely because it is a space of common interest and shared sovereignty, multiple norms operate to demarcate the exact contours of jurisdictional competence. The UN Convention on the Law of the Sea (UNCLOS) is considered to codify long-standing customary rules on the prerogatives of flag and coastal States in the different sea zones, including norms on interdiction—understood as 'any act of interference' with foreign vessels, 'even acts which do not involve physical [contact] or enforcement'.[19] States do not have absolute control, however, and disagreements regarding the specific reach of interdiction powers necessarily have implications for 'boat migrants'.

a. Territorial Waters: Quasi-plenary Police Powers

The territorial sea extends 12 nautical miles (NM) from the baselines of the coastal State.[20] This is an area of extensive yet limited sovereignty, which must be exercised in conformity with UNCLOS and 'other rules of international law'.[21] Within this area, the coastal State enjoys quasi-plenary policing jurisdiction, although the vessels of all countries have a right of innocent passage.[22] This allows them to navigate the territorial sea without entering internal waters or calling at a port, unless authorized by the coastal State. Passage must be continuous and expeditious, except for stopping or anchoring incidental to ordinary navigation, or rendered necessary by *force majeure* or distress or for the purpose of rendering assistance.[23]

[15] Azadeh Dastyari, *United States Migrant Interdiction and the Detention of Refugees in Guantánamo Bay* (CUP 2015).

[16] Daniel Ghezelbash, *Refuge Lost: Asylum Law in an Interdependent World* (CUP 2019) 74–99.

[17] Daniel Ghezelbash, Violeta Moreno-Lax, Natalie Klein, and Brian Opeskin, 'Securitization of Search and Rescue at Sea: The Response to "Boat Migration" in the Mediterranean and Offshore Australia' (2018) 67 ICLQ 315.

[18] *Medvedyev v France* (2010) 51 EHHR 39, para 81.

[19] *The M/V 'Norstar' Case (Panama v Italy)* (International Tribunal for the Law of the Sea (ITLOS), 10 April 2019, not yet reported) paras 222–3.

[20] UNCLOS (n 4) arts 2(2), 3. [21] ibid art 2(3). [22] ibid art 17. [23] ibid art 18(2).

Article 19 of UNCLOS specifies that passage is not innocent when it is prejudicial to the peace, good order, or security of the coastal State. In particular, passage is rendered non-innocent if a vessel engages in the 'loading or unloading' of persons 'contrary to the immigration rules of the coastal State'.[24] In such situations, if the coastal State has adopted domestic legislation to regulate the matter, it may enforce it, including through interdiction.[25] Article 25 of UNCLOS explicitly authorizes coastal States to adopt 'the necessary steps . . . to prevent passage', which has been interpreted as entailing a power to eject vessels from the territorial sea.[26]

Goodwin-Gill and McAdam have suggested that '[t]he fact that a vessel may be carrying refugees or asylum seekers who intend to request the protection of the coastal State arguably removes that vessel from the category of innocent passage'.[27] But there is no consensus. Pallis rejects this approach, noting that asylum seeking actually 'accords with international law', and thus the passage of migrant boats cannot automatically be assumed as non-innocent.[28] In fact, interdiction powers must comply with UNCLOS and 'other rules of international law',[29] including human rights and refugee law, regardless of how passage is characterized.[30] This includes the principle of *non-refoulement*,[31] the prohibition on penalizing refugees for irregular entry,[32] and the right of any person to seek asylum.[33] Moreover, 'passage' does not strictly correspond to the 'loading' or 'unloading' of persons, which arguably excludes migrant boats merely transiting the territorial sea from the scope of interdiction powers. There is also the possibility that migrant boats become or are in distress, in which case the general customary right of ships in distress to seek refuge in foreign ports[34] would 'neutralize' the non-innocence of their passage.[35] Contrary State practice should, therefore, be seen as a violation of the relevant norms.[36]

[24] ibid art 19(2)(g). [25] ibid art 21(1)(h).

[26] Robin Churchill and Vaughan Lowe, *The Law of the Sea* (3rd edn, Manchester University Press 1999) 87, 95–100; Jasmine Coppens, 'Interdiction of Migrant Boats at Sea' in Moreno-Lax and Papastavridis (n 8) 199, 201.

[27] Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, OUP 2007) 274.

[28] Mark Pallis, 'Obligations of States towards Asylum Seekers at Sea: Interactions and Conflicts between Legal Regimes' (2002) 14 IJRL 329, 357.

[29] UNCLOS (n 4) art 21(1).

[30] UNHCR Executive Committee Conclusion 97 (LIV), 'Protection Safeguards in Interception Measures' (2003).

[31] See Chapter 50 in this volume; Violeta Moreno-Lax, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law* (OUP 2017) ch 8.

[32] On Refugee Convention, art 31, see Chapter 51 in this volume.

[33] See Chapter 48 in this volume; Moreno-Lax (n 31) ch 9.

[34] Aldo Chircop, 'Ships in Distress, Environmental Threats to Coastal States, and Places of Refuge: New Directions for an Ancien Regime?' (2002) 33 Ocean Development and International Law 207; Aldo Chircop and Olof Linden (eds), *Places of Refuge for Ships* (Brill 2006).

[35] UNCLOS (n 4) art 18(2), final sentence.

[36] cf *Ruddock v Vadarlis* (2001) 110 FCR 491, concerning the *Tampa* affair.

b. Contiguous Zone: Limited Constabulary Functions

The contiguous zone (CZ) is a 'functional' area,[37] extending 24 NM from the baselines,[38] within which the coastal State enjoys 'a limited right of police'.[39] This area preserves the navigational freedoms associated with the high seas. But article 33 of UNCLOS allows the coastal State to exercise 'the control necessary to prevent [the] infringement of its . . . immigration . . . laws and regulations within its territory or territorial sea',[40] subject to proportionality.[41]

It is not obvious that powers of detention are encompassed by this provision. While the coastal State is permitted to issue warnings and to board and inspect foreign vessels suspected of engagement in illicit activity,[42] it is 'arguable that the necessary power to control does not include the right to arrest and forcible redirection into port, because at this stage [namely, that of a ship coming into the CZ from outside territorial waters] the ship cannot have committed an offence'.[43] Yet, it has been argued that in situations of 'constructive presence', whereby mother ships on the high seas transfer illicit cargoes to smaller boats that complete smuggling offences within the territorial jurisdiction of the coastal State, there is a right to interfere and seize the delinquent vessels to prevent the crime.[44]

A different matter is the right of 'hot pursuit', which may be undertaken when the coastal State has good reason to believe that a foreign ship has violated its domestic regulations.[45] But there are conditions to its exercise. Such pursuit must commence when the foreign ship is within the territorial sea or the CZ of the pursuing State and may only be continued outside that area if the pursuit has not been interrupted. If the foreign ship is within the CZ, it may only be pursued if there has been an infringement 'of the rights for the protection of which the zone was established',[46] which includes the prevention of violations of immigration laws.[47] Based on the doctrine of 'objective territorial jurisdiction',[48] some authors conclude that this allows for the prosecution of ships for acts committed in the CZ that produce effects in the territorial waters of the coastal State.[49]

37 Maria Gavouneli, *Functional Jurisdiction in the Law of the Sea* (Nijhoff 2007).

38 UNCLOS (n 4) art 33(2).

39 Daniel O'Connell, *The International Law of the Sea*, vol II (OUP 1984) 1058.

40 UNCLOS (n 4) art 33(1).

41 Permanent Arbitral Tribunal, *Guyana v Suriname* [2007] 30 RIAA 128, para 445.

42 Ivan Shearer, 'Problems of Jurisdiction and Law Enforcement Against Delinquent Vessels' (1986) 35 ICLQ 320, 330.

43 O'Connell (n 39) 1058. Considering the two practices (in the first part of the sentence) equivalent, see *The 'Camouco' Case (Panama v France)* [2000] ITLOS Rep 10, para 71; *The 'Monte Confurco' Case (Seychelles v France)* [2000] ITLOS Rep 86, para 90; *The 'Hoshimaru' Case (Japan v Russia)* [2005–2007] ITLOS Rep 18, para 12.

44 *The M/V 'Saiga' (No 2) Case (St Vincent and the Grenadines v Guinea)* [1999] ITLOS Rep 10, Separate Opinion of Judge Laing, para 16.

45 UNCLOS (n 4) art 111.

46 ibid art 111(1).

47 ibid art 33(1)(a).

48 Ian Brownlie, *Principles of Public International Law* (7th edn, OUP 2008) 301.

49 Douglas Guilfoyle, 'Maritime Interdiction of Weapons of Mass Destruction' (2007) 12 Journal of Conflict and Security Law 1, 7.

In both scenarios, interdiction powers translate into a right of the coastal State to apprehend delinquent vessels and escort them to a port within territorial waters for further legal enforcement. This may explain why few coastal States engage in this course vis-à-vis 'boat migrants', for fear of becoming responsible for any related asylum claims.[50] There is no right *per se* to push vessels away from the CZ to elsewhere in the high seas. And every exercise of jurisdiction in this zone remains subject to 'other rules of international law',[51] including human rights and refugee law.

c. High Seas: Near-absent Interdiction Prerogatives

On the high seas, freedom of navigation reigns and, as a rule, ships are subject to the exclusive jurisdiction of their flag State.[52] Other States may exercise jurisdiction in very limited circumstances, as '*expressly* provided for in international treaties or in [UNCLOS]'.[53] This includes situations of slave transport, piracy, unauthorized broadcasting, flaglessness, and hot pursuit,[54] where a 'right of visit' obtains.[55] Such a right, '[e]xcept where acts of interference derive from powers conferred by treaty', entitles States to approach and board foreign ships to effect a *vérification du pavillon*. Whether it grants further powers of arrest and detention is controversial.[56] Opinion is divided and limited jurisprudence is available on this point.[57]

Regarding flagless ships and vessels without nationality,[58] which are typically the vessels used by 'boat migrants', some consider that the use of force would not be justified without 'some jurisdictional nexus in order that a State may extend its laws to those on board…and enforce the laws against [them]'.[59] Others suggest that 'extraordinary deprivational measures are permitted with respect to stateless ships', since they do not enjoy the protection of any State.[60] The first view appears more aligned with UNCLOS. The fact that visit and enforcement powers are regulated separately—as in relation to pirate vessels, where the right of visit is enshrined in article 110, while seizure is allowed under article 105—suggests that a right of visit does not generally imply wider enforcement prerogatives without express provision to that effect. According to article 110, when a ship is without nationality, the warship of the State concerned may proceed to verify its identity. 'If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all

[50] cf Richard Barnes, 'The International Law of the Sea and Migration Control' in Bernard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control* (Brill, 2010) 103, 126–7.

[51] UNCLOS (n 4) arts 2(3), 87(1). See O'Connell (n 39) 1058.

[52] UNCLOS (n 4) arts 92(1), 87.

[53] UNCLOS (n 4) art 92(1) (emphasis added).

[54] ibid arts 99, 100, 109, 110(1)(d), 111.

[55] ibid art 110.

[56] For an overview, see Efthymios Papastavridis, 'The Right of Visit on the High Seas in a Theoretical Perspective: Mare Liberum versus Mare Clausum Revisited' (2011) 24 Leiden Journal of International Law 45.

[57] cf *Norstar* (n 19).

[58] UNCLOS (n 4) arts 91, 92. See further, Herman Meijers, *The Nationality of Ships* (Nijhoff 1967).

[59] Churchill and Lowe (n 26) 214.

[60] Myres McDougal and William Burke, *The Public Order of the Oceans* (Yale University Press 1962) 1084.

possible consideration'. Nowhere does UNCLOS provide for any additional powers with regard to these vessels or the persons on board.[61]

Seizure would assume that a crime has been committed on the high seas, but merely navigating on a flagless ship is not illegal. If the ship is used to transport slaves, articles 99 and 110 of UNCLOS only grant a right of visit.[62] In cases of human trafficking, the relevant UN Protocol calls for cooperation to prevent and combat the crime, while protecting and assisting the victims thereof,[63] reminding States party that 'the[ir] rights, obligations and responsibilities . . . under international law' remain unaltered.[64] The same applies in smuggling scenarios, where the related UN Protocol aims to 'prevent and combat the smuggling of migrants . . . while protecting the rights of smuggled migrants'.[65] Regarding interdiction, article 8 of the Smuggling Protocol allows parties to 'board and search' flagless vessels used for the crime and to 'take appropriate measures'. But any such measures must comply with 'relevant domestic and international law',[66] taking account of 'other rights, obligations and responsibilities of States and individuals under international law'.[67] Therefore, actions like ordering the ship to modify its course; escorting it on such course; conducting the ship to a third country; or handing its passengers over to foreign authorities, insofar as they may be exposed to a risk of *refoulement*, are not permitted. As discussed in Section 4, these are, however, some of the actions that destination States have adopted vis-à-vis 'boat migrants', thus evading their rescue and related obligations, which are examined in Section 3.

3. Search and Rescue Obligations (and Their Intersection with Human Rights and Refugee Law)

Like the interdiction powers explored above, search and rescue (SAR) obligations under UNCLOS must also be carried out in conformity with 'other rules of international law'.[68]

[61] Myron Nordquist (ed), *United Nations Convention on the Law of the Sea*, vol III (Nijhoff 1985) 127; cf Irini Papanicolopoulou, 'A Missing Part of the Law of the Sea Convention: Addressing Issues of State Jurisdiction over Persons at Sea' in Clive Schofield, Seokwoo Lee, and Moon-Sang Kwon (eds), *The Limits of Maritime Jurisdiction* (Nijhoff 2014) 387, 402–3.

[62] cf Efthymios Papastavridis, 'Interception of Human Beings on the High Seas: A Contemporary Analysis under International Law' (2009) 36 Syracuse Journal of International Law and Commerce 145; Samuel Menefee, 'The Smuggling of Refugees by Sea: A Modern Day Maritime Slave Trade' (2003) 2 Regent Journal of International Law 1.

[63] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 25 December 2003) 2237 UNTS 319 (Trafficking Protocol) art 2.

[64] ibid art 14(1). See further Chapter 30 in this volume.

[65] Protocol Against the Smuggling of Migrants by Land, Sea, and Air, supplementing the UN Convention against Transnational Organized Crime (15 November 2000, entered into force 28 January 2004) 2241 UNTS 480 (Smuggling Protocol) art 2.

[66] ibid art 8(7). [67] ibid art 19. [68] UNCLOS (n 4) arts 2(3), 87(1).

States' selective and minimalistic understanding of their SAR duties, detaching them from related commitments under human rights and refugee law, contradicts this imperative. Rather, an integrated reading of the maritime treaties is called for which takes account of all relevant rules applicable in the specific situation.[69] This is true for both flag and coastal States.

a. Search and Rescue Duties of Flag States

Article 98(1) of UNCLOS obliges 'every State' to require ships flying its flag 'to render assistance to any person found at sea in danger of being lost' and 'to proceed to the rescue of persons in distress'. The only limitation foreseen is that the captain intervene 'in so far as he can do so without serious danger to the ship, the crew, or the passengers'. The Safety of Life at Sea (SOLAS) Convention reiterates the obligation in similar terms, the trigger being the receipt of 'a signal *from any source* that persons are in distress'.[70]

The personal scope of application of the obligation is universal. It benefits 'any person' irrespective of nationality or legal status, which includes 'boat migrants'.[71] Discrimination on other grounds is also prohibited. The territorial ambit extends 'throughout the ocean'.[72] The use of the generic 'at sea' in the relevant provisions does not allow for geographical restrictions. This means that, regardless of where a vessel encounters a ship in distress, it is duty-bound to assist it.

As regards the material object of the obligation, the notions of 'distress' and 'rescue' are key. 'Distress' is defined as 'a situation wherein there is reasonable certainty that a person, a vessel or other craft is threatened by grave and imminent danger', which is the reason for it requiring 'immediate assistance'.[73] Yet, the term has been interpreted in two different ways. The most stringent requires that safety of life be a factor, entailing 'something of a grave [and impending] necessity'.[74] The other focuses on the likelihood of the danger materializing in the foreseeable future, without there being 'an actual physical necessity existing at the moment'.[75] This interpretation better accommodates the object and purpose of the maritime conventions,[76] which strive to secure the safety of human life at sea, and take account of the positive obligations ensuing from the right to life,

[69] Moreno-Lax (n 14).
[70] SOLAS Convention (n 4) ch V, reg 33(1) (emphasis added).
[71] SAR Convention (n 4) annex, para 2.1.10.
[72] Satya Nandan and Shabtai Rosenne, *United Nations Convention on the Law of the Sea 1982—A Commentary*, vol III (Nijhoff 1995), 177.
[73] SAR Convention (n 4) annex, para 1.3.13.
[74] John Noyes, 'Ships in Distress' in Rüdiger Wolfrum (ed), *Max Planck Encyclopaedia of Public International Law* (OUP 2007) para 1; George Walker, *Definitions of the Law of the Sea* (Nijhoff 2012) 169.
[75] English High Court of Admiralty, *The Eleanor* (1809) Edwards Rep 135, 161.
[76] SOLAS Convention (n 4) annex, ch V, reg 7(1); SAR Convention (n 4) preamble, paras 1, 3, annex, para 2.1.1.

which favour an expansive reading.[77] In this light, unseaworthiness *per se* may entail distress, which would make boat migrants' vessels—typically overcrowded, ill-equipped, and vulnerable to many hazards—in need of assistance *by definition*.

Whether 'boat migrants' put themselves in peril by 'voluntarily' undertaking a voyage does not release shipmasters from their duty to assist. There is no indication to this effect in the relevant texts. Moreover, this would require an *ex tunc* subjective assessment on dubious moral premises, away from the *ex nunc* objective appraisal of the situation at hand. Such a stance would contravene 'elementary considerations of humanity',[78] and amount to indirect discrimination regarding the enjoyment of the right to life.[79]

Like 'distress', 'rescue' is not defined in UNCLOS. The 2004 amendments to the SAR and SOLAS Conventions have clarified the term.[80] It is now accepted to entail an operation in three steps: 'to retrieve persons in distress', to 'provide for their initial medical or other needs', and 'to deliver them to a place of safety', where rescue is considered to terminate.[81] Since survivors are to be 'disembarked from the assisting ship and delivered to a place of safety',[82] this implies that the 'place of safety' needs to be on dry land,[83] requiring cooperation from the coastal States.

b. Search and Rescue Duties of Coastal States

Coastal States have a duty to ensure that necessary arrangements are made for coast watching and for both the searching *and* rescuing of persons in distress around their coasts. These arrangements include the operation and maintenance of SAR facilities.[84] The SAR Convention provides, in addition, for inter-State coordination of SAR services and for the delimitation of SAR regions (SRR) in cooperation between the parties.[85] The objective is to develop a SAR system that can effectively respond to emergencies at sea.

[77] See further, Lisa-Marie Komp, 'The Duty to Assist Persons in Distress: An Alternative Source of Protection against the Return of Migrants and Asylum Seekers to the High Seas' in Moreno-Lax and Papastavridis (n 8) 222.

[78] *Corfu Channel* (n 5) para 215.

[79] Human Rights Committee, 'General Comment No 36, Article 6: Right to Life', UN doc CCPR/C/GC/36 (3 September 2018).

[80] IMO, 'Amendment to the International Convention on Maritime Search and Rescue, 1979, as Amended', Res MSC.155(78) (20 May 2004); IMO, 'Adoption of Amendments to the International Convention for the Safety of Life at Sea, 1974, as Amended', Res MSC.153(78) (20 May 2004). See also IMO, 'Guidelines on the Treatment of Persons Rescued at Sea', Res MSC.167(78) (20 May 2004) (IMO Guidelines). Although IMO Guidelines are not strictly binding, they must 'be taken into account' by States parties to the SAR and SOLAS Conventions, accepting the 2004 amendments to both instruments. See SAR Convention (n 4) annex, para 3.1.9.

[81] SAR Convention (n 4) annex, para 1.3.2.

[82] ibid annex, ch 3, para 3.1.9; SOLAS Convention (n 4) annex, ch V, reg 33 (1–1).

[83] See further Martin Ratcovich, 'The Concept of "Place of Safety": Yet Another Self-Contained Maritime Rule or a Sustainable Solution to the Ever Controversial Question of Where to Disembark Migrants Rescued at Sea?' (2015) 33 Australian Yearbook of International Law 81.

[84] SOLAS Convention (n 4) ch V, reg 7(1); UNCLOS (n 4) 98(2).

[85] SAR Convention (n 4) annex, chs 2, 3.

This requires the establishment of adequate communication and operational infrastructure, including a Rescue Coordination Centre responsible for recording distress signals and coordinating the assistance response.[86] Rescue units attached to them must, in turn, be suitably equipped, staffed, and managed.[87]

Awareness of a distress situation through whatever means—including satellite imagery, drone surveillance, or radar detection—triggers the obligation to assist.[88] The objective is to ensure the preservation of human life at sea. The State responsible for the SRR in which assistance is rendered retains 'primary responsibility' to ensure the cooperation necessary for the survivors to be 'delivered to a place of safety'.[89] Although the duty on the coastal State is limited to ensuring collaboration, rather than disembarkation in its own territory, the 2004 amendments nonetheless establish an obligation of result, in that survivors must be taken to landfall.[90] The SAR operation will not be considered accomplished unless survivors are effectively disembarked.

Neither the 'place of safety' nor the concept of 'safety' itself has been defined. Yet, the amendments do indicate that in determining such a location, both the individual circumstances of the case as well as the International Maritime Organization (IMO) Guidelines have to be taken into account.[91] According to the Guidelines, this must be 'a place where the survivors' safety of life is no longer threatened and where their basic human needs . . . can be met'.[92] Because '[e]ach case is unique', the selection of a place of safety 'may need to account for a variety of important factors',[93] in particular any risk of *refoulement*, which 'is a consideration in the case of asylum-seekers and refugees recovered at sea'.[94] States cannot circumvent international protection obligations by declaring interdiction measures to be rescue operations.[95] Equating the two and disconnecting them from their human rights and refugee law implications has no support in international law.[96]

The identification of a precise port of disembarkation has been most problematic,[97] with divergent views clashing as a result. It can be the next port of call, the geographically closest to the emergency, one within the SRR where survivors are retrieved, or one

[86] ibid annex, paras 2.1.3, 2.3, 2.1.8, 3.1.

[87] ibid annex, paras 2.4.1.1, 2.5.

[88] ibid annex, paras 4.2.1, 4.3; Efthymios Papastavridis, 'The ECHR and Migration at Sea: Reading the "Jurisdictional Threshold" of the Convention Under the Law of the Sea Paradigm' (2020) 21 German Law Journal 417.

[89] SAR Convention (n 4) annex, para 3.1.9; SOLAS Convention (n 4) ch V, reg 33 (1–1).

[90] Seline Trevisanut, 'Search and Rescue Operations in the Mediterranean: Factor of Cooperation or Conflict?' (2010) 25 International Journal of Marine and Coastal Law 523, 524.

[91] SAR Convention (n 4) annex, para 3.1.9; SOLAS Convention (n 4) ch V, reg 33 (1–1).

[92] IMO Guidelines (n 80) para 6.12.

[93] ibid para 6.15.

[94] ibid para 6.17. See also IMO and UNHCR, 'Rescue at Sea: A Guide to Principles and Practices as Applied to Migrants and Refugees' (2015) <http://www.unhcr.org/450037d34.pdf> accessed 25 May 2020.

[95] Andreas Fischer-Lescano, Tillmann Lohr, and Timo Tohidipur, 'Border Controls at Sea: Requirements under International Human Rights and Refugee Law' (2009) 21 IJRL 256, 291.

[96] *Hirsi Jamaa v Italy* (2012) 55 EHRR 21; Human Rights Committee (n 79).

[97] UNHCR, 'Problems related to the Rescue of Asylum-Seekers in Distress at Sea', EC/SCP/18 (26 August 1981) paras 19–21.

provided by the flag State of the rescuing vessel. In case of conflict, there is no residual rule in the maritime conventions. An IMO circular recommended that '[i]f disembarkation . . . cannot be arranged swiftly elsewhere', the State responsible for the relevant SRR '*should* accept the disembarkation of the persons rescued . . . into a place of safety under its control'.[98] This has not become hard law, however, leaving ample space for negotiations, delays, and disputes between the countries concerned, which powerful States have exploited to their advantage, as Section 4 elaborates.

4. Creating Spaces of Non-protection through Interdiction

The maritime conventions delineate functional areas of responsibility that States must oversee in good faith. Yet, perceived gaps and ambiguities have been interpreted in self-serving ways by destination States. As discussed below, rescue has been (mis)construed to inflate interdiction powers and to deflect protection responsibilities to other States, if not to neglect them altogether. The three strategies of inflation, deflection, and negation result in a denial of opportunities for 'boat migrants' to access international protection. Interdiction in these different configurations is undertaken directly, indirectly, or by omission, as examples from the US, Australia, and the Mediterranean demonstrate.

a. Direct Interdiction: Co-opting Rescue within the US Caribbean Programme

The first and most rudimentary type of interdiction emerged and was systematized as part of the US Caribbean interdiction programme in the 1980s, to prevent an influx of Haitian refugees by sea.[99] It was extended to Cubans, Ecuadorians, Dominican Republic nationals, and Chinese citizens in later periods.[100] The technique is 'direct' and consists in contact-based measures of detention, seizure, boarding, and apprehension of the persons concerned for their repatriation or forcible transfer to areas within government control. The technique draws on an understanding that neither *non-refoulement* nor international protection obligations at large apply in these circumstances. Rhetorically, interdiction is justified on compassionate grounds, co-opting the meaning of rescue and exploiting provisions in the maritime conventions to ramp up policing strategies of

[98] IMO, 'Principles Relating to Administrative Procedures for Disembarking Persons Rescued at Sea', IMO doc FAL.35/Circ.194 (2009) (emphasis added).

[99] For a comprehensive overview, see Dastyari (n 15) 13–52.

[100] Niels Frenzen, 'Responses to "Boat Migration": A Global Perspective—US Practices' in Moreno-Lax and Papastavridis (n 8) 279, 283.

'sovereign capture'.[101] This entails the instrumentalization of succour to legitimize interception, diversion, and rejection of responsibility for those concerned, (re)presenting interdiction as a humanitarian measure that saves lives, albeit negating related rights.

In the first iteration of the programme, the US accepted it had a *non-refoulement* obligation vis-à-vis potential refugees, maintaining a rudimentary screening process on board interdicting ships. 'Screened-in' Haitians were taken to the US military base in Guantánamo for offshore processing, while those 'screened-out' were held at sea. When the number of shipboard detainees became too large, the US started repatriations. The fear was that taking screened-out Haitians to US soil would create a 'pull factor' and 'bring a massive outflow [from Haiti] resulting in large numbers of deaths on the high seas',[102] so the measure was obliquely justified as a sort of pre-emptive rescue.

The approach changed in 1992, when the US disclaimed *non-refoulement* responsibilities and extended the repatriation policy to all Haitians intercepted at sea, regardless of international protection considerations.[103] The approach was validated by the US Supreme Court in *Sale*, based on the interpretation that neither domestic US immigration law or constitutional protections, nor the Refugee Convention, had extraterritorial application.[104] Interdiction and forced repatriation were, once more, portrayed as 'tantamount to a life-saving policy, preventing death at sea'.[105]

Over the years, the shipboard pre-screening policy has been reintroduced, interrupted, and reintroduced again. But this has been done without reversing the *Sale* paradigm:—in other words, as an act of goodwill, rather than as a matter of legal obligation,[106] following Haiti's threat to otherwise suspend the readmission agreement.[107] Instead of providing access to its territory, the US has concluded additional agreements with several Caribbean Island States for the processing and resettlement of 'screened-in' claimants elsewhere.[108]

Although the US has since recognized the extraterritorial scope of the Convention against Torture and has accepted its application to Guantánamo in the context of the

[101] Polly Pallister-Wilkins, 'Humanitarian Rescue/Sovereign Capture and the Policing of Possible Responses to Violent Borders' (2017) 8 Global Policy 19.

[102] Howard French, 'US Starts to Return Haitians who Fled Nation after Coup', *New York Times* (19 November 1991) <https://www.nytimes.com/1991/11/19/world/us-starts-to-return-haitians-who-fled-nation-after-coup.html> accessed 25 May 2020.

[103] Executive Order No 12807, 3 CRF 303 (24 May 1992).

[104] *Sale v Haitian Centers Council*, 509 US 155 (1993). The US is not a Contracting State to the Refugee Convention, but as a party to the 1967 Protocol, it is required by art 1 'to apply articles 2 to 34 inclusive of the Convention'.

[105] Carl Anderson, 'Justice Blackmun's Query Said It All: Reflections on Haiti, Refugees, and the US Supreme Court' (1993) 1 Hybrid: A Journal of Law and Social Change 73, 73.

[106] Bill Frelick, '"Abundantly Clear": *Refoulement*' (2005) 19 Georgetown Immigration Law Journal 245, 251.

[107] Exchange of Notes Constituting an Agreement concerning the Interdiction of and Return of Haitian Migrants, Haiti–US, [1981] TIAS No 10241, 33 UST 3559.

[108] Angus Francis, 'Bringing Protection Home: Healing the Schism between International Obligations and National Safeguards Created by Extraterritorial Processing' (2008) 20 IJRL 273.

'war on terror',[109] there has been no substantial change to the Caribbean interdiction programme. The Obama and Trump Administrations have continued the policy, which is used as a deterrent for unauthorized maritime arrivals,[110] maintaining the shipboard pre-screening process as a discretionary, compassionate measure that 'the Secretary of Homeland Security may conduct... [if] he deems [it] appropriate'.[111]

b. Indirect Interdiction: Deflecting Rescue within the Australian 'Pacific Strategy'

A second modality of interdiction is 'indirect' and does not necessarily entail full-contact measures or the immediate repatriation of 'boat migrants'. It can be undertaken from a distance by escorting vessels out of jurisdictional waters, enlisting third parties to thwart journeys, or deflecting international responsibilities to third countries, with or without their explicit consent. In this scenario, rescue can be delegated through formal shiprider agreements[112] or via less explicit means of 'consensual containment',[113] such as orchestrating 'pullbacks' by proxy.[114] Recent variants of this practice rely on merchant vessels to carry out 'privatized' interdiction, following guidelines provided by the authorities of countries of intended destination, or on non-State actors, including repurposed militias and former traffickers, to keep unwanted arrivals at bay.[115]

Australia has pioneered this approach through its 'Pacific Strategy' following the so-called *Tampa* incident of August 2001. The incident involved a Norwegian-registered container ship that had rescued 433 asylum seekers within the SRR of Indonesia, but geographically closer to Christmas Island (part of Australia). Australia refused permission to disembark, claiming that it was Indonesia's responsibility to provide a 'place of safety'. This triggered a diplomatic standoff lasting several days, after which the asylum seekers were transferred by the Australian Navy to Nauru and New Zealand for refugee status determination.[116]

[109] Committee Against Torture, 'Concluding Observations on the Third to Fifth Periodic Report of the US', UN doc CAT/C/USA/CO/3–5 (19 December 2014).

[110] Ghezelbash (n 16) 75.

[111] Executive Order No 13276, 3 CRF 252 (15 November 2002) as amended by Executive Order No 13286, 68 FR10619 (28 February 2003).

[112] In the US context, see Frenzen (n 100) 289–92.

[113] Violeta Moreno-Lax and Mariagiulia Giuffré, 'The Rise of Consensual Containment: From "Contactless Control" to "Contactless Responsibility" for Migratory Flows' in Satvinder Juss (ed), *Research Handbook on International Refugee Law* (Elgar 2019) 81. See also Chapter 27 in this volume.

[114] Moreno-Lax (n 3).

[115] Charles Heller, 'Forensic Oceanography—The Nivin Case: Migrants' Resistance to Italy's Strategy of Privatized Push-back' (Forensic Architecture December 2019 <https://content.forensic-architecture.org/wp-content/uploads/2019/12/2019-12-18-FO-Nivin-Report.pdf> accessed 25 May 2020.

[116] *Ruddock* (n 36); cf Penelope Mathew, 'Australian Refugee Protection in the Wake of the *Tampa*' (2002) 96 AJIL 661.

The incident led to the adoption of domestic legislation through which Australia has since 'excised' its national territory for immigration law purposes, such that no valid asylum claim can be made by unauthorized arrivals.[117] This is based on a legal fiction, according to which, even if asylum seekers physically reach Australia's territorial jurisdiction, they are treated as if they had not entered Australia in the legal sense. Instead, in some cases they are taken to third countries, such as Nauru and Papua New Guinea (PNG), where Australia has funded detention centres.[118] Those recognized as refugees are denied settlement in Australia and must remain in Nauru or PNG or be resettled elsewhere.[119] Within this scheme, maritime interdiction has been carried out through *Operation Relex* until 2008 and *Operation Sovereign Borders* since September 2013.[120] The Australian Navy has been instructed to 'turn back' migrant boats at sea or, that failing, to apprehend survivors and forcibly transport them to Nauru or PNG, based on legislative amendments that permit such actions regardless of whether 'the exercise of the power is inconsistent with Australia's international obligations'.[121]

The 'stop the boats' policy has been cloaked in a rhetoric of pity and care for those concerned, presented as 'the most compassionate thing [one] can do'.[122] The majority of turnbacks, however, entail the return of migrant boats to the edge of Indonesian waters, often without Indonesia's knowledge, and sometimes after people have been transferred to purpose-built lifeboats purchased by Australia.[123] There are also reports of asylum seekers being handed over to Sri Lankan authorities on the high seas, exposing them to a direct risk of *refoulement*,[124] and of instances where interdiction has been carried out from within Australia's territorial waters, in contravention of UNCLOS provisions.[125] A Parliamentary inquiry was established in 2015 when it emerged that Australian author-

[117] See generally Jane McAdam and Fiona Chong, *Refugee Rights and Policy Wrongs: A Frank, Up-to-date Guide by Experts* (UNSW Press 2019).

[118] The Migration Act initially provided important protections to ensure that transfers occurred consistently with international law (see Michelle Foster, 'The Implications of the Failed "Malaysia Solution": The Australian High Court and Refugee Responsibility Sharing at International Law' (2012) 13 Melbourne Journal of International Law 395), but those were later removed, such that now the only criterion to designate a country as a 'regional processing country' is that it is 'in the national interest': Migration Act 1958 (Cth), s 198AB(2).

[119] Claire Higgins, 'The (Un-)sustainability of Australia's Offshore Processing and Settlement Policy' in Moreno-Lax and Papastavridis (n 8) 303. See also Chapter 24 in this volume.

[120] Violeta Moreno-Lax, Daniel Ghezelbash, and Natalie Klein, 'Between Life, Security and Rights: Framing the Interdiction of "Boat Migrants" in the Central Mediterranean and Australia' (2019) 32 Leiden Journal of International Law 715; Ghezelbash, Moreno-Lax, Klein, and Opeskin (n 17).

[121] Maritime Powers Act 2013 (Cth), s 75A(1)(c).

[122] Richard Ackland, 'If Europe Listens to Tony Abbott, the Future for Refugees Will Be Cruel', *The Guardian* (21 April 2015) <https://www.theguardian.com/commentisfree/2015/apr/21/if-europe-listens-to-tony-abbott-the-future-for-refugees-will-be-cruel> accessed 25 May 2020/.

[123] George Roberts, 'Asylum Seekers Give Details on Operation Sovereign Borders Lifeboat Turn-Back', *ABC News* (18 March 2014) <https://www.abc.net.au/news/2014-03-17/asylum-seekers-give-details-on-operation-sovereign-borders/5326546> accessed 25 May 2020.

[124] Azadeh Dastyari and Daniel Ghezelbash, 'Asylum at Sea: The Legality of Shipboard Refugee Status Determination Procedures' (2020) 32 IJRL 1; 'Australia Sends Back Sri Lankan Asylum Seekers', *BBC News* (9 May 2016) <www.bbc.com/news/world-australia-36,222,959> accessed 25 May 2020.

[125] Andreas Schloenhardt and Colin Craig, 'Turning Back the Boats: Australia's Interdiction of Irregular Migrants at Sea' (2015) 27 IJRL 536, 549–50.

ities had paid smugglers to turn around ‘boat migrants’.[126] The scandal exposed the government’s objective of impeding boat arrivals through whatever means,[127] despite the ‘saving lives’ rhetoric.

c. Interdiction by Omission: Negating Rescue in the Mediterranean

The third and most dangerous kind of interdiction is accomplished ‘by omission’. This purportedly falls within the family of measures of neo-*refoulement*, defined by Hyndman and Mountz as measures that instrumentalize geography to restrict access to asylum.[128] These practices have flourished and acquired new proportions, particularly in the Mediterranean, since the eruption of the ‘refugee crisis’, consolidating ‘policies based on deterrence, militarization and extraterritoriality’ that incorporate ‘the risk of migrant deaths as part of an effective control of entry’.[129] This modality is based on the negation of rescue, including through outright abandonment at sea,[130] the withdrawal of naval assets, or the reduction of operational areas covered by maritime missions to avoid contact with potential ‘boat migrants’.[131] Port closures and the criminalization of ‘solidarity rescues’ undertaken by civil society organizations are also characteristic of this trend.[132]

The replacement of *Mare Nostrum*,[133] an Italian mission launched in response to the mass drownings of Lampedusa of 2013,[134] with the much smaller EU border control

[126] Senate Legal and Constitutional Affairs References Committee, *Payment of Cash or Other Inducements by the Commonwealth of Australia in Exchange for the Turn Back of Asylum Seeker Boats: Interim Report* (May 2016) <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Payments_for_turn_backs/Interim_Report> accessed 25 May 2020.

[127] Oliver Laughland, ‘Angus Campbell Warns Asylum Seekers Not to Travel to Australia by Boat’, *The Guardian* (11 April 2014) <https://www.theguardian.com/world/2014/apr/11/angus-campbell-stars-in-videos-warning-asylum-seekers-not-to-travel-by-boat> accessed 25 May 2020.

[128] Jennifer Hyndmann and Alison Mountz, ‘Another Brick in the Wall? Neo-Refoulement and the Externalization of Asylum by Australia and Europe’ (2008) 43 Government and Opposition 249.

[129] UNGA, *Report of the Special Rapporteur of the Human Rights Council on Extrajudicial, Summary or Arbitrary Executions, Agnès Callamard*, UN doc A/72/335 (15 August 2017) para 10.

[130] Charles Heller and Lorenzo Pezzani, ‘Death by Rescue: The Lethal Effects of Non-assistance at Sea’ (*Forensic Architecture*, 18 April 2016) <https://forensic-architecture.org/investigation/death-by-rescue-the-lethal-effects-of-non-assistance-at-sea> accessed 25 May 2020.

[131] Charles Heller and Lorenzo Pezzani, ‘Forensic Oceanography—*Mare Clausum*: Italy and the EU’s Undeclared Operation to Stem Migration across the Mediterranean’ (Forensic Architecture May 2018) <https://content.forensic-architecture.org/wp-content/uploads/2019/05/2018-05-07-FO-Mare-Clausum-full-EN.pdf>.

[132] Charles Heller and Lorenzo Pezzani, ‘Blaming the Rescuers’ (2017) <https://blamingtherescuers.org>. For analysis, see Moreno-Lax, Ghezelbash, and Klein (n 120).

[133] ‘Mare Nostrum Operation’ (*Marina Militare*) <http://www.marina.difesa.it/EN/operations/Pagine/MareNostrum.aspx> accessed 25 May 2020.

[134] ‘Lampedusa Boat Tragedy: Migrants “Raped and Tortured”’, *BBC News* (8 November 2013) <https://www.bbc.co.uk/news/world-europe-24,866,338> accessed 25 May 2020.

operation *Triton*,[135] coordinated by the external frontiers agency (Frontex),[136] illustrates this approach. *Mare Nostrum* had been deployed after Italy's condemnation by the European Court of Human Rights in *Hirsi* for practices of interdiction and direct return of 'boat migrants' to their point of departure, similar to those of Australia and the US.[137] These practices had been praised by EU officials for having 'a positive impact', because, 'on the humanitarian level, fewer lives ha[d] been put at risk, due to fewer departures'.[138] The *Hirsi* judgment rejected the interdiction–rescue equation and declared pushbacks to Libya a violation of the prohibitions of ill-treatment and collective expulsion, clarifying the extraterritorial reach of *non-refoulement* at sea.[139]

With pushbacks banned and *Mare Nostrum* cancelled,[140] in the aftermath of the Lampedusa tragedy, the EU launched *Triton*. The EU Council expressed 'its deep sadness' for the deaths and asserted that 'determined action should be taken…to prevent the loss of lives at sea'.[141] The solution proposed, however, was to strengthen 'the fight against trafficking and smuggling' by reinforcing Frontex.[142] *Triton*'s operational area, naval assets, and financial means were much smaller than those of *Mare Nostrum*.[143] Despite the grand language used to justify the mission, it was not designed as a SAR operation, since 'Frontex is not [intended as] a search and rescue body'.[144] As a result, only a small proportion of rescues in the Central Mediterranean have been carried out by Frontex-coordinated assets since 2014.[145] This is the consequence of *Triton*'s operational area lying far away from Libyan jurisdictional waters, where most distress incidents occur, and due to the strategic choice by Frontex that 'instructions to move…outside *Triton* operational area' for the purpose of rendering assistance to

[135] Sergio Carrera and Leonhard den Hertog, 'Whose *Mare*? Rule of Law Challenges in the Field of European Border Surveillance in the Mediterranean' (2015) CEPS Paper in Liberty and Security No 79.

[136] Regulation (EU) 2019/1896 of 13 November 2019 on the European Border and Coast Guard [Frontex] and Repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 [2019] OJ L295/1.

[137] *Hirsi* (n 96).

[138] Human Rights Watch, 'Pushed Back, Pushed Around' (21 September 2009) 37 <https://www.hrw.org/sites/default/files/reports/italy0909web_0.pdf> accessed 25 May 2020.

[139] *Hirsi* (n 96); Violeta Moreno-Lax, '*Hirsi v Italy* or the Strasbourg Court *v* Extraterritorial Migration Control?' (2012) 12 Human Rights Law Review 574.

[140] Paolo Cuttitta, 'Delocalization, Humanitarianism and Human Rights: The Mediterranean Border between Exclusion and Inclusion' (2018) 50 Antipode 783.

[141] European Council, Presidency Conclusions, EUCO 169/13 (25 October 2013) 46.

[142] ibid 47.

[143] 'EU Migrants: Reduced Mediterranean Mission Set to Go', *BBC News* (31 October 2014) <https://www.bbc.co.uk/news/world-europe-29,856,458> accessed 25 May 2020.

[144] European Commission, 'Frontex Joint Operation "Triton": Concerted Efforts to Manage Migration in the Central Mediterranean' (31 October 2014) <https://www.europa-nu.nl/id/vjohgqgsbzzn/nieuws/frontex_joint_operation_triton_concerted> accessed 25 May 2020.

[145] For detailed statistics, see Eugenio Cusumano, 'Migrant Rescue as Organized Hypocrisy: EU Maritime Missions Offshore Libya between Humanitarianism and Border Control' (2019) 54 Cooperation and Conflict 3, 10–11.

migrant boats '[would] not be considered'.[146] The manifest breach of rescue obligations this involves is presented as necessary to avoid 'act[ing] as a pull factor'.[147]

EUNAVFOR MED *Operation Sophia*,[148] deployed in 2015 as part of the EU's 'war on smugglers',[149] constituted another expression of the interdiction by omission strategy. Justified as an endeavour to 'save lives by reducing crossings',[150] its mission was to engage in a 'systematic effort to capture and destroy vessels used by the smugglers',[151] so as 'to better contain the growing flows of illegal migration' across the Central Mediterranean.[152] A UN Security Council Resolution provided the legal backing.[153] In the course of their interventions, *Sophia* assets were occasionally called upon to assist migrant vessels in distress. Although the operation played a relatively minor role in total rescues,[154] such that it could not be 'regarded as decisive in terms of a pull factor',[155] discontent amongst participating Member States led to the withdrawal of naval assets.[156] From March 2019 until the end of the operation one year later,[157] the EU conducted a naval mission without naval assets in an effort to avoid direct contact with migrant vessels in distress and evade rescue responsibilities.[158] Instead, surveillance drones were used to capture relevant information,[159] which was communicated to the Libyan

[146] Letter by Frontex Director of Operations, Klaus Rösler, to Italian General Director of Immigration and Border Police, Dr Giovanni Pinto (Ref 19,846/25.11.2014, 25 November 2014) <https://assets.documentcloud.org/documents/3531242/Rosler-Pinto-Frontex-Letter-2014.pdf>.

[147] Frontex, *Risk Analysis for 2017* (2017) 32 <http://frontex.europa.eu/assets/Publications/Risk_Analysis/Annual_Risk_Analysis_2017.pdf> accessed 25 May 2020.

[148] Council Decision 2015/778/CFSP of 18 May 2015 on a European Union Military Operation in the Southern Central Mediterranean (EUNAVFOR MED) [2015] OJ L122/31.

[149] European Commissioner Avramopoulos, 'Remarks', SPEECH/15/4840 (23 April 2015).

[150] European External Action Service (EEAS), 'European Union Naval Force: Mediterranean Operation Sophia' (15 September 2016) <https://eeas.europa.eu/sites/eeas/files/factsheet_eunavfor_med_en_0.pdf> accessed 25 May 2020.

[151] European Council, Statement, EUCO/18/15 (23 April 2015).

[152] European Council, Presidency Conclusions, EUCO 22/15 (26 June 2015).

[153] UNSC Resolution 2240 (9 October 2015).

[154] Cusumano (n 145) 13–14.

[155] EEAS, *EUNAVFOR Med Op Sophia—Six monthly report*, *1 January–31 October 2016* (30 November 2016) 7–8 <http://statewatch.org/news/2016/dec/eu-council-eunavformed-jan-oct-2016-report-restricted.pdf> accessed 25 May 2020.

[156] European Council, 'EUNAVFOR MED Operation Sophia: Mandate Extended until 30 September 2019' (29 March 2019) <https://www.consilium.europa.eu/en/press/press-releases/2019/03/29/eunavfor-med-operation-sophia-mandate-extended-until-30-september-2019/> accessed 25 May 2020.

[157] European Council, 'EU Launches Operation IRINI to Enforce Libya Arms Embargo' (31 March 2020) <https://www.consilium.europa.eu/en/press/press-releases/2020/03/31/eu-launches-operation-irini-to-enforce-libya-arms-embargo/> accessed 25 May 2020.

[158] For a similar trend in Australia, see David Hambling, 'Australia Will Use Robot Boats to Find Asylum Seekers at Sea', *New Scientist* (31 July 2020) <https://www.newscientist.com/article/2250406-australia-will-use-robot-boats-to-find-asylum-seekers-at-sea/#ixzz6baOBSoKx> accessed 20 October 2020.

[159] Daniel Howden, Apostolis Fotiadis, and Antony Loewenstein, 'Once Migrants on Mediterranean Were Saved by Naval Patrols. Now They Have to Watch as Drones Fly Over', *The Guardian* (4 August 2019) <https://www.theguardian.com/world/2019/aug/04/drones-replace-patrol-ships-mediterranean-fears-more-migrant-deaths-eu> accessed 25 May 2020.

Coastguard for its intervention, through the intermediation of the Italian authorities.[160] Intercepted 'boat migrants' were thus pulled back to Libya, in disregard of 'place of safety' and *non-refoulement* provisions.[161]

5. Conclusion

As the foregoing has shown, rhetorical recourse to 'saving lives' has been instrumentalized to justify practices of interdiction impeding access to safety worldwide.[162] Besides the erosion of the principle of *non-refoulement* that such practices entail, they also undermine the right to leave any country and the right to seek asylum, converting rescue into a denier of international protection. While destination States inflate their interdiction powers through reliance on rescue discourse, beyond the provisions of the law of the sea (Section 2), they deflate their SAR obligations and detach them from related human rights and refugee protections, quibbling with the definitions of 'safety' and 'distress' (Section 3). The precise modalities are varied and can range from forms of 'direct', 'indirect', and 'by omission' interdiction employed to deflect responsibilities to third countries or to neglect them altogether, as the examples from the US, Australia, and the Mediterranean illustrate (Section 4).

The ultimate consequence of these practices is to overwhelm rescue with interdiction, through a mechanism that launders the final effect. The invocation of humanitarian language masks the violence implicated. It makes measures that deny dignity and rights ethically more palatable. The line between SAR and security-related interdiction is, thereby, increasingly blurred and manipulated. SAR should be understood as an end in itself, not as a means to prevent 'boat migration' at the service of anti-smuggling strategies. The use of rescue as a form of containment fundamentally fails to create protection space or to address the root causes of displacement, leaving both unchanged.[163] Such policies do not remove the actual drivers of forced movements by sea. Rather, they erect barriers and divert flows to typically longer and more perilous routes, contributing

[160] Letter of Ms Paraskevi Michou, Director-General for Migration and Home Affairs, to Mr Fabrice Leggeri, Frontex Executive Director (Ref Ares(2019)1755075, 18 March 2019)<http://www.statewatch.org/news/2019/jun/eu-letter-from-frontex-director-ares-2019)1362751 per cent20Rev.pdf> accessed 25 May 2020.

[161] This practice of employing the Libyan Coastguard as proxy for pullbacks has been denounced at the European Court of Human Rights: *SS v Italy*, App No 21660/18 (ECtHR) (pending). See further Moreno-Lax (n 3).

[162] Adrian Little and Nick Vaughan-Williams, 'Stopping Boats, Saving Lives, Securing Subjects: Humanitarian Borders in Europe and Australia' (2017) 23 European Journal of International Relations 533.

[163] Regarding Libya, see eg Human Rights Watch, 'No Escape from Hell' (January 2019) <https://www.hrw.org/report/2019/01/21/no-escape-hell/eu-policies-contribute-abuse-migrants-libya> accessed 25 May 2020.

to the rise of death tolls.[164] They also entrench insecurity, fuelling not only the original causes of flight but creating new dangers that make seeking protection a life-or-death exercise.[165] Rescue, in this guise, is essentially distorted and ultimately becomes a denier of asylum.

Scholars in the field need to be wary of developments in domestic law and practice which reinforce this slant. The renewed appeal of nationalist politics and anti-refugee sentiment globally endangers the integrity of the international protection regime and international law at large. Particular vigilance is required to monitor consolidating practices of interdiction by omission, which not only tolerate, but purposively embed, the risk of death as part of the migration control toolbox of destination States. The securitization of maritime borders risks becoming all-pervading, obfuscating rescue, asylum, and *non-refoulement* at sea. Further investigation is hence required of these dynamics which, if unchecked, will dismantle the most fundamental principles of international refugee law.

[164] UNHCR, 'Desperate Journeys' (January 2019) <https://www.unhcr.org/desperatejourneys/> accessed 25 May 2020; Tara Brian and Frank Laczko (eds), *Fatal Journeys: Identification and Tracing of Dead and Missing Migrants* (IOM 2016).

[165] Violeta Moreno-Lax and Martin Lemberg-Pedersen, 'Border-Induced Displacement: The Ethical and Legal Implications of Distance-Creation through Externalization' (2019) 56 Questions of International Law 5.

CHAPTER 27

EXTRATERRITORIAL MIGRATION CONTROL AND DETERRENCE

THOMAS GAMMELTOFT-HANSEN
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1. Introduction

The right to seek asylum is elemental to the international protection of refugees, yet almost always requires that an asylum seeker reach a State's territory to access protection. During the last three decades different forms of extraterritorial border controls have developed across the world, rendering access increasingly difficult. For the vast majority of refugees today, access to international mobility is thus highly limited or non-existent.[1]

As a matter of international law, States retain the right to control immigration as an ancillary prerogative flowing from territorial sovereignty. States further have legitimate reasons to enforce border controls, including the prevention of transnational crimes, such as smuggling in goods, terrorism, and trafficking in persons. Yet far too often, extraterritorial controls fail to provide the necessary 'doors' for persons in need of international protection.[2]

Since the end of the Cold War, policies to block and deter international mobility for refugees have emerged as an increasingly normalized form of policymaking on the part of developed States. Today, the 'deterrence paradigm' arguably constitutes the dominant

[1] Thomas Spijkerboer 'The Global Mobility Infrastructure: Reconceptualising the Externalisation of Migration Control' (2018) 20 EJML 452.

[2] Betsy L Fisher, 'Doors to Safety: Exit West, Refugee Resettlement, and the Right to Asylum' (2019) 117 Michigan Law Review 1119.

policy framework through which States in the Global North approach refugees.[3] In the same period, deterrence and the ensuing lack of access to asylum have emerged as 'perhaps the single most prominent topic in refugee studies'.[4]

This contribution begins by reviewing some of the key shifts in the evolution of extraterritorial migration control from the 1980s to the present. The second section sets out the state of international refugee law vis-à-vis extraterritorial controls. Section 3 accounts for existing refugee law responses to extraterritorial controls, encompassing key questions of extraterritorial jurisdiction and State responsibility. Finally, the chapter sketches out a 'topographical approach' to understanding and challenging contemporary extraterritorial controls.

2. The Evolution of Extraterritorial Migration Control

The separation of migration control from State borders and territory is not a new phenomenon. As early as 1751, Denmark levied fines on shipowners bringing in Jewish passengers, prompting private shipmasters to perform controls prior to boarding (thus having the same effect as carrier sanctions today).[5] The United States first introduced visa requirements in 1924, thereby shifting control over admission from State territory to embassies and consulates around the globe.[6] It is, however, in the lead-up to the end of the Cold War that the modern-day variants of these policies have re-emerged as a systematic response to proxy war refugee flows, changing asylum and migration patterns, and waning ideological receptivity to receive refugees.[7] Since then, extraterritorial controls have continuously expanded and today comprise a broad 'toolbox' of both direct and indirect measures to frustrate access to States' territory and asylum systems.[8]

Several more substantial shifts can be observed in the way that extraterritorial migration control has evolved. First, while early forms of extraterritorial controls—for

[3] Thomas Gammeltoft-Hansen and Nikolas F Tan, 'The End of the Deterrence Paradigm? Future Directions for Global Refugee Policy' (2017) 5 Journal on Migration and Human Security 28.

[4] Cathryn Costello, 'Refugees and (Other) Migrants: Will the Global Compacts Ensure Safe Flight and Onward Mobility for Refugees?' (2018) 30 IJRL 643.

[5] Martin S Lausten, *Jøder og kristne i Danmark: Fra middelalderen til nyere tid* (Anis 2012).

[6] Aristide Zolberg, 'Matters of State' in Charles Hirschman, Philip Kasinitz, and Josh DeWind (eds), *The Handbook of International Migration: The American Experience* (Russell Sage Foundation 1999) 71; John Torpey, *The Invention of the Passport: Surveillance, Citizenship and the State* (CUP 2000).

[7] BS Chimni, 'The Geopolitics of Refugee Studies: A View from the South' (1998) 11 JRS 350.

[8] See further Chapter 48 in this volume; Bill Frelick, Ian M Kysel, and Jennifer Podkul, 'The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants' (2016) 4 Journal on Migration and Human Security 190. On the historical context of extraterritorial controls, see Daniel Ghezelbash, 'Legal Transfers of Restrictive Immigration Laws: A Historical Perspective' (2017) 66 ICLQ 235.

example, visa regimes,[9] carrier sanctions[10] and high seas interdictions[11]—tend to involve one State acting unilaterally, extraterritorial controls have gradually come to feature more prominently as part of regional cooperation, becoming embedded in international agreements at both the bilateral and multilateral level. Contemporary extraterritorial controls thus often involve two or more States (as well as private actors[12]) engaged in 'cooperative deterrence', such as third country processing.[13]

Secondly, while policies of extraterritorial migration control have traditionally been led by asylum countries in the Global North—particularly the United States, Australia, and Europe—the geographic *locus* of controls has shifted well beyond these regions. As a matter of international diplomacy, some forms of controls, such as visas, are often subject to reciprocity, making many States in the Global South adopt similar restrictions in reverse. Likewise, the role of private airline staff performing migration control has come to be regulated as a matter of international aviation law, providing for a similarly globalizing effect.[14] Asylum countries in the Global South may sometimes be seen to adopt similar deterrence policies in response to regional refugee pressures. For instance, Thailand, Malaysia, and Indonesia all pushed back boats carrying Rohingya and Bangladeshi migrants and asylum seekers in the Bay of Bengal and the Andaman Sea in 2015,[15] before agreeing to provide temporary protection to Rohingya asylum seekers. In some cases, this kind of 'policy transfer' occurs as a result of cooperation with diplomatic pressure from Global North States, keen to expand controls further upstream.[16] For example, Australia has lobbied both Indonesia and Malaysia to cease granting visas on arrival to Iranian nationals.[17]

[9] Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, OUP 2007) 375; Spijkerboer (n 1) 457.

[10] UNHCR, 'Position on Visa Requirements and Carrier Sanctions' (September 1995); Tilman Rodenhäuser, 'Another Brick in the Wall: Carrier Sanctions and the Privatization of Immigration Control' (2014) 26 IJRL 223.

[11] Stephen H Legomsky, 'The USA and the Caribbean Interdiction Programme' (2006) 18 IJRL 677; André Brouwer and Judith Kumin, 'Interception and Asylum: When Migration Control and Human Rights Collide' (2003) 21(4) Refuge 6.

[12] Thomas Gammeltoft-Hansen, 'Private Security and the Migration Control Industry' in Rita Abrahamsen and Anna Leander (eds), *Routledge Handbook of Private Security Studies* (Routledge 2015) 207.

[13] Thomas Gammeltoft-Hansen and James C Hathaway, '*Non-Refoulement* in a World of Cooperative Deterrence' (2015) 53 Columbia Journal of Transnational Law 235.

[14] The International Civil Aviation Organization (ICAO) Standards and Recommended Practices on Facilitation were first adopted in 1949 pursuant to art 37 of the 1944 Convention on Civil Aviation (adopted 7 December 1944, entered into force 4 April 1947) 15 UNTS 295 (Chicago Convention) and designated as Annex 9 and subsequently developed and revised.

[15] Human Rights Watch, 'Southeast Asia: End Rohingya Boat Pushbacks' (14 May 2015) <https://www.hrw.org/news/2015/05/14/southeast-asia-end-rohingya-boat-pushbacks> accessed 4 August 2019; Simon Tisdall, 'South-East Asia Faces Its Own Migrant Crisis as States Play "Human Ping-Pong"', *The Guardian* (14 May 2015) <http://www.theguardian.com/world/2015/may/14/migrant-crisis-south-east-asia-rohingya-malaysia-thailand> accessed 4 August 2019.

[16] On the subject of policy transfer in regard to migration control more generally, see Rosemary Byrne, Gregor Noll, and Jens Vedsted-Hansen (eds), *New Asylum Countries? Migration Control and Refugee Protection in an Enlarged European Union* (Kluwer Law International 2002); Daniel Ghezelbash, *Refuge Lost: Asylum Law in an Interdependent World* (CUP 2018).

[17] Asher Hirsch, 'The Borders beyond the Border: Australia's Extraterritorial Migration Controls' (2017) 36(3) RSQ 48, 73.

Thirdly, and related to the point above, even within Global North-led cooperation on migration control, recent practice suggests a gradual reversal of operational roles. Earlier forms of cooperative deterrence tended to place emphasis on controls being performed by the intended destination State's own authorities—limiting the cooperative element to ensuring access to third State waters and territory, or providing more nominal contributions from third State authorities, such as 'shipriders'.[18] Current cooperation on migration control, however, often leaves the actual implementation of controls largely to the authorities of partner States in transit or origin countries. This form of 'contactless control'[19] is specifically designed to avoid any direct jurisdictional links to the sponsoring State, at whose behest controls are carried out.[20] Thus, Italy and other European States provide extensive material assistance, training, and guidance to the Libyan Coast Guard, which assumes the principal role in stopping and turning around migrant boats along the central Mediterranean route. The EU–Turkey Statement agreement equally leaves Turkish authorities to perform exit border controls.[21] Similarly, Australia has sought to wind down its operational involvement in Nauru and Papua New Guinea, ceding greater operational control to local authorities.

As Sections 3 and 4 explain in more detail, each of these shifts raises further questions from the perspective of international refugee and human rights law. The current state of deterrence practices means that refugee lawyers must be particularly attentive to how responsibility is established and distributed across multiple States, the different international and regional legal regimes applicable across jurisdictions, and what forums of accountability exist at both the national and international levels.

3. The State of International Refugee Law

The right to seek and enjoy asylum is enshrined in article 14 of the UDHR.[22] International refugee law, however, does not provide a right to access asylum in the

[18] Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea* (CUP 2009) 72.

[19] Violeta Moreno-Lax and Mariegiulia Giuffré, 'The Rise of Consensual Containment: From "Contactless Control" to "Contactless Responsibility" for Migratory Flows' in Satvinder Juss (ed), *Research Handbook on International Refugee Law* (Edward Elgar 2019) 85; Thomas Gammeltoft-Hansen, 'International Cooperation on Migration Control: A Legal Research Agenda' (2018) 20 EJML 373, 379.

[20] Whether, from an international law perspective, sponsoring States are successful in this endeavour is, however, debatable. See further Section 3.

[21] European Council, 'EU–Turkey Statement' (18 March 2016) <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement> accessed 25 November 2019.

[22] Thomas Gammeltoft-Hansen and Hans Gammeltoft-Hansen, 'The Right to Seek Revisited: On the UN Human Rights Declaration Article 14 and Access to Asylum Procedures in the EU' (2008) 10 EJML 439; Vincent Chetail, 'The Transnational Movement of Persons under General International Law: Mapping the Customary Law Foundations of International Migration Law' in Vincent Chetail and Céline Bauloz (eds), *Research Handbook on International Law and Migration* (Edward Elgar 2014) 27ff.

sense of permission to enter and remain on the State's territory.[23] Instead, the *non-refoulement* principle prohibits States from exposing refugees to the risk of being persecuted for a Convention reason.[24] The duty of *non-refoulement* is a robust obligation and finds expression in several general human rights treaties beyond the Refugee Convention, as well as in regional refugee and human rights instruments.[25] Moreover, article 33 of the Refugee Convention explicitly prohibits *refoulement* 'in any manner whatsoever', covering any measure of rejection, expulsion, extradition, or return to a situation where a refugee's life or freedom is threatened.

The *non-refoulement* principle may be argued to amount to a '*de facto*' duty to admit asylum seekers until their claim has been examined, in most situations.[26] The asylum process requires a thorough evaluation of the individual's case if *refoulement* is to be avoided. In practice, this means that any person who either claims asylum or who is recognizable as coming from a refugee-producing situation should be allowed to remain on the territory of the asylum State for the duration of the refugee status determination process.[27]

Yet, the duty of *non-refoulement* does not guarantee that refugees must in all cases be admitted to the territory. The drafters of the Convention were conscious that situations could arise where States might refuse admission to their own territory and divert a refugee to a third country as long as no risk of persecution existed there.[28] However, attempts by States to realize 'protection elsewhere' policies face a number of obstacles which stem not only from the *non-refoulement* principle, but also other key rights in the Refugee Convention and general human rights law.[29]

States have also sought to deny admission to refugees who have not yet arrived on their territory by arguing that the *non-refoulement* principle only protects those already present within their territory. Unlike most other provisions of the Refugee Convention, article 33 does not contain a specific delimitation *ratione loci*. This led some of the early commentators to assume a strict territorial interpretation,[30] a view also upheld by the United States Supreme Court with respect to the Haitian interdiction programme in the

[23] Guy S Goodwin-Gill, 'The Dynamic of International Refugee Law' (2014) 25 IJRL 651, 654; Gregor Noll, *Negotiating Asylum: The EU Acquis, Extraterritorial Protection and the Common Market of Deflection* (Martinus Nijhoff 2000) 387.

[24] For a detailed analysis, see Chapter 50 in this volume.

[25] See for instance CAT, art 3; ICCPR, arts 6, 7; OAU Convention, art II(3); American Convention on Human Rights, art 22(8). See further Chapter 36 in this volume.

[26] Gammeltoft-Hansen and Hathaway (n 13) 238. [27] ibid.

[28] Ad Hoc Committee on Statelessness and Related Problems, First Session, Summary Record of the Twentieth Meeting Held at Lake Success, New York (10 February 1950), UN doc E/AC.32/SR.20, para 14.

[29] For a detailed analysis of this issue, see Michelle Foster, 'Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in Another State' (2006) 28 Michigan Journal of International Law 223; Gregor Noll, 'Visions of the Exceptional: Legal and Theoretical Issues Raised by Transit Processing Centres and Protection Zones' (2003) 5 EJML 303.

[30] As Robinson bluntly concludes: 'if a refugee has succeeded in eluding the frontier guards, he is safe; if he has not, it is his dumb luck.' Nehemiah Robinson, *Convention Relating to the Status of Refugees: Its History, Contents and Interpretation—A Commentary* (Institute for Jewish Affairs 1953) 163. See further Atle Grahl-Madsen, *Commentary on the Refugee Convention 1951 (Articles 2–11, 13–37)* (UNHCR, Department of International Protection 1997) 136–7.

Sale case.[31] Today, however, the overwhelming consensus is that the *non-refoulement* principle applies wherever States exercise jurisdiction, including when carrying out migration control on the high seas or within foreign territory.[32] This is supported by both State practice[33] and a growing body of case law.[34] In one of the most prominent cases concerning interception of refugees on the high seas, *Hirsi v Italy*, the Grand Chamber of the European Court of Human Rights unanimously struck down the legality of Italy's cooperation scheme with Libya, arguing that pushbacks on the high seas violated article 3 of the ECHR. The court equally suggested that international refugee law, notably the principle of *non-refoulement*, has to be observed when carrying out operations on the high seas.[35] In a separate opinion, Judge Pinto de Albuquerque explicitly rejected the reasoning in *Sale*, stating that 'the United States Supreme Court's interpretation contradicts the literal and ordinary meaning of the language of Article 33 of the UN Refugee Convention and departs from the common rules of treaty interpretation'.[36]

Refugees further benefit from other rights under both refugee and general international law when seeking asylum. Article 31 of the Refugee Convention provides that States may not impose penalties on refugees for illegally crossing a border or staying on the territory. This non-penalization principle provides legal protection against a number of States' current deterrence policies, such as mandatory detention practices and criminalization, which *de facto* penalize asylum seekers.[37]

Similarly, given the inherent dangers related to the journeys many refugees undertake today, international human rights law provides important auxiliary protections, placing obligations upon States both during the initial encounter with border authorities and for refugees in transit crossing their jurisdiction.[38] International human rights law further places a positive duty upon all States to prevent, investigate, and prosecute serious human rights violations against migrants and refugees by non-State actors within their jurisdiction.[39]

[31] *Sale v Haitian Center Council* 509 US 155 (1993). See also UNHCR, 'Brief Amicus Curiae: The Haitian Interdiction Case 1993' (1994) 6 IJRL 85.

[32] UNHCR, 'Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol' (26 January 2007). For an overview of this debate, see further Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (CUP 2011) ch 3.

[33] See eg UNHCR Executive Committee Conclusion No 97 (2003) para a(iv).

[34] See eg *Haitian Center for Human Rights v United States ('US Interdiction of Haitians on the High Seas')*, Inter-American Commission on Human Rights Report No 51/96, Case No 10.675 (13 March 1997); *Xhavara v Italy and Albania*, App No 39473/98 (ECtHR, 11 January 2001); *JHA v Spain*, UN doc CAT/C/41/D/323/2007 (21 November 2008).

[35] *Hirsi Jamaa v Italy* (2012) 55 EHRR 21, paras 134–5.

[36] ibid (Separate Concurring Opinion of Judge Pinto de Albuquerque) 70.

[37] Cathryn Costello, Yulia Ioffe, and Teresa Büchsel, 'Article 31 of the 1951 Convention relating to the Status of Refugees', UNHCR Legal and Protection Policy Research Series PPLA/2017/01 (2017); see Chapter 51 in this volume.

[38] Louis Henkin, 'Refugees and Their Human Rights' (1994) 18 Fordham Law Review 1079, 1080.

[39] Office of the United Nations High Commissioner for Human Rights, 'Unlawful Death of Refugees and Migrants: Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions', UN doc A/72/335 (15 August 2017).

The law of the sea imposes a duty on coastal and seafaring States to perform search and rescue. Both government and private vessels are obliged to rescue anyone in distress,[40] and coastal States must maintain 'an adequate and effective search and rescue service'.[41] The search and rescue regime has been marred by the absence of clear rules for deciding where rescued persons should be put ashore and the lack of an explicit obligation for States to allow disembarkation at a place of safety. While legal amendments to the relevant treaties,[42] regional standards,[43] and guidelines[44] have attempted to close this gap, differing interpretations still result in political stand-offs between States and private vessels, often with dire humanitarian consequences.[45]

A particular concern may arise where migration control is carried out within a refugee's country of origin. This may occur where naval authorities are granted permission to patrol the territorial waters of foreign States; where immigration liaison officers operate control in foreign airports; or where visas are denied consulates, thereby impairing the possibility of lawful travel to another country.[46] In such cases, all rights under the Refugee Convention are inoperable, since refugee status is premised upon the refugee having left the country of origin. Here again, the protection offered by general human rights law becomes particularly important: it should be noted that the principle of *non-refoulement* here does not carry a similar geographical restriction. In addition, exercising migration control to the effect that individuals are prevented from leaving their

[40] United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 1 November 1994) 833 UNTS 397 (UNCLOS) art 98(1) and International Convention on the Safety of Life at Sea (adopted 1 November 1974, entered into force 25 May 1980) 1184 UNTS 3 (SOLAS) Chapter V, Regulations 10(a) and 33. This entails a positive duty on flag States to adopt domestic legislation that imposes penalties on shipmasters who ignore calls for, or fail to provide, assistance. In practice, however, many States have failed to do so and enforcement is difficult. See Michael Pugh, 'Drowning not Waving: Boat People and Humanitarianism at Sea' (2004) 17 JRS 50; Sophie Cacciaguidi-Fahy, 'The Law of the Sea and Human Rights' (2007) 19 Sri Lanka Journal of International Law 85.

[41] UNCLOS art 98(2).

[42] The 2004 amendments to the 1979 Convention on Maritime Search and Rescue (SAR) and the SOLAS. International Maritime Organization, 'Resolution 153(78): Adoption of Amendments to the SOLAS. Annex 3', UN doc MSC 78/26/Add.1; International Maritime Organization, 'Resolution 155(78): Adoption of Amendments to the SAR. Annex 5', UN doc MSC 78/26/Add.1.

[43] Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 Establishing Rules for the Surveillance of the External Sea Borders in the Context of Operational Cooperation Coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2002] OJ L 189/93.

[44] International Maritime Organization, 'Principles relating to Administrative Procedures for Disembarking Persons Rescued at Sea', UN doc FAL.3/Circ.194 (22 January 2009); UNHCR, 'Rescue at Sea. A Guide to Principles and Practice as Applied to Migrants and Refugees' (September 2006). See further UNHCR, 'Model Framework for Cooperation following Rescue and Sea Operations involving Refugees and Asylum-Seekers', Annex 1 of UNHCR, 'Refugees and Asylum-Seekers in Distress at Sea—How Best to Respond? Summary Conclusions' (5 December 2011).

[45] Violeta Moreno-Lax and Efthymios Papastavridis (eds), *'Boat Refugees' and Migrants at Sea: A Comprehensive Approach. Integrating Maritime Security with Human Rights* (Martinus Nijhoff 2016).

[46] Byrne, Noll, and Vedsted-Hansen (n 16) 10ff.

country of origin may, depending on the circumstances, amount to a violation of the right to leave any country as established in article 12 of the ICCPR, for example.[47]

4. Legal Responses to Extraterritorial Controls

Various challenges have been brought against the legality of extraterritorial controls since their inception. Much of the legal scholarship in this area is directed towards demonstrating that particular measures are unlawful, in the hope of forcing States to either abandon or significantly alter their practices. Reviewing this body of work shows a similar evolution in terms of legal thinking, highlighting how international refugee law has successfully expanded its gaze to leverage doctrinal and institutional developments within the broader frameworks of international human rights law and public international law.[48]

Early challenges to extraterritorial controls and other deterrence mechanisms often centred on arguments based on the Refugee Convention itself.[49] Central debates revolved around the geographical scope of the *non-refoulement* principle and the implications of the non-penalization principle. In some instances, this resulted in expansive interpretations that are difficult to reconcile with the plain meaning of the Convention's text. For example, it was argued that article 31 of the Refugee Convention (prohibiting States from penalizing refugees for irregularly entering their territory) encompassed financial penalties imposed on airlines in the context of carrier sanctions.[50] In practice, however, the success of such arguments has been limited.

Domestic courts have played a significant role in challenging certain deterrence measures, such as safe third country rules and mandatory detention. Yet, national judges from key States implementing deterrence policies have so far been more reluctant to extend protection under the Refugee Convention to situations involving extraterritorial action.

[47] Human Rights Committee, 'General Comment No 27: Freedom of Movement (art 12)', UN doc CCPR/C/21/Rev.1/Add.9 (2 November 1999) para 10.

[48] This is particularly evident when comparing subsequent editions of refugee law textbooks covering this issue. See Thomas Gammeltoft-Hansen, 'The Role of International Refugee Law in Refugee Policy' (2014) 27 JRS 574, 584. Some scholars further advance explicitly 'integrationist' or 'aggregate standards' methodologies: see eg Violeta Moreno-Lax, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law* (OUP 2017).

[49] See eg Jens Vedsted-Hansen, 'Transporters' Responsibilities under the Chicago Convention on International Civil Aviation' in Morten Kjærum (ed), *The Role of Airline Companies in the Asylum Procedure* (Danish Refugee Council 1988) 14–16; Guy S Goodwin-Gill, 'The Haitian Refoulement Case: A Comment' (1994) 6 IJRL 103; James C Hathaway, 'The Emerging Politics of Non-Entrée' (1992) 91 Refugees 40.

[50] Erika Feller, 'Carrier Sanctions and International Law' (1989) 1 IJRL 48, 58; Anthony Cruz, *Shifting Responsibility: Carriers' Liability in the Member States of the European Union and North America* (Trentham Books 1995) 74.

Thus, despite broad scholarly consensus and UNHCR's support for the position that the *non-refoulement* principle enshrined in article 33 of the Refugee Convention applies extraterritorially, wherever a State exercises jurisdiction, higher courts in the United States, the United Kingdom, and Australia have adopted more restrictive interpretations.[51]

The wider embrace of international human rights law within refugee law scholarship represents a significant turning point in regard to extraterritorial controls as well.[52] International human rights law has served both as a framework through which to interpret core obligations of international refugee law, and as a wider catalogue of substantive rights creating other normative entry points against deterrence policies or additional protections for certain people at risk. These include, for instance, the right to leave[53] and the special protection afforded to children.[54] A number of studies have further linked interpretation of the *non-refoulement* obligation within the Refugee Convention to the burgeoning literature and case law on extraterritorial human rights jurisdiction.[55]

From a practice-oriented perspective, perhaps the most important implication of this human rights turn has been the concurrent shift in litigative avenues. By framing arguments through international human rights law, access is simultaneously enabled to a range of regional courts and international human rights bodies. Over the past decades, several important cases relating to extraterritorial migration control have thus been heard before regional human rights courts, with successful litigation often forcing States to substantially adjust their policies. In Europe, this includes the *Hirsi* case mentioned in

[51] *Sale v Haitian Center Council* (n 31); *Regina v Immigration Officer at Prague Airport, Ex parte European Roma Rights Centre and Others* [2004] UKHL 55 para 68; *CPCF v Minister for Immigration and Border Protection* [2015] HCA 1 (High Court of Australia) para 461; *Minister for Immigration and Multicultural Affairs v Khawar* HCA 14 (High Court of Australia) para 42; *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* HCA 55 (High Court of Australia) para 137.

[52] Paul Weis, 'Refugees and Human Rights' (1971) 1 Israel Yearbook on Human Rights 35; Gervase JL Coles, 'Human Rights and Refugee Law' (1991) Bulletin of Human Rights 63; James C Hathaway, 'Reconceiving Refugee Law as Human Rights Protection' (1991) 4 JRS 113; Hélène Lambert, 'Protection against Refoulement from Europe: Human Rights Law Comes to the Rescue' (1999) 48 ICLQ 515; Brian Gorlick, 'The Convention and the Committee against Torture: A Complementary Protection Regime for Refugees' (1999) 11 IJRL 479; Jane McAdam, *Complementary Protection in International Refugee Law* (OUP 2007). See more generally Ruth Rubio-Marin, *Human Rights and Immigration* (OUP 2014).

[53] Vladislava Stoyanova and Elspeth Guild, 'The Human Right to Leave Any Country: A Right to Be Delivered' in Wolfgang Benedek and others (eds), *European Yearbook on Human Rights 2018* (Intersentia 2018) 373–94; Marjoleine Zieck, 'Refugees and the Rights to Freedom of Movement: From Flight to Return' (2018) 39 Michigan Journal of International Law 19; Colin Harvey and Robert P Barnidge, 'Human Rights, Free Movement, and the Right to Leave in International Law' (2007) 19 IJRL 1; Guy S Goodwin-Gill, 'The Right to Leave, Return and Remain' in Vera Gowlland-Debbas (ed), *The Problem of Refugees in the Light of Contemporary International Law Issues* (Martinus Nijhoff 1996) 93, 95. See also Human Rights Committee, 'General Comment No 27' (n 47) para 10.

[54] Jason M Pobjoy, *The Child in International Refugee Law* (CUP 2017).

[55] Bernard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (Brill 2010); Gammeltoft-Hansen (n 32); Maarten den Heijer, *Europe and Extraterritorial Asylum* (Hart 2012); Cathryn Costello, *The Human Rights of Migrants and Refugees in European Law* (OUP 2015); Moreno-Lax (n 48); Shishir Lamichhane, 'The Extra-Territorial Applicability of the Principle of Non-Refoulement and Its Interception with Human Rights Law' (2017) 5 Kathmandu School of Law Review 137; see Chapter 11 in this volume.

the previous section,[56] as well as cases establishing jurisdiction in situations concerning bilateral agreements to intercept migrant boats,[57] and attempts to define 'international zones' to exclude access to domestic asylum procedures.[58] Contrary to the US Supreme Court, the Inter-American Commission of Human Rights found the Haitian interdiction programme to have triggered the United States' obligations under the Refugee Convention and Protocol.[59]

The UN human rights bodies have similarly come to play an important role in this area. In the *Marine I* case, the Committee against Torture considered Spain to have exercised jurisdiction both during interception of migrants off the West African coast and throughout the ensuing detention of 23 persons at a Mauritanian fishing plant.[60] Both the Committee against Torture and the Human Rights Committee, in their concluding observations on Australia, found the Regional Processing Centre on Manus Island in Papua New Guinea to fall under Australia's jurisdiction.[61] More generally, individual communications in relation to asylum and immigration matters have come to form a significant part of the committees' caseloads.[62] Some scholars have thus advocated a greater role for the human rights committees in 'grant[ing] relief to a growing number of asylum seekers and refugees'.[63] Other authors remain more sceptical, noting that far from all of the States accept the individual communication procedure—or, even when they do, the committees' views—and that the soft law status of such views has a limited impact in shaping State practice.[64]

Most recently, the law of complicity has attracted particular attention from refugee law scholars and NGOs. The customary international rule on complicity, expressed in article 16 of the Articles on the Responsibility of States for Internationally Wrongful Acts,[65] provides a possible avenue for holding destination States responsible for aiding and assisting another State in breaching common international obligations. Legomsky has thus applied a 'complicity principle' to safe third country practices,[66] while den

[56] *Hirsi* (n 35). [57] *Xhavara* (n 34). [58] *Amuur v France* (1996) 22 EHRR 533.

[59] *Haitian Center for Human Rights* (n 34).

[60] *JHA v Spain* (n 34). The case was, however, declared inadmissible as the complainant was not expressly authorized to act on behalf of the victims.

[61] Committee against Torture, 'Concluding Observations on the Fourth and Fifth Periodic Reports of Australia', UN doc CAT/C/AUS/CO/4–5 (26 November 2014); Human Rights Committee, 'Concluding Observations on the Sixth Periodic Report of Australia', UN doc CCPR/C/AUS/CO/6 (9 November 2017).

[62] Başak Çali, 'A Few Steps Forward, a Few Steps Sideways and a Few Steps Backwards: The CAT's Revised and Updated GC on Non-Refoulement' (*EJIL:Talk!*, 20 March 2018) <https://www.ejiltalk.org/part-1-a-few-steps-forward-a-few-steps-sideways-and-a-few-steps-backwards-the-cats-revised-and-updated-gc-on-non-refoulement> accessed 4 August 2019.

[63] Gorlick (n 52).

[64] Fanny De Weck, *Non-Refoulement under the European Convention on Human Rights and the UN Convention against Torture* (Brill 2016) 7; Patrick van Berlo, 'The Protection of Asylum Seekers in Australian-Pacific Offshore Processing: The Legal Deficit of Human Rights in a Nodal Reality' (2017) 17 Human Rights Law Review 33, 69.

[65] International Law Commission (ILC), 'Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), Report of the ILC on the Work of its 53rd Session' (2001) UN doc A/56/10.

[66] Legomsky (n 11) 620.

Heijer has considered European 'aid or assistance' in the context of extraterritorial migration control.[67] Giuffré has argued for Italy's derived responsibility vis-à-vis cooperation with Libya in carrying out extraterritorial border controls, finding that 'the conditions posed by Article 16 of the ILC Articles appear to be fully met'.[68] Gammeltoft-Hansen and Hathaway have applied article 16 to situations of cooperative deterrence more generally, concluding that 'States that believe that the more diffuse forms of *non-entrée* involving no exercise of jurisdiction are thus necessarily immune from legal liability are thus proceeding with false confidence'.[69] Markard, in her work on the right to leave, has suggested that EU Member States could be 'complicit in internationally wrongful departure prevention by third countries'.[70] Similarly, Moreno-Lax and Giuffré have raised the possibility of derived responsibility on the part of the EU and its Member States in cooperating with Turkey and Libya on preventing departures.[71]

While complicity is undoubtedly a useful entry point for arguments and advocacy around shared responsibility, it should also be acknowledged that so far it has seen limited practical application by national and international judiciaries.[72] Thus, the French administrative court refused the application of eight NGOs seeking an injunction of France's donation of six patrol vessels to the Libyan Coast Guard on the basis that the determination was too closely related to foreign relations.[73] Nevertheless, at the time of writing, several cases raising issues about attribution and complicity were pending before international courts and bodies. As such, one cannot rule out important advances in this area in coming years, thereby clarifying the interaction between the law on State responsibility and international human rights law in regard to, amongst other things, cooperative forms of migration control.

5. Towards a Topographical Approach to Accountability for Extraterritorial Migration Control

Refugee law, human rights law, and State responsibility continue to have an important role to play in challenging extraterritorial controls. At the same time, the evolution of

[67] den Heijer (n 55) 91ff; Maarten den Heijer, 'Europe Beyond Its Borders: Refugee and Human Rights Protection in Extraterritorial Immigration Control' in Ryan and Mitsilegas (n 55).

[68] Mariagiulia Giuffré, 'State Responsibility Beyond Borders: What Legal Basis for Italy's Push-Backs to Libya?' (2012) 24 IJRL 692, 725ff.

[69] Gammeltoft-Hansen and Hathaway (n 13) 282.

[70] Nora Markard, 'The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries' (2016) 27 EJIL 591, 615.

[71] Moreno-Lax and Giuffré (n 19) 101.

[72] On 'accountability politics', see David S FitzGerald, *Refuge Beyond Reach: How Rich Democracies Repel Asylum Seekers* (OUP 2019) 52ff.

[73] *Amnesty International France v République Français*, App No 1908601/9 (10 May 2019) (Paris Administrative Tribunal).

approaches sketched out in the previous section are also representative of a particular trajectory which looks to human rights law and general international law as a means of overcoming shortcomings and bolstering interpretation within international refugee law as the core legal regime governing people on the move in need of protection. Recently, a group of scholars called for a break with what they see as the 'refugee paradigm' in regard to international migration.[74] In its place, they call for a more 'migrant-centred perspective' exploring the fragmented legal spaces beyond the Refugee Convention and including all levels of law, whether at the 'international, regional, bilateral, transnational [or] national' level.[75]

Following this call, and drawing inspiration from other recent scholarship, this final section sets out what might be termed a 'topographical approach' to accountability for extraterritorial migration control. Such an approach requires refugee lawyers to apply a broader frame to accountability both in terms of the legal regimes they engage with and the geographical outlook applied. While it is beyond the scope of this chapter to provide a full overview of such alternative avenues for accountability, a number of legal areas seem to be of particular relevance.

At the national level, constitutional law offers an accountability regime of growing importance for a range of asylum seeker and refugee rights. In particular, non-discrimination law lends itself as a means of realizing refugee rights.[76] Since the well-known *Prague Airport* case, which found pre-clearance measures to constitute discrimination under the United Kingdom's Race Relations Act 1976, a number of complaints have been brought before constitutional courts. In 2014, for example, the Constitutional Court of Ecuador struck down a presidential decree that limited the rights of asylum seekers to apply for and appeal protection decisions and narrowed the meaning of 'refugee' in national law.[77] In 2016, the Supreme Court of Papua New Guinea in *Namah v Pato* found that detention of asylum seekers breached the right to liberty set out in the constitution.[78] Most recently, Guatemala's Constitutional Court imposed a temporary injunction on the operation of a safe third country agreement with the United States.[79]

[74] Jaya Ramji-Nogales, 'Moving Beyond the Refugee Law Paradigm' (2017) 111 AJIL Unbound 8; Jaya Ramji-Nogales and Peter J Spiro, 'Introduction to Symposium on Framing Global Migration Law' (2017) 111 AJIL Unbound 1; as well as other contributions to the same special issue.

[75] Ramji-Nogales and Spiro (n 74) 1. More generally, see Margaret Young (ed), *Regime Interaction in International Law: Facing Fragmentation* (OUP 2012).

[76] David J Cantor, 'The End of Refugee Law?' (2017) 9 Journal of Human Rights Practice 203, 207; Maarten den Heijer, 'Visas and Non-Discrimination' (2018) 20 EJML 470.

[77] Judgment No 002-14-Sin-CC, Case No 0056-12-IN and 0003-12-IA (14 August 2014) (Constitutional Court of Ecuador). See also Stephen Meili, 'The Human Rights of Non-Citizens: Constitutionalized Treaty Law in Ecuador' (2016) 31 Georgetown Immigration Law Journal 347.

[78] *Namah v Pato* [2016] PGSC 13. See further Azadeh Dastyari and Maria O'Sullivan, 'Not for Export: The Failure of Australia's Extraterritorial Processing Regime in Papua New Guinea and the Decision of the PNG Supreme Court in *Namah*' (2016) 42 Monash University Law Review 308; see Chapters 14 and 49 in this volume.

[79] Sofia Menchu, 'Guatemalan Court Halts "Safe Third Country" Designation for Asylum Seekers' *Reuters* (15 July 2019) <https://www.reuters.com/article/us-usa-immigration-guatemala/guatemalan-court-halts-safe-third-country-designation-for-asylum-seekers-idUSKCN1UA1TK> accessed 21 October 2019.

Particularly in common law countries, private law avenues, such as tort law, may provide remedies for (potential) harm. In Australia, perhaps the most effective litigation challenging third country processing has stemmed from the use of civil litigation establishing the existence of a duty of care between the Australian government and asylum seekers held offshore.[80] Tortious litigation and settlements have thus resulted in the medical evacuation of hundreds of people from Papua New Guinea and Nauru to Australia.

Likewise, different legal regimes may be explored at the international level in order to further litigation and advocacy in regard to cooperative or extraterritorial migration controls. The law of the sea is one potential source of accountability. In the recent *M/V 'Norstar' (Panama v Italy)* case, which concerned Italy's arrest of a Panamanian-flagged vessel, the International Tribunal for the Law of the Sea found that Italy's exercise of criminal jurisdiction over the oil tanker violated the vessel's freedom of navigation under article 87(1) of the Convention on the Law of the Sea. The Tribunal held that 'even acts which do not involve physical interference or enforcement on the high seas may constitute a breach of the freedom of navigation … if such acts produce some "chilling effect" '.[81] Communications to the International Criminal Court alleging crimes against humanity have further arisen with respect to both Australia's operations on Manus Island and the EU's role in pullback operations to Libya.[82] The legal viability of such claims notwithstanding, the submissions have helped create wider attention on and public debate about these policies.[83]

A topographical approach to accountability also implies a broader geographical focus. It is noteworthy that while policies have developed to encompass more complex forms of international cooperation between sponsoring States and an expanding array of transit and origin countries, the focus of scholars and refugee advocates has remained almost exclusively on the role and possible responsibility of sponsoring States in the Global North. The responsibility of cooperating States in transit and origin countries, as

[80] See Majid Karami Kamasaee, 'Fourth Amended Statement of Claim', Submission in *Kamasaee v Commonwealth*, SCI 2014 06770 (7 April 2017); Gabrielle Holly, 'Transnational Tort and Access to Remedy under the UN *Guiding Principles on Business and Human Rights: Kamasaee v Commonwealth*' (2018) 19 Melbourne Journal of International Law 52.

[81] *M/V 'Norstar' (Panama v Italy)* (Merits, Judgment of 10 April 2019), List of Cases No 25, ITLOS Reports 2019, para 233.

[82] Global Legal Action Network (GLAN), 'Communique to the Office of the Prosecutor of the International Criminal Court' (14 February 2017) <https://www-cdn.law.stanford.edu/wp-content/uploads/2017/02/Communiquper centC3per centA9-to-Office-Prosecutor-IntlCrimCt-Art15RomeStat-14Feb2017.pdf> accessed 4 August 2019; Sciences Po Clinical Project, 'Communication to the Office of the Prosecutor of the International Criminal Court Pursuant to Article 15 of the Rome Statute EU Migration Policies in the Central Mediterranean and Libya (2014–2019)' <http://www.statewatch.org/news/2019/jun/eu-icc-case-EU-Migration-Policies.pdf> accessed 4 August 2019.

[83] See eg Owen Bowcott, 'ICC Submission Calls for Prosecution of EU Over Migrant Deaths', *The Guardian* (3 June 2019) <https://www.theguardian.com/law/2019/jun/03/icc-submission-calls-for-prosecution-of-eu-over-migrant-deaths> accessed 4 August 2019; Jamie Smyth, 'Lawyers Urge ICC to Probe Australia over Refugee Abuse Claims' *Financial Times* (13 February 2017) <https://www.ft.com/content/cfc1cce8-f193-11e6-8758-6876151821a6> accessed 4 August 2019.

part of these schemes, is seldom, if ever, considered, much less the possibility to address or litigate human rights violations through the domestic jurisdiction or regional avenues provided for in these countries.[84]

It is arguable that this bias is appropriate given developed States' principal role in instigating and funding such cooperation, as well as the fundamental inequality in terms of wealth and political power across the Global North–South divide. Yet, an exclusive focus on the responsibility of sponsoring States risks coming at the expense of migrants and refugees, for whom the international justice element is likely to be a secondary concern to the human rights violations endured. Moreover, at a time when international cooperation on migration control is generally tipping towards stronger involvement of authorities in transit and origin States, it becomes all the more important to consider the role and responsibility of these States, as well as the legal remedies available within these jurisdictions.

As Abass and Ippolito point out, the role of domestic courts in transit and origin countries is often underestimated.[85] It was neither UN treaty bodies nor domestic courts in Australia that finally undid detention in Australia's offshore processing centre on Manus Island. Rather, the Supreme Court of Papua New Guinea ruled that the detention of asylum seekers within the centre violated the right to personal liberty enshrined in the country's constitution.[86] In March 2017, a Libyan appeal court formally suspended the Memorandum of Understanding signed between Libya and Italy and ordered a halt to all current cooperation on migration control between the two countries—even though the case was subsequently overturned by the Supreme Court.[87]

At the regional level, refugee instruments such as the OAU Convention and the Cartagena Declaration both entail more refined approaches to international cooperation and responsibility-sharing.[88] In terms of litigation, the Inter-American human rights system has a long track record of affording complementary protection to refugees and

[84] Gammeltoft-Hansen (n 19); Nikolas F Tan, 'The Manus Island Regional Processing Centre: A Legal Taxonomy' (2018) 20 EJML 427.

[85] Ademola Abass and Francesca Ippolito, 'Introduction—Regional Approaches to the Protection of Asylum Seekers: An International Legal Perspective' in Ademola Abass and Francesca Ippolito (eds), *Regional Approaches to the Protection of Asylum Seekers: An International Legal Perspective* (Ashgate 2014) 15.

[86] *Namah* (n 78).

[87] Libya Herald Reporters, 'Tripoli Court Blocks Serraj's Migrant Deal with Italy: Effect Unclear' *Libya Herald* (22 March 2017) <https://www.libyaherald.com/2017/03/22/tripoli-court-blocks-serrajs-migrant-deal-with-italy-effect-unclear/> accessed 4 August 2019; Libya Herald Reporters, 'Supreme Court Overturns Lower Court Ban on Libya–Italy Migrant Deal as Italian Interior Minister Discusses Issue with Fezzan Mayors' *Libya Herald* (26 August 2017) <https://www.libyaherald.com/2017/08/26/supreme-court-overturns-lower-court-ban-on-libya-italy-migrant-deal-as-italian-interior-minister-discusses-issue-with-fezzan-mayors/> accessed 4 August 2019.

[88] Marina Sharpe, *The Regional Law of Refugee Protection in Africa* (OUP 2018) 76–7; Susan Kneebone, 'ASEAN and the Conceptualisation of Refugee Protection in Southeastern Asian States' in Abass and Ippolito (n 85) 299–300; Liliana L Jubilut, 'Fora and Programmes for Refugees in Latin' in Abass and Ippolito (n 85) 261.

asylum seekers.[89] More nascent, recent rulings from the African Court on Human and Peoples' Rights suggest that this institution could potentially play a stronger role in this area in the future.[90] Refugee issues may furthermore be addressed in the context of broader regional political institutions and frameworks. As Ebobrah shows, regional economic communities have given rise to sub-regional human rights regimes across the African continent that hold the potential to play a bigger role in issues concerning refugee and migrant rights.[91]

In sum, a variety of avenues exists beyond the traditional Global North and human rights-centred approaches through which to pursue accountability for extraterritorial migration control. While not diminishing the continued importance of existing efforts to litigate extraterritorial migration control before bodies such as the European Court of Human Rights, the topographical approach sketched out here shows that legal responses in this area may still see substantial evolutions.[92]

6. Conclusions

The present chapter has dealt with extraterritorial migration control as a fundamental and systemic challenge for refugees' ability to access asylum. From its modern origins in the 1980s, extraterritorial migration control has spread across countries in both the Global North and—to a lesser extent—the Global South and continuously developed and refined as States hope to eclipse their responsibilities under international refugee law. The chapter has also sought to demonstrate that international refugee law has far from remained static in this period. From dynamic developments in the interpretation of key concepts—such as the geographical application of the *non-refoulement* principle—to the wider turn to international human rights law and litigation, refugee lawyers have consistently challenged new developments in State practice. The recent surge in scholarship and advocacy work focusing on the law on State responsibility and principles of complicity may come to constitute another significant turning point in this area, to the extent that such arguments gain acceptance by domestic and international judiciaries.

[89] David J Cantor and Stefania Barichello, 'Protection of Asylum Seekers under the Inter-American Human Rights System' in Abass and Ippolito (n 85) 268.

[90] See eg *Anudo Ochieng Anudo v United Republic of Tanzania*, App No 02/2015 (22 March 2018). Attention may further be directed to the Special Rapporteur on Refugees, Asylum Seekers, and Internally Displaced Persons established under the African Commission on Human and Peoples' Rights <https://www.achpr.org/specialmechanisms/detail?id=5> accessed 25 November 2019.

[91] Solomon T Ebobrah, 'Sub-Regional Frameworks for the Protection of Refugees in Africa: Bringing Relief Closer to Trouble Zones' in Abass and Ippolito (n 85) 67–8.

[92] For a more comprehensive account of the topographical approach, see Nikolas F Tan and Thomas Gammeltoft-Hansen, 'A Topographical Approach to Accountability for Human Rights Violations in Migration Control' (2020) 21 German Law Journal 335.

As the final part of the chapter outlined, however, legal responses to extraterritorial migration control do not stop here. In line with the topographical approach advanced above, accountability for migration control should be pursued through a broad range of avenues, cutting across different legal regimes, different levels of national, transnational, regional, and international law, and different jurisdictions in both the Global North and the Global South. With current shifts in cooperative deterrence leading to a bigger operational role for authorities in the Global South, these 'alternative' venues through which to establish accountability for extraterritorial migration control are likely to become more important in the years to come.

CHAPTER 28

THE EVOLUTION OF SAFE THIRD COUNTRY LAW AND PRACTICE

LUISA FELINE FREIER, ELENI KARAGEORGIOU, AND KATE OGG

1. Introduction

States and regions use safe third country (STC) practices to deny protection to asylum seekers and refugees on the grounds that they have, or may have, protection in another country. While ascribed different labels, including 'protection elsewhere', 'country of first asylum', and 'safe third country', and implemented by various methods, the core legal issues remain the same: whether a State can deny protection on the grounds that it is available elsewhere, and the nature and scope of protection the third country must provide.[1]

The STC notion originated in Switzerland in 1979, spread throughout Europe in the 1980s, and was adopted by the European Union (EU) and countries such as Australia and Canada in the 1990s.[2] Since then, developments in STC law and practice globally include new bilateral agreements, reforms to STC provisions in domestic and supranational legislation, and landmark decisions of superior courts. We examine these changes in Europe, Australia, and North and South America, focusing in particular on the period from 2010 to 2020. As yet, these developments have received little academic attention, particularly offering the comparative perspective provided in this chapter. We argue that there has been a dilution of STC protection standards in these four regions. The thresholds for effective protection have diminished and are lower than the minimum

[1] Stephen Legomsky, 'Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection' (2003) 15 IJRL 567, 570–1.

[2] Jane McAdam, 'Migrating Laws? The "Plagiaristic Dialogue" Between Europe and Australia' in Hélène Lambert, Jane McAdam, and Maryellen Fullerton (eds), *The Global Reach of European Refugee Law* (CUP 2013) 29–34.

laid down in international treaties. Further, in the introduction and evolution of these STC practices, lawmakers and judges have disregarded the legal principle of international solidarity. While STC practices have long been critiqued as burden-shifting rather than -sharing,[3] new STC law and jurisprudence exacerbates inequities between States with respect to responsibility for hosting refugees. These developments pose significant risks to the protection of individual refugees, as well as the international protection regime more broadly.

2. Protection and Cooperation as Foundational Principles of Refugee Law

One of the central issues in STC scholarship is the delineation of the appropriate protection standards that must be available in the third country.[4] The predominate view is that the third country must comply with all obligations assumed by virtue of being a party to the Refugee Convention. The Michigan Guidelines on Protection Elsewhere (Michigan Guidelines) state that while *non-refoulement* is 'the most fundamental constraint on implementation of a protection elsewhere policy',[5] STC practices must ensure that refugees enjoy all rights in the Refugee Convention.[6] UNHCR's understanding of effective protection has been ambivalent,[7] but in its most recent guidance it has stressed the need for third countries to meet Convention protection standards.[8] Suggestions that there is a

[3] Savitri Taylor, 'Protection Elsewhere/Nowhere' (2006) 18 IJRL 283; Madeline Garlick, 'The Dublin System, Solidarity and Individual Rights' in Vincent Chetail, Philippe De Bruycker, and Francesco Maiani (eds), *Reforming the Common European Asylum System: The New European Refugee Law* (Brill 2016).

[4] The dominant view is that because the Convention neither authorizes nor prohibits such transfers, they are acceptable if effective protection is available in the third State: UNHCR, 'Summary Conclusions on the Concept of "Effective Protection" in the context of Secondary Movements of Refugees and Asylum Seekers (Lisbon Expert Roundtable, 9–10 December 2002)' (February 2003) para 12; Michelle Foster, 'Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in Another State' (2007) 28 Michigan Journal of International Law 223, 237; University of Michigan Law School, 'Michigan Guidelines on Protection Elsewhere' (2007) <https://www.refworld.org/docid/4ae9acd0d.html> accessed 23 May 2020; cf Violeta Moreno-Lax, 'The Legality of the "Safe Third Country" Notion Contested: Insights from the Law of Treaties' in Guy S Goodwin-Gill and Philippe Weckel (eds), *Migration & Refugee Protection in the 21st Century: International Legal Aspects* (Martinus Nijhoff 2015).

[5] Michigan Guidelines (n 4) para 6. The Guidelines refer to the principle of *non-refoulement* as reflected in art 33 of the Refugee Convention, as well as in human rights treaties and customary international law: para 11.

[6] ibid paras 1, 3, 4, 8.

[7] Dallal Stevens, 'What Do We Mean by "Protection"?' (2013) 20 International Journal of Minority and Group Rights 233, 248.

[8] UNHCR, 'Legal Considerations Regarding Access to Protection and a Connection between the Refugee and the Third Country in the context of Return or Transfer to Safe Third Countries' (April 2018) paras 3–4; UNHCR, 'Guidance on Responding to Irregular Movement of Refugees and Asylum Seekers' (September 2019) paras 11, 18.

lower threshold for effective protection have been critiqued on the grounds that there is no principled method for determining which Convention rights should be prioritized.[9]

While the Refugee Convention outlines a refugee-specific rights regime,[10] there are significant gaps that need to be supplemented by regional law and international human rights law (IHRL), such as the ICCPR, ICESCR, and ECHR.[11] If protection granted to refugees in the third country was to be limited to the prescriptions of the Refugee Convention, this would legitimize transfers to third countries that do not guarantee, *inter alia*, a refugee's right to personal security,[12] family life and unity,[13] or an adequate standard of living.[14]

We suggest that when determining whether a third country is safe, the starting point should be the rights enumerated in the Refugee Convention, including, but not limited to, *non-refoulement*. Refugees' access to further civil and political and socio-economic rights should also be taken into account. While some suggest that this is a difficult standard to reach in practice,[15] it is the correct and appropriate threshold for effective protection for three reasons. First, States cannot 'contract out' of their obligations under the Refugee Convention and human rights treaties through STC policies.[16] Secondly, the Refugee Convention's rights regime was never intended to be aspirational but was designed to 'give refugees a minimum number of advantages, which would permit them to lead a tolerable life in the country of reception'.[17] Thirdly, fundamental human rights, such as personal security and family unity, are not expressly enumerated in the Refugee Convention, yet are crucial for adequate protection.[18]

The Refugee Convention also rests on notions of international cooperation, solidarity, and responsibility-sharing.[19] Given that the effects of refugee movements are not distributed evenly, States are expected to show solidarity through providing assistance to overburdened States.[20] This is reflected in regional law where solidarity obligations

[9] Foster (n 4) 279–84 critiques Legomsky's (n 1) suggestion that fundamental or non-derogable rights be prioritized; Stevens (n 7) 248 criticizes the articulation in UNHCR, 'Statement by Erika Feller at the Fifty-Fifth Session of the Executive Committee of the High Commissioner's Programme' (7 October 2004) of 'quality protection' that includes only some Refugee Convention rights.

[10] James C Hathaway, *The Rights of Refugees under International Law* (CUP 2005) 4; Jane McAdam, *Complementary Protection in International Refugee Law* (OUP 2007) 5–6.

[11] Hathaway (n 10) 121; McAdam (n 10) 5.

[12] ICCPR, art 9; ECHR, art 5.

[13] ICCPR, art 23; ECHR, art 8.

[14] ICESCR, art 11. See Alice Edwards, 'Human Rights, Refugees, and the Right "To Enjoy" Asylum' (2005) 17 IJRL 293, 325–6 for why ICESCR rights apply to refugees despite art 2(3) providing that developing countries may determine to what extent they guarantee non-nationals ICESCR rights.

[15] Legomsky (n 1) 624 states that the Refugee Convention rights regime is 'vast' and it may be impossible for a third country to comply with all obligations.

[16] *TI v United Kingdom*, ECHR 2000–III 435, 457; Foster (n 4) 268.

[17] Ad Hoc Committee on Statelessness and Related Problems, 'Summary Record of the Twenty-Second Meeting' (2 February 1950) UN doc E/AC.32/SR.22, para 14.

[18] Hathaway (n 10) 121; Edwards (n 14) 311; McAdam (n 10) 5.

[19] Refugee Convention, preamble recital 4.

[20] Agnès Hurwitz, *The Collective Responsibility of States to Protect Refugees* (OUP 2009) 164, 285; Eleni Karageorgiou, 'The Distribution of Asylum Responsibilities in the EU: Dublin, Partnerships with Third Countries and the Question of Solidarity' (2019) 88 Nordic Journal of International Law 315, 321; see Chapter 25 in this volume.

have been institutionalized[21] and affirmed in the New York Declaration for Refugees and Migrants[22] and the Global Compact on Refugees.[23] Accordingly, we also suggest that a State's legislature, executive, and judiciary must consider the principle of international solidarity when implementing and interpreting STC rules. STC practices that lead to refugees' containment to countries already hosting large numbers of refugees or are otherwise unable to provide effective protection, run contrary to the Refugee Convention and jeopardize the provision of asylum.

3. European STC Law and Practice

The EU has established a body of law and institutional practice on asylum—the Common European Asylum System (CEAS). The EU Treaties require both that CEAS measures be in accordance with the Refugee Convention and other relevant human rights treaties, and be based on solidarity between the Member States.[24] The CEAS cooperation is underpinned by the principle of mutual trust, that is, the presumption that all EU Member States observe fundamental rights and international law obligations vis-à-vis refugees.[25] A generalized assessment of safety underlies the transfer of responsibility for refugees to non-EU countries as well. While the protection standards for STC transfers to EU States are fairly weak, recent developments with respect to STC transfers to non-EU countries reflect even lower protection safeguards. Judicial references to solidarity are scarce and have failed to challenge responsibility-shifting through STC rules.

a. Dublin Regulation Transfers

The Dublin Regulation[26] embraces the core elements of the STC concept, namely the allocation of responsibility to examine a claim and the transfer to the country responsible,[27] in a way that apparently reflects the objectives of the internal market.[28]

[21] Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ L 326/47–326/390 (TFEU) art 80; OAU Convention, art II(4).

[22] New York Declaration, para 68.

[23] Global Compact on Refugees, paras 3–5, 14–16.

[24] TFEU chapter 2, arts 77–80.

[25] See eg Case C-120/78 *Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649 and Opinion 2/13 of the Court of 18 December 2014: Accession by the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, ECLI:EU:C:2014:2454.

[26] Regulation 604/2013 of 26 June 2013 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in One of the Member States by a Third-Country National or a Stateless Person (recast) [2013] OJ L 180/31.

[27] Gregor Noll, *Negotiating Asylum: The EU Acquis, Extraterritorial Protection and the Common Market of Deflection* (Martinus Nijhoff 2000) 182–5.

[28] Elspeth Guild, 'The Europeanisation of Europe's Asylum Policy' (2006) 18 IJRL 630.

This system was intended neither to distribute hosting responsibilities fairly, nor to pay due regard to individual preferences or integration prospects. Rather, it was designed to be a system to assign responsibility, in which the State that played the most significant role in the asylum seeker's entry into the EU would be responsible for examining her or his application.[29]

While the Dublin system purports to deal with the allocation of responsibility between safe countries with comparable reception and protection systems, empirical analysis has revealed the opposite.[30] Furthermore, the European Court of Human Rights (ECtHR) and the Court of Justice of the EU (CJEU) have precluded transfers on human rights grounds. The ECtHR in *MSS v Belgium and Greece* determined that extreme poverty and homelessness in the receiving country, in combination with procedural shortcomings, and long delays in decision-making, amounted to inhuman or degrading treatment.[31] In *NS and ME*, the CJEU declared the presumption that other EU Member States are safe for asylum seekers, and that their claims would be properly processed, is rebuttable.[32] However, despite challenging the automatic nature of Dublin transfers, the ruling imposed the high threshold of 'systemic deficiencies'[33] for the suspension of transfers, even on grounds of risks of inhuman and degrading treatment. This narrow understanding is also reflected in more recent CJEU jurisprudence concerning the living conditions in a Member State following the grant of international protection. Only 'a situation of extreme material poverty that does not allow the individual to meet his most basic needs' would amount to inhuman and degrading treatment such as to preclude transfer.[34]

Unlike the CJEU, the ECtHR does not endorse the 'systemic breaches' threshold. In post-*MSS* jurisprudence, factors such as age and family unity are taken into account,[35] rendering the legality of a Dublin transfer conditional upon a thorough and individualized assessment of the applicant's situation in the receiving State.[36] Thus, it is arguable that the ECtHR looks beyond *refoulement* and takes into account, for example, children's rights, whereas the standard for effective protection in CJEU jurisprudence is limited to *non-refoulement* as protection from cruel, inhuman, and degrading treatment.

Reference to solidarity between States has rarely been part of courts' decisions in relation to Dublin transfers.[37] An exception was in *Jafari*, where the CJEU used the principle

[29] ibid 637.

[30] European Council on Refugees and Exiles, 'Wrong Counts and Closing Doors: The Reception of Refugees and Asylum Seekers in Europe' (March 2016) 31.

[31] *MSS v Belgium and Greece*, ECHR 2011-I 255, paras 230–4, 263–4, 300–22.

[32] Joined Cases C-411/10 and C-493/10 *NS v Secretary of State for the Home Department and ME v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* [2011] ECR I-13905, para 81.

[33] ibid para 94.

[34] Case C-163/17 *Jawo v Bundesrepublik Deutschland* (CJEU, 19 March 2019) paras 91–3.

[35] See eg *Tarakhel v Switzerland*, ECHR 2014-VI 195.

[36] See Cathryn Costello, *The Human Rights of Migrants and Refugees in European Law* (OUP 2015) 272–3.

[37] *NS and ME* (n 32) paras 93–4; *MSS* (n 31) (Rozakis J); Case C-528/11 *Halaf v Darzhavna agentsia za bezhantsite pri Ministerskia savet* (CJEU, 30 May 2013).

of solidarity to justify why compliance with the 'first entry criterion' in the Dublin Regulation should not be disputed, even in times of crisis.[38]

b. Transfer of Responsibility to Non-EU Countries

Protection standards are lower in the context of EU readmission policy to 'third countries', when contrasted with the Dublin standards set out above. The STC concept is enshrined in the Asylum Procedures Directive (APD) and serves as the basis for EU States to declare asylum applications inadmissible and to transfer the applicants to third countries, often through readmission agreements.[39]

A recent example is the transfers executed pursuant to the EU–Turkey statement.[40] Under the APD, the third country to which an applicant is to be transferred is not explicitly required to have ratified the Refugee Convention; rather, the applicant must have the possibility to acquire refugee status and, if found to be a refugee, to receive protection 'in accordance with' the Convention.[41] Although Turkey has ratified the 1967 Protocol to the Refugee Convention, it has maintained the geographical limitation, meaning it is only obliged to consider as refugees those individuals who have fled from events taking place in Europe. This excludes the majority of those seeking refuge in Turkey from Convention-based protection. As suggested above, forcible return of an asylum seeker to an intermediary country is permitted provided that the full protection package under the Refugee Convention along with IHRL standards is guaranteed. With respect to the EU–Turkey statement, this condition is not fulfilled.[42]

As regards international solidarity, the agreement envisages financial assistance to Turkey and some resettlement of Syrian refugees from Turkey to EU Member States.[43] Overall, the agreement confirms and legitimizes the confinement of refugees in Turkey, rather than questioning the system of refugee containment. Replicating the migration-control rationale of the Dublin system, the allocation of responsibility through the

[38] Case C-646/16 *Jafari and Jafari* (CJEU, 26 July 2017) para 88; cf Case C-646/16 *Khadija Jafari and Zainab Jafari* (CJEU, 26 July 2017), Opinion of AG Sharpston, paras 234–5 where it is suggested that the application of the first entry criterion would result in putting significant pressure on Western Balkan countries rendering them unable to cope with their EU Charter of Fundamental Rights and ECHR obligations.

[39] Mariagiulia Giuffré, *The Readmission of Asylum Seekers under International Law* (Hart 2020) 152–3.

[40] European Council, 'EU–Turkey Statement' (18 March 2016).

[41] Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status [2005] OJ L 326/13, art 27(1); Council Directive 2013/32/EU of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection (recast) OJ L 180/60, art 38(1).

[42] cf Daniel Thym, 'Why the EU–Turkey Deal is Legal and a Step in the Right Direction' (*Verfassungsblog*, 2018) <https://verfassungsblog.de/why-the-eu-turkey-deal-is-legal-and-a-step-inthe-right-direction> accessed 23 April 2020; Kay Hailbronner, 'The Concept of Safe Country and Expeditious Asylum Procedures: A Western European Perspective' (1993) 5 IJRL 31, 65.

[43] EU–Turkey Statement (n 40) paras 2, 4, 6.

EU–Turkey statement is grounded in a fundamental inequality between the countries involved, which is being addressed by compensatory measures such as transfer of money and States' voluntary pledges for resettlement. This is not in accordance with the principle of solidarity under European and international law, which requires fairness between States and towards refugees.[44] By shifting responsibilities to countries closer to regions of origin, such practices weaken protection by making it hard for host States to comply with their international obligations, and undermine, rather than express, international solidarity.

The CJEU declined to review the EU–Turkey statement, deeming it not to be an EU act.[45] This has been, indeed, a legally unpersuasive ruling that, arguably, made it possible for EU institutions to circumvent the democratic and judicial checks and balances as laid down in EU Treaties.[46]

The legality of EU Member States' sending applicants to STCs has been the subject matter of a number of ECtHR judgments, the most recent being *Ilias and Ahmed*.[47] In earlier cases, the court prohibited removal when the treatment of the applicant in the destination country would amount to a violation of article 3 (or other) ECHR rights.[48] In more recent STC cases, the court's approach is mainly procedural, examining the procedures of the removing State, without a substantive assessment of whether the third country in question is safe or not.[49] Regarding containment in facilities at the borders or airport zones prior to removal, the court has apparently diluted protection by permitting removing States to invoke 'exceptional migratory pressures' in a manner that facilitates STC returns.[50] In *Ilias and Ahmed*, the Grand Chamber held that the applicants' stay in the Hungarian border transit zone did not amount to detention under article 5 ECHR as they could return to Serbia without facing any 'direct threat to life and health'.[51] The court considered this a 'realistic' possibility for the applicants in light of the EU–Serbia readmission agreement, despite contending that it is not for the court to assess whether the applicants fall under the scope of that agreement.[52] Following this line of reasoning, the court did not undertake the substantive assessment of the risk of treatment contrary to article 3 EHCR in Serbia, or indeed whether Serbia was inclined or prepared to take these particular individuals in.[53]

[44] Karageorgiou (n 20) 356.

[45] Cases T-192/16, T-193/16 and T-257/16 *NF, NG and NM v European Council* (GC, 28 February 2017); Joined Cases C-208/17 P to C-210/17 P *NF and Others v European Council* (CJEU, 12 September 2018).

[46] Sergio Carrera, Leonard den Hertog, and Marco Stefan, 'It wasn't me! The Luxembourg Court orders on the EU–Turkey refugee deal' (2017) CEPS Policy Insights No. 2017–15/April 2017.

[47] *Ilias and Ahmed v Hungary*, App No 47287/15 (ECtHR, 21 November 2019).

[48] 'Flagrant breach' of an ECHR right other than article 3 may prevent removal. See eg *Othman (Abu Qatada) v United Kingdom*, ECHR 2012-I 159.

[49] ECtHR, 'Articles 2, 3, 8 and 13: The Concept of a "Safe Third Country" in the Case-Law of the Court' (2018).

[50] *Khlaifia and Others v Italy*, App No 16483/12 (ECtHR, 15 December 2016) paras 185, 199–201, 211; *JR and Others v Greece*, App No 22696/16 (ECtHR, 25 January 2018) paras 138, 143, 147.

[51] *Ilias and Ahmed* (n 47) para 248; cf Joined Cases C-924/19 PPU and C-925/19 PPU, *FMS and Others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság* (CJEU, 14 May 2020).

[52] ibid paras 236–7.

[53] *Amuur v France*, ECHR 1996-III 850 para 48.

The European courts' STC jurisprudence indicates that breaches of article 3 ECHR and article 4 EU Charter of Fundamental Rights remain the main consideration when assessing the legality of a removal. The standard is set at *non-refoulement*—far lower than the protections in the Refugee Convention and IHRL. Compared to transfers within the EU, a lower standard focusing mainly on States' procedural obligations is applied to transfers outside the EU, raising further protection concerns. This analysis suggests that STC arrangements within the CEAS and beyond do not meet the standards set by the Refugee Convention and IHRL. In addition, the Dublin system's inbuilt inequality for States located in Europe's external borders, and readmission agreements that shift responsibility to non-EU countries, have not been challenged by reference to European and international solidarity. In this context, the 2016 proposed reform of the EU asylum procedures, which makes the application of STC rules mandatory,[54] should not come as a surprise. STC rules are becoming the *modus operandi* of EU policies on asylum.

4. Australian STC Law and Practice

STC practices in the EU influenced the development of Australian STC policy.[55] This section analyses the development of two areas of Australian STC law and practice.[56] First, the Migration Act 1958 (Cth) (Migration Act) stipulates that Australia does not owe protection to a person who has not taken all possible steps to avail themselves of a right to enter and reside in another country.[57] Secondly, many refugees have resisted transfer to, or sought transfer from, one of Australia's regional processing centres (RPCs) in Nauru and Papua New Guinea (PNG). Both STC practices have generated a significant body of case law that remains largely unexamined with respect to what constitutes effective protection.

a. The Right to Enter and Reside in a Third Country

This STC notion first arose in a 1997 Federal Court decision concerning a man who had been recognized as a refugee in France. The court held that the Refugee

[54] Proposal for a Regulation of the European Parliament and of the Council Establishing a Common Procedure for International Protection in the Union and Repealing Directive 2013/32/EU, COM/2016/0467 final—2016/0224.

[55] McAdam (n 2).

[56] The STC rules not discussed here are procedural bars preventing an application for a protection visa. The Migration Act 1958 (Cth), Division 3, Subdivision AI bars a person from applying if they have a connection to a prescribed STC (see McAdam (n 2) 30–4). Currently, there are no prescribed STCs. There is a procedural bar if a country is declared to have requisite protection standards: Migration Act s 91N(2). However, no such declaration has been made. A procedural bar also applies to dual nationals: Migration Act s 91N(1).

[57] Migration Act s 36(3).

Convention does not preclude a State from sending a refugee to a third country that provides effective protection.[58] The decision, which predated the STC legislation noted above, did not set the standard for effective protection at the legally appropriate standard (ie respecting the rights in the Refugee Convention), but rather at the lower threshold of *non-refoulement*.[59] Nevertheless, the court stated that the third country must 'effectively ensure' against *refoulement*.[60] Both a protected status and legal right to re-enter and reside were relevant to determining this standard.[61] In this limited way, consideration of the refugee protection in the third country beyond formal *non-refoulement* was relevant.

In subsequent cases, this threshold of effective protection was diluted,[62] drifting further from the Refugee Convention standards. Courts even accepted that effective protection was available in circumstances where *non-refoulement* could not be 'effectively ensured'. For example, asylum seekers were deemed to have effective protection even if they did not have confirmed refugee status[63] or a right of residence[64] in the third country. A third country that was not a party to the Refugee Convention could also be deemed to provide effective protection.[65]

In 2005, the High Court of Australia (HCA) overturned the STC rule in *NAGV and NAGW*, which concerned whether Jewish refugees have effective protection in Israel because of the right to return.[66] The HCA held that the Migration Act did not permit Australia to deny protection on the ground that a person could be sent to another country.[67] While the HCA did not explicitly define the scope of effective protection, the judgment is closer to the international standards espoused above. It stated that protection obligations go beyond *non-refoulement* and include, for example, access to courts and religious freedom.[68] However, before the HCA determined *NAGV and NAGW*, the Migration Act was amended to provide for denial of protection on STC grounds. The Act stipulates that if a person has a right to enter or reside in another country permanently or temporarily, they will be denied protection in Australia unless there is a risk of *refoulement* in the third country.[69] These amendments were introduced due to a perceived need to deter refugees from 'forum shopping'.[70] Given that there are few constitutional rights protections in Australia, the legislative amendment effectively overrode the HCA ruling.

[58] *Minister for Immigration and Multicultural Affairs (MIMA) v Thiyagarajah* (1997) 80 FCR 543, 562.
[59] ibid 562. [60] ibid. [61] ibid 565.
[62] Penelope Mathew, 'Safe for Whom? The Safe Third Country Concept Finds a Home in Australia' in Susan Kneebone (ed), *The Refugees Convention 50 Years On* (Ashgate 2003).
[63] *Rajendran v MIMA* (1998) 86 FCR 526.
[64] *Patto v MIMA* (2000) 106 FCR 119, para 36. [65] ibid para 37.
[66] *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs (MIMIA)* (2005) 222 CLR 161.
[67] ibid para 81. [68] ibid paras 31, 80. [69] Migration Act ss 36(3)–(5A).
[70] Border Protection Legislation Amendment Bill 1999 (Cth) Supplementary Explanatory Memorandum para 1.

Since then, there is a burgeoning body of jurisprudence interpreting the new statutory provision, which is in need of deeper scholarly analysis. Courts have included some safeguards. For example, the STC provisions will not apply if the person has a right to enter another country for a limited purpose as opposed to a genuine right of residence.[71] Also, they will only be triggered when a person can immediately exercise a right to enter without any preliminary processes.[72] Nevertheless, the threshold for effective protection is far below international standards. A person can be denied protection even though they will not be recognized as a refugee in the third country[73] and will not have any form of protection beyond protection against persecution.[74] This means that, rather than entitlement to all rights in the Refugee Convention and other fundamental human rights, protection is reduced to *non-refoulement*. Moreover, the protection against *refoulement* is, in many cases, illusory. A person can be denied protection even though there is no guarantee that they can access the STC once removed from Australia. This can be observed in a case involving an Indian man who established a well-founded fear of persecution, but was denied protection because he had not availed himself of his right to enter Nepal.[75] One issue was whether he would be able to enter Nepal without having to first go to India. The court confirmed that the STC provision 'looks to the past rather than the future' and operates differently from the internal relocation test.[76] The relevant question was whether the refugee took all possible steps to avail himself of his right to enter Nepal. Whether Nepal would grant him entry or whether he would have to first travel through India was irrelevant.[77] The Federal Court has refused to interpret 'all possible steps' in a more refugee-protective way, stating that it should 'not be read down in any way'.[78]

This STC jurisprudence creates a *refoulement* risk because, even when a person can travel directly from Australia to the third country, there is no guarantee of entry. Courts have interpreted the 'right to enter and reside' as not requiring a legally enforceable right. A person will be deemed to have such a right even if it is 'capable of withdrawal and not capable of any particular enforcement' and 'does not give rise to any particular duty upon the state in question'.[79] How this creates a *refoulement* risk is evident in a decision concerning a Latvian family denied protection because they had not taken all possible steps to enter and reside in all other 27 EU Member States.[80] The family pleaded

[71] *WAGH v MIMIA* [2003] FCAFC 194.

[72] *MZXLT v Minister for Immigration and Citizenship (MIC)* [2007] FMCA 799.

[73] *BCI16 v Minister for Immigration and Border Protection (MIBP)* [2018] FCA 851, para 37.

[74] ibid.

[75] *SZVGQ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (MICMSMA)* [2018] FCCA 597, para 25; *SZVGQ v MICMSMA* [2019] FCA 1985. The Treaty of Peace and Friendship between India and Nepal 1950, art 7 provides that both States grant 'to the nationals of one country in the territories of the other the same privileges in the matter of residence…'.

[76] *SZVGQ v MICMSMA* [2018] FCCA 597, para 25.

[77] ibid.

[78] *NBLC v MIMIA* (2005) 149 FCR 151, para 64.

[79] *V856/00A v MIMA* (2001) 114 FCR 408, para 31; *MIMAC v SZRHU* (2013) 215 FCR 35.

[80] *SZNBX v MIBP* [2018] FCA 1172, paras 6, 9. Section 36(3) was applied even though when the family left Latvia, Latvia was not in the EU. The time of the decision is the relevant time for determining whether a person has a right to enter and reside in another country: Department of Home Affairs, Refugee Law Guidelines (1 July 2017) para 4.3.

that they would be excluded from other EU countries on security and health grounds (the husband had a criminal conviction and the wife had mental health conditions). The court held that the family, who were not legally represented, could not substantiate this claim.[81] The family provided a European Parliament document providing statistics of EU countries' refusal to grant residence to EU citizens.[82] However, the court reasoned that it bore no relevance to the asylum seekers' individual circumstances.[83] This raises the question as to what evidence could have been supplied other than affidavit evidence from all 27 immigration authorities as to what decision would have been made.

This STC jurisprudence is also in tension with international cooperation. The main cases considering the original STC rule involved France and Israel as STCs, States that arguably have a similar protection capacity to Australia. However, the legislative STC provisions have been applied in more inequitable circumstances, without any judicial reflection on the capacity of the STC in question. For example, a Syrian man who came to Australia in 2012 was denied protection because he had an expired Lebanese permanent residence visa, and would be granted a six-month visa upon re-entry.[84] The assessment of Lebanon as an STC was limited to *refoulement*, and the court paid no regard to Lebanon's extraordinarily high *per capita* refugee population.[85] Similarly, a Burundian woman was denied protection because she had the right to enter and reside in any part of the East African Community (Uganda, Kenya, Tanzania, and Rwanda), all lower income States already hosting large numbers of refugees.[86]

b. Offshore Processing

Australia has made RPC agreements with Malaysia, PNG, and Nauru. Numerous refugees have instituted court proceedings resisting transfer to an RPC or requesting return to Australia. The decisions do not use the term 'safe third country' but nevertheless delimit the conditions and circumstances that permit or necessitate a transfer, so are in substance an STC practice. The scope and content of protection required to permit transfer has decreased from a broad set of rights to a much narrower focus on emergency medical care.[87]

In a 2011 decision regarding Australia's agreement with Malaysia, the HCA set a high watermark for effective protection.[88] At the time, the Migration Act provided that refugees could be sent to a third country if the Minister made a declaration that the

[81] *SZNBX* (n 80) para 39. [82] ibid. [83] ibid. [84] *SZVVB v MIBP* [2017] FCA 207.

[85] At the material times, see UNHCR, 'Global Trends 2014' (18 June 2015) 3 <https://www.unhcr.org/uk/statistics/unhcrstats/576408cd7/unhcr-global-trends-2015.html> accessed 23 May 2020.

[86] *SZRTC v MIBP* [2014] FCAFC 43.

[87] Kate Ogg, 'Destination Australia: Journeys of the Moribund' in Veronica Fynn Bruey and Steven Bender (eds), *Deadly Voyages: Migrant Journeys Across the Globe* (Lexington 2019) 88.

[88] Michelle Foster, 'The Implications of the Failed "Malaysian Solution": The Australian High Court and Refugee Responsibility Sharing at International Law' (2012) 13 Melbourne Journal of International Law 395, 418; Kate Ogg, 'A Sometimes Dangerous Convergence: Refugee Law, Human Rights Law and the Meaning of "Effective Protection"' (2013) 12 Macquarie Law Journal 109, 110.

country provides protection.[89] The lead majority held that the word 'protection' referred to 'protections of all of the kinds, which parties to the [Refugee Convention] are bound to provide', including *non-refoulement* but also rights such as freedom of religion, access to courts, work, and education.[90] Justice Kiefel added that there must also be reference to IHRL more broadly.[91] Thus, the HCA's judgment is in line with the international standards for effective protection.

The Migration Act was subsequently amended to provide that the only condition for the Minister to designate a third country as an RPC is that it is in the national interest.[92] Accordingly, given Australia's constitutional system, courts can no longer consider questions of protection.[93] The later case law is now divorced from international standards on effective protection. Nauru and PNG have been designated as RPCs. All cases before Australian courts in which refugees have relied on international and public law arguments to resist transfer to, or request transfer from, Nauru or PNG have been unsuccessful.[94] The only cases that have secured transfers, albeit temporary ones, are grounded in the private law wrong of negligence and concern access to medical care.[95] The turn to private law means that case law now focuses on protecting refugees' physical and mental health, but no longer considers their human and refugee rights as such. If they are admitted to Australia, it is as sick people in need of medical care rather than as refugees entitled to effective protection.[96] The use of private law to challenge offshore processing needs further research.[97]

5. STC Law and Practice in the Americas

In the United States (US), the Immigration and Nationality 1965 Act (INA) bars a person from applying for protection if they fall under the scope of an STC Agreement (STCA).[98] The INA provides that refugees may be sent to countries where they are

[89] Migration Act s 198A(3)(a) (now repealed).

[90] *Plaintiff M70/2011 v MIC and Plaintiff M106/2011 v MIC* (2011) 244 CLR 144, para 119.

[91] ibid para 240.

[92] Explanatory Memorandum, Migration Legislation Amendment (Regional Processing and Other Measures) Bill 2012 (Cth).

[93] *Plaintiff S156/2013 v MIBP* (2014) 254 CLR 28, para 40.

[94] ibid; *Plaintiff M68/2015 v MIBP* (2016) 257 CLR 42; *Plaintiff S195/2016 v MIBP* (2017) 346 ALR 181. See Ogg (n 87).

[95] *Plaintiff S99/2016 v MIBP* [2016] FCA 483; *DCQ18 v Minister for Home Affairs (MHA)* [2018] FCA 918. See Kate Ogg, 'Sexing the Leviathan: When Feminisms and Crimmigration Meet' in Peter Billings (ed), *Crimmigration in Australia* (Springer 2019).

[96] Ogg (n 87) 97. In February 2019, legislation was passed enabling people in RPCs to be transferred to Australia for medical care, but it was repealed in December 2019.

[97] Gabrielle Holly, 'Challenges to Australia's Offshore Detention Regime and the Limits of Strategic Tort Litigation' (2020) 21 *German Law Journal* 549.

[98] Immigration and Nationality Act 1965, Title 8, chapter 12, subchapter II, Part I, §1158 introduced by the Illegal Immigration Reform and Immigration Responsibility Act 1996.

not persecuted for a Convention reason and have full access to fair asylum procedures,[99] a standard that excludes most of the protections in the Refugee Convention. Below, we analyse STCAs between the US and Canada and Central American countries, and Peru's recent STC practice. We highlight how evolving STC law and practice in the region weakens protection standards and is antithetical to international solidarity.

a. STCA between the US and Canada

Modelled on the Dublin II Regulation, the US signed its first STCA with Canada in 2004.[100] Under this STCA, asylum seekers were required to make their protection claims in the first of the two countries entered, unless they qualified for an exception.[101] If asylum seekers entered Canada via an official land border crossing from the US, they were removed back to the US. In 2007, the Canadian Federal Court declared the STCA unconstitutional as it violated sections 15 (equality)[102] and 7 (life, liberty, and security of person)[103] of the Canadian Charter of Rights and Freedoms (Charter) and Canada's *non-refoulement* obligations.[104] It found that the US was unsafe for refugees due to the imposition of statutory bars.[105] Further, the exclusion of people from refugee status for reasons impermissible by the Refugee Convention,[106] and its equivocal approach to gender claims were noted.[107] Nevertheless, the court set the standard for effective protection at the very low threshold of *non-refoulement*,[108] despite expert evidence urging that other rights should also be considered.[109]

In 2008, the Federal Court of Appeal reversed this decision.[110] The appeal removed protections for asylum seekers in the US subject to the STCA by declaring that the Charter does not operate extraterritorially,[111] and that evidence regarding US breaches of international law was irrelevant to the STCA's validity.[112] While the first instance

[99] ibid.

[100] Agreement between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries (29 December 2004).

[101] Exceptions include family relationships, unaccompanied minors, and public interest considerations.

[102] *Canadian Council for Refugees, Canadian Council of Churches, Amnesty International and John Doe v Her Majesty the Queen*, 2007 FC 1262, para 333.

[103] ibid para 254. [104] ibid para 154. [105] ibid. [106] ibid para 191.

[107] ibid para 206. [108] ibid paras 118, 125.

[109] See eg Affidavit of Professor James C Hathaway, referred to in Michelle Foster, 'Responsibility Sharing or Shifting: "Safe" Third Countries and International Law' (2008) 25(2) Refuge 64, 67.

[110] *The Queen v Canadian Council for Refugees, Canadian Council of Churches, Amnesty International and John Doe*, 2008 FCA 229.

[111] ibid para 102.

[112] The Federal Court of Appeal held that that the Federal Court erred in ruling that US compliance with the Refugee Convention and CAT was a condition precedent to the exercise of delegated authority, the only requirement being that the executive acted in good faith in designating the US as a country that complied with *non-refoulement* obligations: ibid para 80.

decision set the bar for effective protection at the low threshold of *non-refoulement*, the appeal decision removed even this minimal protection.

In 2011, the Inter-American Commission on Human Rights found Canada to be in breach of both the right to asylum and to a fair trial in returning asylum seekers to the US under the STCA.[113] This decision was significant because it rejected the lawfulness of an inter-State system based on the automatic application of the STC concept,[114] reflecting the Inter-American system's more human rights-driven approach to migrants and refugees (in comparison to the ECtHR).[115] However, the decision is not binding and the STCA continues to operate.

A new legal challenge to the STCA was launched in the Canadian Federal Court in 2017. It was heard in the context of Canada's intentions to expand the STCA to the entire border.[116] The asylum seeker applicants had each been physically present in Canada, which meant that the question of whether the Charter applies extraterritorially was not relevant. The court held that the STCA is in violation of article 7 of the Charter on the grounds that asylum seekers who are returned to the US pursuant to the STCA are arbitrarily detained.[117] The Court stressed that the risks of *refoulement* and imprisonment under cruel conditions are grossly disproportionate to the administrative benefits of such responsibility sharing agreements. Broader arguments, including that the STCA is inconsistent with Canada's obligations under the Refugee Convention and that the US is in violation of *non-refoulement*, were not successful.[118] The court suspended the declaration of STCA's invalidity to allow time for the Parliament of Canada to respond. The Canadian government has appealed the decision, but the appeal had not been heard at the time of writing.

b. Asylum Cooperation Agreements between the US and Central American Countries

In 2019, the Trump administration introduced sweeping changes to US asylum practice, ostensibly aiming to reduce irregular immigration at the southern US border with Mexico.[119]

[113] *John Doe et al v Canada*, Inter-American Commission on Human Rights Report No 78/11, Case No 12.586 (21 July 2011).

[114] María-Teresa Gil-Bazo, 'The Safe Third Country Concept in International Agreements on Refugee Protection Assessing State Practice' (2015) 33 Netherlands Quarterly of Human Rights 42.

[115] Marie-Bénédicte Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (OUP 2015).

[116] Anna Mehler Paperny, 'Canada Defends Safe Third Country Agreement as Court Challenge Wraps Up' *Global News* (8 November 2019) <https://globalnews.ca/news/6148781/safe-third-country-agreement-court/> accessed 23 May 2020.

[117] *Canadian Council for Refugees et al v The Minister of Immigration, Refugees and Citizenship and the Minister of Public Safety and Emergency Preparedness*, 2020 FC 770, paras 136, 138, 162.

[118] ibid paras 80, 113.

[119] US Department of Homeland Security, 'Fact Sheet: DHS Agreements with Guatemala, Honduras, and El Salvador' <https://www.dhs.gov/sites/default/files/publications/19_1028_opa_factsheet-northern-central-america-agreements_v2.pdf> accessed 23 May 2020.

The Transit Country Asylum Ban purports to preclude asylum seekers from applying for protection in the US if they transited through a State which was either a party to the Refugee Convention or the Convention Against Torture (CAT).[120] The US also signed Asylum Cooperation Agreements (ACAs)—*de facto* STCAs—with Guatemala, El Salvador, and Honduras.[121] These agreements require asylum seekers to make their claims in the first of the three Central American countries they enter. Only if denied protection there, may they apply in the US. Otherwise, their asylum claims are deemed inadmissible in the US, and the US asserts it may deport them to one of these Central American States. These STC laws and practices have led to a substantial increase in rejections of asylum claims and deportations.[122] Furthermore, the US signed the Migrant Protection Protocol (MPP) with Mexico, whereby Mexico pledged to accept and retain Spanish-speaking (mainly Central American) migrants while they await their US asylum hearings.[123]

Regarding the threshold of effective protection in the ACAs with Guatemala, El Salvador, and Honduras, it is questionable whether these States meet even these low standards, given the prevalence of violent crime and socio-economic deprivation.[124] None of the three Central American States has a well-developed asylum system.[125] The US screenings purport to determine whether an asylum seeker is at risk of persecution, but they are cursory and lack procedural protections.[126] There are no protection standards in the agreement with Mexico, and asylum seekers deported under the MPP

[120] Department of Justice and Department of Homeland Security, 'Asylum Eligibility and Procedural Modifications' (16 July 2019).

[121] Memorandum of Cooperation between the Department of Homeland Security of the United States of America and the Ministry of Government of the Republic of Guatemala on Security Activities that Make It Possible to Address Irregular Migration (31 May 2019); Agreement between the Government of the United States and the Government of the Republic of Honduras for Cooperation in the Examination of Protection Claims (25 September 2019); Agreement between the Government of the United States and the Government of the Republic of El Salvador for Cooperation in the Examination of Protection Claims (20 September 2019).

[122] Caitlin Dickerson, 'Confusion on the Border as Appeals Court Rules Against Trump's "Remain in Mexico" Policy', *The New York Times* (28 February 2020) <https://www.nytimes.com/2020/02/28/us/migrants-court-remain-in-mexico-mpp-injunction.html?auth=login-email&login=email&referringSource=articleShare> accessed 23 May 2020.

[123] Muzaffar Chishti and Jessica Bolter, 'Interlocking Set of Trump Administration Policies at the US–Mexico Border Bars Virtually All from Asylum', Migration Policy Institute (27 February 2020) <https://www.migrationpolicy.org/article/interlocking-set-policies-us-mexico-border-bars-virtually-all-asylum> accessed 23 May 2020.

[124] UNHCR, 'Statement on New US Asylum Policy' (19 November 2019) <https://www.unhcr.org/uk/news/press/2019/11/5dd426824/statement-on-new-us-asylum-policy.html> accessed 11 March 2020; Adriana Beltrán, 'Guatemala Is No Safe Third Country: Why the Asylum Deal Is a Mistake', *Foreign Affairs* (25 September 2019) <https://www.foreignaffairs.com/articles/guatemala/2019-09-25/guatemala-no-safe-third-country> accessed 23 May 2020.

[125] ibid.

[126] Refugees International, 'Refugees International Opposes Asylum Cooperative Agreements with Guatemala, El Salvador and Honduras' (23 December 2019) <https://www.refugeesinternational.org/reports/2019/12/23/refugees-international-opposes-asylum-cooperative-agreements-with-guatemala-el-salvador-and-honduras> accessed 23 May 2020.

have faced human rights abuses and some have lost their lives.[127] The agreements also disregard the principle of international solidarity. They allocate responsibility to Central American countries under asymmetrical power contexts; the US exerted economic pressures to secure these agreements,[128] while the agreements overburden third countries with the task of processing an increased number of asylum applications, which exceeds their resources and capacities.[129]

These practices are being challenged in US courts. The Transit Country Asylum Ban only entered into full effect after the US Supreme Court (USSC) stayed a District Court ruling that had suspended it temporarily during litigation.[130] In January 2020, the ACAs were legally challenged.[131] In February 2020, the Ninth Circuit upheld a preliminary injunction against the implementation of the MPP, indicating it may breach *non-refoulement*,[132] but put its ruling on hold after a request by the Trump administration. In March 2020, the USSC stayed the preliminary injunction and gave permission for the MPP to be implemented while the US government appeals.[133] The legal challenges are ongoing but these preliminary decisions indicate that *non-refoulement* may be the main legal consideration.

c. South America: STC Practice in Peru

In South America, a region that UNHCR officials have hailed as the avant-garde of international refugee protection,[134] non-government organizations and UNHCR representatives have reported *de facto* STC practices, which often lack any legal basis. Since 2015, the Venezuelan displacement crisis has put the refugee protection system across the region to test.[135]

Based on the Cartagena refugee definition, South American countries are obliged to recognize most Venezuelans who flee as refugees.[136] However, many States have

[127] Chishti and Bolter (n 123).

[128] Associated Press, 'US to Sign Agreement to Send Asylum Seekers to El Salvador', *The Guardian* (20 September 2019) <https://www.theguardian.com/us-news/2019/sep/20/us-el-salvador-asylum-seekers-deal-immigration> accessed 23 May 2020. The Trump administration threatened to impose a five per cent tariff, which could be gradually increased to 25 per cent, on all Mexican goods if Mexico did not reduce the number of migrants at the US southern border: Amanda Mars, 'Trump anuncia un arancel general del 5% a México como castigo por la inmigración irregular', *El País* (31 May 2019) <https://elpais.com/internacional/2019/05/31/estados_unidos/1559256743_016777.html> accessed 23 May 2020.

[129] Beltrán (n 124).

[130] *Barr v East Bay Sanctuary Covenant*, No 19A230 588 US (US Supreme Court, 11 September 2019).

[131] *UT et al v Barr et al* (US District Court, District of Columbia, 15 January 2020).

[132] *Innovation Law Lab v Wolf*, 951 F 3d 1073 (9th Circuit, 28 February 2020).

[133] *Wolf, Sec. of Homeland, et al v Innovation Law Lab et al* (US Supreme Court, 11 March 2020).

[134] Luisa Feline Freier, 'A Liberal Paradigm Shift? A Critical Appraisal of Recent Trends in Latin American Asylum Legislation' in Jean-Pierre Gauci, Mariagiulia Giuffré, and Evangelia Tsourdi (eds), *Exploring the Boundaries of Refugee Law: Current Protection Challenges* (Brill 2015).

[135] Luisa Feline Freier and Jean-Pierre Gauci, 'Refugee Rights Across Regions: a Comparative Overview of Legislative Good Practices in Latin America and the EU' (2020) Refugee Survey Quarterly (39) 322.

[136] Luisa Feline Freier, Isabel Berganza, and Cécile Blouin, 'The Cartagena Refugee Definition and Venezuelan Displacement in Latin America' (2020) International Migration.

implemented increasing restrictions to legal access, residence, and the asylum procedure.[137] For example, Peru introduced screening interviews at the border in mid-2019. This violates the right of asylum seekers to due process.[138] Furthermore, asylum applicants have been rejected if they could not sustain why they had not applied for asylum in Ecuador, with reference to article 6 of the regulating decree of Peru's 2002 Refugee Law.[139] Although UNHCR officials have reported informal STC pratices in other countries in the region, Peru represents the first case of a South American country systematically implementing a unilateral STC measure to limit the inflow of asylum seekers. It has done so without any standards with respect to what constitutes effective protection.

6. Conclusion

The changes to STC law and practice examined in this chapter reveal a concerning trend. Standards for effective protection are moving further away from the Refugee Convention's rights regime and IHRL, while proportionate responsibility for refugee hosting is disregarded. A central question for refugee law scholars is how to realign understandings of effective protection with the Refugee Convention rights regime, supplemented by IHRL. In pursuing this inquiry, one area of focus should be the efficacy of strategic litigation. Much of the European, Australian, and North American litigation examined here has been undertaken by public interest organizations and is the product of carefully planned strategies, often involving media campaigns and broader law reform agendas. Yet, there is little investigation of the outcomes of these interventions, especially with respect to the evolution of STC rules and the notion of effective protection. There also needs to be greater emphasis on comparative scholarship and transjudicial communication. The extent to which domestic and regional STC jurisprudence is, and should be, informing other jurisdictions, especially in the context of recent landmark decisions, is an important question for future research. Finally, there is a need for further investigation of how international solidarity can be harnessed to inform and influence policymaking, legislative change, and jurisprudence. The disconnect between international solidarity as a principle of international law, and evolving STC policies, is an urgent endeavour for refugee law scholarship.

[137] Luisa Feline Freier and Soledad Castillo, 'El Presidencialismo y la Política Migratoria en América Latina: un Análisis de las Reacciones Políticas frente al desplazamiento de Ciudadanos Venezolanos' (2020) Internacia.

[138] Amnesty International, 'Buscando refugio: Perú da la espalda a quienes huyen de Venezuela' (February 2020).

[139] Reglamento de la Ley del Refugiado, Ley No 27,891 (2002); Luisa Feline Freier and Marta Luzes, 'How Humanitarian Are Humanitarian Visas? An Analysis of Theory and Practice in South America' in Liliana Jubilut, Gabriela Mezzanotti, and Marcia Vera Espinoza (eds), *Latin America and Refugee Protection: Regimes, Logics and Challenge* (Berghahn 2021).

CHAPTER 29

SMUGGLING OF MIGRANTS AND REFUGEES

ANDREAS SCHLOENHARDT

1. Introduction

In large parts of the world, avenues for legal migration and asylum seeking are not available. If they do exist, they are often slow, inefficient, or expensive. As a result, many migrants use irregular avenues. Irregular migration comprises mixed flows of persons who are forced to emigrate as well as persons who willingly cross international borders. Many States respond to irregular migration by tightening border controls, building fences, and turning away boats carrying people seeking asylum. Such measures increase human suffering, and push migrants further into irregularity.[1] As early as 2000, UNHCR noted that, 'given an increasing number of obstacles to access safety, asylum seekers are often compelled to resort to smugglers'.[2]

Smuggling of migrants broadly refers to the facilitation of irregular migration, though international law uses the term more narrowly for circumstances in which the illegal entry of another person is facilitated for the purpose of obtaining a financial or other

[1] Susan Kneebone, 'The Refugee–Trafficking Nexus: Making (Good) the Connections' (2010) 29(1) RSQ 137, 157; Mathias Czaika and Mogens Hobolth, *Deflection into Irregularity? The (Un)intended Effects of Restrictive Asylum and Visa Policies* (International Migration Institute Working Paper 84, University of Oxford, February 2014) 17, 19. See also Claire Brolan, 'An Analysis of the Human Smuggling Trade and the Protocol Against the Smuggling of Migrants by Land, Air and Sea (2000) from a Refugee Protection Perspective' (2003) 14 IJRL 562, 573–6, 580.

[2] UNHCR, 'Summary Position on the Protocol Against the Smuggling of Migrants by Land, Sea and Air and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the UN' (11 December 2000).

material benefit.[3] The Refugee Convention and its Protocol do not expressly deal with the facilitation of cross-border movements and make no mention of smuggling of migrants, a term that was not in use when these instruments were conceived. The principal binding global instrument on this topic is the United Nations Protocol against the Smuggling of Migrants by Land, Sea and Air, which is the main focus of this chapter, especially insofar as applies to the situation of refugees.

On the surface, the Smuggling of Migrants Protocol coexists alongside international refugee law in situations where smuggled migrants are asylum seekers, as will often be the case. Unlike the Refugee Convention, the Smuggling of Migrants Protocol is a criminal justice instrument, which is emphasized by its relationship to the UN Convention against Transnational Organized Crime (UNTOC).[4] The Smuggling of Migrants Protocol expressly recognizes the protection afforded to refugees under international law and does not alter this regime. Further, it contains clear statements confirming that the Protocol seeks to criminalize migrant smugglers who prey on, and seek to profit from, irregular migrants but does not intend to criminalize those who are the object of migrant smuggling, including asylum seekers. The interpretation, operation, and implementation of the Smuggling of Migrants Protocol by States parties, however, has been less clear on this point, and all too frequently the focus of law enforcement, criminal justice, and other repressive measures has been on smuggled migrants and not on their smugglers.

2. Concepts and Terminology

Article 3(a) of the Smuggling of Migrants Protocol defines smuggling of migrants as 'the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State party of which the person is not a national or a permanent resident'. Illegal entry is defined in article 3(b) to mean 'crossing borders without complying with the necessary requirements for legal entry into the receiving State'. The reference to 'financial or other material benefit' adds a purpose element to the definition.

Somewhat related to—and often confused with—the smuggling of migrants is trafficking in persons, which involves the transportation or acquisition of people by improper means, such as intimidation or deception, with the aim of exploiting them.[5] Not all instances of trafficking involve cross-border movements and, if they do, these may not be irregular. Because of their volatile situation and their irregular status, many refugees are particularly vulnerable to exploitation and trafficking.

[3] Protocol against the Smuggling of Migrants by Land, Sea, and Air (adopted 15 November 2000, entered into force 28 January 2004) 2247 UNTS 507 (Smuggling of Migrants Protocol) art 3(a).

[4] United Nations Convention against Transnational Organized Crime (adopted 12 December 2000, entered into force 29 September 2003) 2225 UNTS 209.

[5] Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (adopted 15 November 2000, entered into force 25 December 2003) 2237 UNTS 319 (Trafficking in Persons Protocol) art 3(a); see Chapter 30 in this volume.

Smuggling of migrants and trafficking in persons are governed by two separate legal instruments that contain different obligations concerning criminalization and, importantly, the protection of smuggled migrants and victims of trafficking. Although definitions of smuggling of migrants and trafficking in persons have existed in international law for 20 years, confusion persists about the elements that define and distinguish them.

In international law, the main point of difference lies in the legislative purpose of the offences. The trafficking offence seeks to protect the rights, integrity, and freedom of trafficked persons (who are referred to as victims) and to punish people who force, threaten, deceive, or otherwise abuse them for exploitative purposes. Smuggling of migrants, on the other hand, is an offence against the State that seeks to protect national sovereignty and the ability of States to control borders, manage the flow of people across them, and prevent misuse of immigration procedures.[6] The protection of smuggled migrants is only a secondary goal of the Smuggling of Migrants Protocol.

Another point of difference can be found in the smuggler's/trafficker's motivation. The United Nations Office on Drugs and Crime (UNODC), the 'guardian' of UNTOC and its protocols, explains that 'the primary source of profit and thus also the primary purpose of trafficking in persons is exploitation'.[7] Smuggling of migrants, by contrast, typically involves 'no intention to exploit the smuggled migrant after having enabled him or her to irregularly enter or stay in a country'.[8] Rather, smugglers seek to make profit by demanding financial or other material payment from the smuggled migrants for facilitating their illegal entry.

The issue of consent provides a further point of difference. The Trafficking in Persons Protocol is based on the understanding that '[v]ictims of trafficking have either never consented—for instance if they have been abducted or sold—or, if they have given an initial consent, their consent has become void through the means the traffickers have used to gain control over the victim, such as deception or violence'.[9] While the Smuggling of Migrants Protocol does not directly address questions about consent, it takes the view that smuggling involves a consensual agreement whereby the smuggler facilitates the illegal entry of the migrant and receives some benefit in return.[10] For this reason, the Smuggling of Migrants Protocol does not refer to smuggled migrants as victims.[11]

The distinction between smuggling of migrants and trafficking in persons is difficult to maintain in practice, and situations of smuggling can morph into trafficking. For example, a person may agree to be smuggled, unaware that, on arrival, he or she will be forced to work in poor or restrictive conditions for the smuggler in order to pay off a debt for the service.[12] This situation would be considered an instance of trafficking

[6] Mary A Young, 'The Smuggling and Trafficking of Refugees and Asylum Seekers: The International Community Neglecting the Duty to Protect the Persecuted in the Pursuit of Combating Transnational Organized Crime' (2003) 27 Suffolk Transnational Law Review 101, 108.

[7] UNODC, 'A Short Introduction to Smuggling of Migrants: Issue Paper' (2010) 10.

[8] ibid.

[9] ibid.

[10] Tom Obokata, 'Smuggling of Human Beings from a Human Rights Perspective: Obligations of Non-State and State Actors under International Human Rights Law' (2015) 17 IJRL 394, 396.

[11] Young (n 6) 123.

[12] See also Obokata (n 10) 401.

because of the deceptive means and the exploitation. Smuggled migrants might retract their consent during a smuggling venture but may be forced by the smugglers to continue the journey.[13] Retracting consent alone does not automatically transform smuggling into trafficking; other elements of trafficking in persons, such as the purpose of exploitation, would still need to be satisfied.

The Working Group on the Smuggling of Migrants, established by the Conference of the Parties to the UNTOC, has acknowledged that '[t]here is a need for more clarity regarding the differences between the crimes of trafficking in persons and smuggling of migrants'.[14] It is imperative to distinguish clearly between the two phenomena because separate legal instruments with vastly different requirements and consequences govern international and national responses to smuggling and trafficking. The distinction is particularly consequential for the persons concerned as it affects the protection and assistance afforded to them. Several authors have criticized the existing definitions for creating an artificial dichotomy between the experiences of victims of trafficking and smuggled migrants.[15] This problem is all the more complex if a person is also seeking asylum. It 'can make a difference between arrest and protection, or between deportation and asylum, or between return to an uncertain fate and assistance for a decent life'.[16] For example, persons crossing a border with the aid of smugglers may be detained and swiftly removed from the receiving State without any assessment of the circumstances of their arrival, which may involve exploitation and other elements of trafficking. All too frequently, border guards, law enforcement officers, and immigration officials focus only on the irregular status of the person and fail to recognize that they may be victims of trafficking or refugees fleeing persecution.

3. The Smuggling of Migrants Protocol

a. Outline and Purpose

On the surface, it appears that the Smuggling of Migrants Protocol pursues three equally important goals: to stop the smuggling of migrants, foster international cooperation, and protect the rights of smuggled migrants.[17] A closer look, however, reveals that the

[13] UNODC (n 7) 10; UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (2004) 340–1.

[14] Conference of Parties to the United Nations Convention against Transnational Organized Crime, Working Group on the Smuggling of Migrants, 'Challenges and Good Practices in the Criminalization, Investigation and Prosecution of the Smuggling of Migrants', UN doc CTOC/COP/WG.7/2012/2 (21 March 2012) para 6.

[15] Obokata (n 10) 397; John Fitzpatrick, 'Trafficking as a Human Rights Violation: The Complex Intersection of Legal Frameworks for Conceptualizing and Combating Trafficking' (2003) 24 Michigan Journal of International Law 1143, 1150; John Salt, 'Trafficking and Human Smuggling: A European Perspective' (2000) 1 International Migration 3133.

[16] Marika McAdam, 'The Antics of Semantics in International Law' (2018) 11 Anti-Trafficking Review 125, 125.

[17] Smuggling of Migrants Protocol (n 3) art 2.

criminal justice focus of the Smuggling of Migrants Protocol trumps human rights considerations.

Early drafts of the Smuggling of Migrants Protocol were limited to criminalization and international cooperation and made no reference to the protection of smuggled migrants.[18] During its development, several delegations suggested adding the words 'as well as to protect the victims of such smuggling, including their human rights' to the stated purposes or, alternatively, in a separate article,[19] but the draft text remained unchanged at that time.[20] An intervention by several UN agencies eventually led to a formal, albeit modest, textual recognition of the rights of smuggled migrants. In early 2000, the Office of the United Nations High Commissioner for Human Rights (OHCHR), along with UNHCR, the United Nations Children's Fund (UNICEF), and the International Organization for Migration (IOM) submitted a note stressing the

> clear need to ensure that the individuals falling victim to such practices are protected. The vulnerability of migrants, in particular irregular migrants, as a result of their precarious situation in society often leads to violations of their most basic human rights.... It is imperative, therefore, that the Protocol should preserve and seek to uphold the fundamental human rights to which all persons, including smuggled migrants, are entitled.[21]

With the support of most delegations, the purpose 'to promote international cooperation in the interest of the protection of such trafficking and respect for their human rights' was included in a revised draft.[22] In October 2000, the words 'victims' and 'trafficking' were removed (and incorporated in the corresponding text of the Trafficking in Persons Protocol) and substituted with the final text of article 2, which refers to 'protecting the rights of smuggled migrants'.[23]

b. Saving Clause

i. *Reference to International Refugee Law*

The only express reference to refugees in the Smuggling of Migrants Protocol can be found in article 19(1), which states:

[18] UNODC, *Travaux préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (2006) 459.

[19] ibid.

[20] David McClean, *Transnational Organized Crime: A Commentary on the UN Convention and its Protocols* (OUP 2007) 379.

[21] Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, 'Note by the Office of the United Nations High Commissioner for Human Rights, the Office of the United Nations High Commissioner for Refugees, the United Nations Children's Fund and the International Organization for Migration on the Draft Protocols concerning Migrant Smuggling and Trafficking in Persons', UN doc A/AC.254/27 (8 February 2000) para 15.

[22] UNODC (n 18) 461.

[23] ibid. See also Anne Gallagher and Fiona David, *The International Law of Migrant Smuggling* (CUP 2014) 47–8.

> Nothing in this Protocol shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.

Article 14(1) of the Trafficking in Persons Protocol contains an identical provision. This clause was adapted from the original draft which only referred to the Refugee Convention and Protocol. In their note, OHCHR, UNHCR, UNICEF, and IOM stressed the importance of 'the inclusion of a specific reference to international human rights law' and

> recommended that a saving clause such as that contained in the Trafficking Protocol be inserted, with reference being made to the rights, obligations and responsibilities of States and individuals under international law, including applicable international humanitarian law and international human rights law and, in particular, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees.[24]

The saving clause serves as a reminder that, although the two protocols are criminal justice instruments, States are nevertheless under an obligation to ensure that measures taken do not undermine or otherwise negatively affect human rights.[25] The basic principle established by this clause is that any rights, obligations, or responsibilities arising from other international instruments are maintained and not compromised by the Smuggling of Migrants Protocol.[26] While the saving clause makes explicit mention of the Refugee Convention, the Interpretative Notes stress that the two protocols do 'not cover the status of refugees'.[27] In cases where a smuggled migrant is also a refugee, the Refugee Convention applies in addition to the Smuggling of Migrants Protocol.[28] This also means that a migrant smuggler who is a refugee is afforded protection under the Refugee Convention even though he or she may be prosecuted for smuggling.[29]

The note by the UN agencies also led to the inclusion of the express reference to the principle of *non-refoulement*, thus acknowledging 'that increasing numbers of asylum

[24] Ad Hoc Committee (n 21) para 17.

[25] OHCHR, 'Human Rights and Human Trafficking: Fact Sheet No 36' (2014) 49; Kneebone (n 1) 142. On the human rights of smuggled migrants generally, see Gallagher and David (n 23) 147–51.

[26] Conference of the Parties to the United Nations Convention against Transnational Organized Crime, 'Implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime: Information received from States for the Second Reporting Cycle, Analytical Report of the Secretariat', UN doc CTOC/COP/2006/6 (16 August 2006) para 38; UNODC (n 18) 555. For a summary of obligations to protect smuggled migrants under other international instruments, see Obokata (n 10) 407–9.

[27] UNODC (n 18) 555.

[28] Conference of the Parties to the United Nations Convention against Transnational Organized Crime (n 26) para 38.

[29] Gallagher and David (n 23) 167.

seekers, including those with genuine claims to refugee status, are being transported by means covered in the [Smuggling of Migrants Protocol]'.[30] The fact that some asylum seekers and refugees employ smugglers does not undermine their right not to be subjected to *refoulement*, which applies irrespective of whether a person enters a State lawfully or unlawfully and with or without the aid of smugglers.[31]

The note further suggested that, in order to make such a provision effective, a clause should be added requiring States parties to ensure that smuggled migrants were given full opportunity, including through the provision of adequate information, to make a claim for asylum or to present any other justification for remaining in the country, and that such claims be considered on a case-by-case basis.[32] However, this suggestion was not adopted by the drafters.

ii. *Non-discrimination Clause*

Article 19(2) of the Smuggling of Migrants Protocol states that the measures set forth by the Protocol shall be interpreted and applied in a way that is not discriminatory to persons on the grounds that they have been smuggled, and shall be consistent with internationally recognized non-discrimination principles. The statement acknowledges that measures taken by States to prevent and suppress smuggling can perpetuate discrimination or violate the prohibition against discrimination, which is particularly acute in cases involving persons who are not citizens of the host country, such as refugees. International law is clear that smuggled migrants cannot be discriminated against simply because they are non-nationals.[33]

The 'internationally recognized principles of non-discrimination' referred to in article 19(2) are not further defined in the Smuggling of Migrants Protocol and the phrase does not refer to a specific set of instruments or documents. Article 2 of the UDHR provides one of the earliest non-discrimination statements by declaring that all rights and freedoms are afforded 'without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'. Subsequent international agreements, such as article 26 of the ICCPR, further elaborate on this statement by recognizing additional protected classes or persons.[34]

c. Criminalization and Offences

The central feature of the Smuggling of Migrants Protocol is the obligation in article 6(1)(a) to criminalize the smuggling of migrants. Article 6(1)(b) provides that (i) 'producing a fraudulent travel or identity document' and (ii) 'procuring, providing or possessing

30 Ad Hoc Committee (n 21) para 18.
31 Young (n 6) 119; Brolan (n 1) 592; Gallagher and David (n 23) 165.
32 Ad Hoc Committee (n 21) para 18.
33 OHCHR (n 25) 6.
34 See McClean (n 20) 369.

such a document' must be criminalized. Under article 6(1)(c), States parties must further criminalize enabling the illegal stay of migrants, such as

> cases where the smuggling scheme itself consisted of procuring the entry of migrants using legal means, such as the issuance of visitors' permits or visas, but then resorting to illegal means to enable them to remain for reasons other than those used for entry or beyond the length of time covered by their permits or authorisations to enter.[35]

Article 6(3) creates an obligation to legislate aggravating circumstances for situations 'that endanger, or are likely to endanger, the lives or safety of the migrants concerned' or in which smugglers maltreat or exploit migrants. This provision seeks to protect the physical integrity and the lives of smuggled migrants by calling on States parties to provide higher penalties for instances that involve particularly dangerous methods of smuggling or circumstances that put the health of smuggled migrants at risk or their lives in jeopardy.

d. Carrier Liability

Under article 11(2), States parties must adopt measures to prevent the use of commercial carriers, such as airlines, bus companies, and shipping companies, to smuggle migrants. This includes a requirement that carriers check the travel documents of passengers (article 11(3)) and provision for appropriate sanctions if that is not done (article 11(4)). These measures can have far-reaching implications for refugees and asylum seekers. An Interpretative Note to article 11(2) adds that

> this paragraph requires States parties to impose an obligation on commercial carriers only to ascertain whether or not passengers have the necessary documents in their possession and not to make any judgment or assessment of the validity or authenticity of the documents. It should further be noted that this paragraph does not unduly limit the discretion of States parties not to hold carriers liable for transporting undocumented refugees and that article 19 preserves the general obligations of States parties under international law in this regard, making specific reference to the 1951 Convention and 1967 Protocol relating to the Status of Refugees. Article 11 was also adopted on the understanding that it would not be applied in such a way as to induce commercial carriers to impede unduly the movement of legitimate passengers.[36]

e. Exemptions and Limitations

The Smuggling of Migrants Protocol recognizes that smuggling frequently involves persons who flee persecution, war, torture, discrimination, or severe human rights

[35] UNODC (n 13) 342–3.

[36] UNODC (n 18) 521.

abuses.[37] For this reason, the instrument does not intend to criminalize persons who offer humanitarian assistance. To achieve this, the definition of smuggling migrants and the criminalization requirements are limited to instances in which the offender seeks to obtain 'a financial or other material benefit'. This element reflects the drafters' intention

> to include the activities of organised criminal groups acting for profit, but to exclude the activities of those who provided support to migrants for humanitarian reasons or on the basis of close family ties. It was not the intention of the Protocol to criminalise the activities of family members or support groups such as religious or non-governmental organisations.[38]

Humanitarian smuggling activities include, for instance, providing food, medication, clothing, and temporary accommodation if these activities serve to save or protect the life of smuggled migrants. They further involve rescuing migrants from a life-threatening situation and other measures to save or restore their lives or health. Whether or not the danger stems from another person or from natural events does not matter.[39] The Smuggling of Migrants Protocol leaves it open for States to criminalize such acts under their domestic laws even if they are not done for profit,[40] but the Protocol does not provide the foundation or justification for such offences and they do not fall within the definition of smuggling of migrants.

The financial or other material benefit element further exempts from criminal liability individuals who are involved in the smuggling of their family members. It is not uncommon for earlier migrants to support the migration of their relatives, and smuggling can serve as a way to reunite families or to rescue family members from situations of persecution, poverty, or other hardship. Persons facilitating the illegal entry or enabling the illegal stay of a family member (or indeed any other person), or who provide fraudulent documents to enable their irregular migration, are not criminalized by the Smuggling of Migrants Protocol so long as they do not seek to benefit materially from these activities. The idea here is that no person should have to choose between committing a criminal offence or abandoning his or her closest relatives.[41]

[37] cf UNODC, 'Toolkit to Combat Smuggling of Migrants, Tool 1: Understanding the Smuggling of Migrants' (July 2010) 29. See also Andreas Schloenhardt and Connor Davies, 'Smugglers and Samaritans: Defences to People Smuggling in Australia' (2013) 36 UNSW Law Journal 954, 976–80.

[38] Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, 'Report on the Work of Its First to Eleventh Sessions, Addendum: Interpretative Notes for the Official Records (Travaux préparatoires) of the Negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto', UN doc A/55/383/Add.1 (3 November 2000) paras 88, 89.

[39] Schloenhardt and Davies (n 37) 969–76.

[40] Conference of Parties to the United Nations Convention against Transnational Organized Crime (n 14) para 12.

[41] Susanne Reindl-Krauskopf and Christian Grafl, *Kriminalität nicht integrierter Ausländer: Eine vielfältige Herausforderung für das Strafrecht* (Manz 2009) 70.

f. Non-criminalization of Smuggled Migrants

For refugees and asylum seekers, one of the most important provisions under the Smuggling of Migrants Protocol is article 5 which states that 'migrants shall not become liable to criminal prosecution under this Protocol for the fact of having been the object of conduct set forth in article 6 of this Protocol'. The basic effect of this provision is to shield smuggled migrants from prosecutions arising from the fact of having been smuggled. It upholds the cardinal principle that irregular migration and asylum seeking are not criminal offences. It was 'the intention of the drafters that the sanctions established in accordance with the Smuggling of Migrants Protocol should apply to the smuggling of migrants by organized criminal groups and not to mere migration or migrants, even in cases where it involves entry or residence that is illegal under the laws of the State concerned'.[42]

Through article 5, the Smuggling of Migrants Protocol recognizes that smuggled migrants, including 'refugees, often have to rely on smugglers to flee persecution, serious human rights violations or conflict. They should not be criminalized for making use of smugglers or for their illegal entry.'[43] In this context, reference is also made to article 31 of the Refugee Convention which recognizes that refugees may have to use irregular means to enter a country of asylum.[44] Article 31 was included in the Refugee Convention specifically to prevent States from penalizing the unauthorized entry or presence of refugees or applying unnecessary restrictions to their movement.[45] In a similar fashion, article 5 of the Smuggling of Migrants Protocol operates to protect irregular migrants from criminalization merely for seeking or gaining entry with the assistance of smugglers.[46] Smuggled migrants may, however, be prosecuted for violating national immigration laws and for offences unrelated to their smuggling.[47] Furthermore, article 5 does not shield migrants from removal or deportation to another country.[48] The Legislative Guides note that:

> The Protocol itself takes a neutral position on whether those who migrate illegally should be the subject of any offences: Article 5 ensures that nothing in the Protocol itself can be interpreted as requiring the criminalisation of mere migrants or of conduct likely to be engaged in by mere migrants as opposed to members of or those linked to organised criminal groups. At the same time, article 6, paragraph 4, ensures that nothing in the Protocol limits the existing rights

[42] UNODC (n 13) 340. [43] UNODC (n 37) 29.

[44] See further Gallagher and David (n 23) 163–9.

[45] John Morrison, 'The Dark-Side of Globalisation: The Criminalisation of Refugees' (2001) 43(1) Race & Class 71, 73.

[46] See further, Andreas Schloenhardt and Hadley Hickson, 'Non-Criminalization of Smuggled Migrants: Rights, Obligations, and Australian Practice under Article 5 of the Protocol against the Smuggling of Migrants by Land, Sea, and Air' (2013) 25 IJRL 39, 45–7; Young (n 6) 117–18.

[47] Obokata (n 10) 398, pointing to a similar reading of ICCPR, art 13. See also Gallagher and David (n 23) 167–8.

[48] See also Smuggling of Migrants Protocol (n 3) art 18.

> of each State Party to take measures against persons whose conduct constitutes an offence under its domestic law.[49]

Article 16(5) of the Smuggling of Migrants Protocol acknowledges that some States parties detain persons who are suspected of illegal entry in order to investigate their background, process their claims, and/or facilitate their removal. The Smuggling of Migrants Protocol does not endorse or condone this practice; rather, it takes a neutral position on this point.

g. Protection of Smuggled Migrants

The initial drafts of the Smuggling of Migrants Protocol did not contain any reference to the protection of, or assistance for, smuggled migrants.[50] To this day, the Smuggling of Migrants Protocol faces criticism for failing to protect smuggled migrants, refugees, and asylum seekers in particular.[51] In 1999, the UN High Commissioner for Human Rights urged the drafting committee to recognize the vulnerability of irregular migrants and incorporate provisions protecting their human rights.[52] The note submitted by OHCHR, UNHCR, UNICEF, and IOM further emphasized the need to include a specific and explicit provision for the protection of smuggled children,[53] but this never materialized.

The Smuggling of Migrants Protocol now lists the protection of the rights of smuggled migrants as one of its purposes in article 2. Article 4 extends the scope of the Protocol to 'the protection of the rights of persons who have been the object of' smuggling. Article 9(1) requires States parties to 'ensure the safety and humane treatment of the persons on board' suspected smuggling vessels.

Article 16 contains several provisions relating to protection that apply equally to the receiving State and the country of origin or habitual residence of smuggled migrants. These 'provisions are intended to set an appropriate standard of conduct for officials who deal with smuggled migrants and illegal residents and to deter conduct on the part of offenders that involves danger or degradation to the migrants'.[54] Article 16(1) contains a general statement to protect the basic human rights of smuggled migrants afforded in relevant international treaties—especially the ICCPR and the ICESCR—it does not create any new obligations for States parties.[55] Article 16(2) requires States parties to protect smuggled migrants from physical violence, and article 16(3) calls on States

[49] UNODC (n 13) 347. See also Conference of Parties to the United Nations Convention against Transnational Organized Crime (n 14) para 12.

[50] See Ad Hoc Committee on the Elaboration of a Convention against Transnational Organised Crime, 'Draft Elements for an International Legal Instrument against Illegal Trafficking and Transport of Migrants', UN doc A/AC.254/4/Add.1 (15 December 1998).

[51] Young (n 6) 103.

[52] Ad Hoc Committee on the Elaboration of the Convention against Transnational Organized Crime, 'Informal Note by the United Nations High Commissioner for Human Rights', UN doc A/AC.254/16 (1 June 1999) paras 1–2.

[53] Ad Hoc Committee (n 21) para 19.

[54] UNODC (n 13) 364.

[55] ibid 265; UNGA (n 38) para 109.

parties to 'afford appropriate assistance to migrants whose lives or safety are endangered by reason of being' smuggled. Just how such assistance may be afforded remains within the ambit of States' discretion. The Model Law against the Smuggling of Migrants proposes that smuggled migrants shall have the right to receive urgent medical care where their life is at risk or they face irreparable harm to their health.[56] This is drawn from the inherent right to life under the ICCPR. A combined reading of article 16(1) of the Smuggling of Migrants Protocol and provisions under the CRC further suggests that assistance could extend to providing education to smuggled migrants who are children.[57]

Article 16(5) implies an obligation to facilitate communication between smuggled migrants and their relevant consulate, especially in situations in which the receiving country detains migrants because of their illegal entry or to facilitate their removal.[58] Reflecting provisions under the Vienna Convention on Consular Relations,[59] this obligation encompasses assistance measures such as informing migrants of their right to contact their relevant consulate, notification of a migrant's request to do so, and facilitation of this communication, in person or otherwise.[60]

Article 18 sets out basic parameters to facilitate the return of smuggled migrants. The return of smuggled migrants is not mandatory, although many receiving States will want to return them if the migrants entered their territory unlawfully and are not eligible for asylum. The provisions under article 18 broadly reflect a call by the UN human rights agencies that

> an article on return should be accompanied by strong and effective safeguard or saving clauses ensuring the right to international protection against *refoulement* and guaranteeing the basic human rights of the migrants involved. In light of its experience in return activities undertaken on behalf of States, IOM suggests that States should be obliged to issue travel documents at the request of another State Party or a relevant international organisation.[61]

h. Border Measures

The Smuggling of Migrants Protocol acknowledges the sovereignty of States over their borders but also seeks to uphold established international human rights and refugee law principles. Regrettably, and all too frequently, the Smuggling of Migrants Protocol has been used as a front to implement restrictive control measures at the border, denying refugees and asylum seekers their rights.[62] 'Instead of curbing' smuggling, notes Young, 'these strict policies compel refugees and [asylum seekers] to resort to traffickers and smugglers'.[63]

[56] UNODC, 'Model Law against the Smuggling of Migrants' (October 2010) 65–6.
[57] ibid 71.
[58] Smuggling of Migrants Protocol (n 3) art 16(5).
[59] Vienna Convention on Consular Relations (opened for signature 24 April 1963, entered into force 19 March 1967) 596 UNTS 261, art 36.
[60] ibid; UNODC (n 56) 73; Obokata (n 10) 413.
[61] Ad Hoc Committee (n 21) para 19.
[62] Kneebone (n 1) 139; Young (n 6) 116.
[63] Young (n 6) 116, 120–1.

Article 11(1) of the Smuggling of Migrants Protocol obliges States parties to strengthen border controls as may be necessary to prevent and detect the smuggling of migrants. This obligation is subject to several qualifications. The words 'to the extent possible' limit it to the means and resources available to each State party. Practical limitations may also arise from the geographical settings of a State's land and sea borders, which can make effective border control difficult. Further, border controls must be 'without prejudice to international commitments in relation to the free movement of people'.[64] The obligation under article 11(1) is further limited to border controls 'as may be necessary to prevent and detect smuggling of migrants'. The Smuggling of Migrants Protocol does not promote the tightening of immigration laws and rigid inspections of cross-border movements; it merely highlights the use of border controls as an additional tool to prevent and detect some instances of smuggling.

When adopting and strengthening border control measures, States need to be mindful that the human rights of all persons at international borders must be respected, regardless of which authorities perform border governance measures and where such measures take place.[65] The UN human rights agencies specifically stress that

> the strengthening of border controls and other measures foreseen in the . . . Smuggling of Migrants Protocol to prevent the smuggling of migrants should be implemented in such a manner that they will not undermine the rights of individuals to seek asylum or put refugees and asylum seekers at risk of refoulement.[66]

In practice, however, many countries who interdict smuggled migrants at the border return them without assessing an asylum claim, which can result directly in *refoulement* or contribute to 'chain *refoulement*' if the country to which the migrants are returned expels them. Moreover, many countries have used anti-migrant smuggling measures, such as returning migrants to transit points, as a way to shift the protection and processing of refugees and asylum seekers to other countries.[67]

4. Binding Regional Law

At present, the only binding regional measures pertaining to smuggling of migrants are those developed by the European Union (EU) in the early 2000s. These measures are part of a framework of common policies on asylum and immigration across EU Member States, in part enabling the free movement of people while also combatting immigration-related crime and abuse of asylum systems.[68]

[64] See eg ICCPR, art 12(2).
[65] See also McAdam (n 16) 127.
[66] Ad Hoc Committee (n 21) para 21.
[67] Young (n 6) 118–19.
[68] See further Patricia Mallia, *Migrant Smuggling by Sea* (Brill 2010) 200–22.

On 28 November 2002, the Council of the European Union adopted Directive 2002/90/EC 'defining the facilitation of unauthorised entry, transit and residence',[69] followed by Framework Decision 2002/946/JHA 'on the strengthening of the penal framework to prevent the facilitation of unauthorized entry, transit and residence'.[70] Council Directive 2002/90/EC provides the definition of facilitation of unauthorized entry, transit, and residence and the cases of exemption. Framework Decision 2002/946/JHA sets out the 'minimum rules for penalties, liability of legal persons and jurisdiction' of the offences under the Council Directive.[71] The framework established by these documents—which do not use the term 'smuggling of migrants'—is less comprehensive than the Smuggling of Migrants Protocol and departs from that instrument in several ways.

One main point of difference is the Council Directive's lack of any reference to the purpose of obtaining a financial or other material benefit, which is explained by the Directive's aim to combat facilitation of illegal immigration in all its forms. This is reinforced by a statement in paragraph 2 of the Directive's preamble, which states that '[m]easures should be taken to combat the aiding of illegal immigration both in connection with unauthorised crossing of the border in the strict sense and for the purpose of sustaining networks which exploit human beings'. Ventrella notes that 'Directive 2002/90/EC does not limit the targets it is aimed at, potentially punishing those who are assisting irregular migration for honourable reasons as harshly as those who do so for financial gain, such as organised crime'.[72] Mitsilegas similarly observes that '[t]he scope of criminalisation is very broad as it can cover any form of assistance to enter or transit the territory of a EU Member State in breach of what is essentially administrative law (such as cases where the migrant is traveling without travel documents)'.[73] The financial or material benefit is only an aggravation under article 1 of the Framework Decision 2002/946/JHA, which envisages higher penalties if the offence under article 1(1)(a) of the Council Directive is committed for financial gain and endangers the lives of the smuggled migrants, or is part of the activities of a criminal organization.

Whereas the Smuggling of Migrants Protocol is clear about its intention not to criminalize persons who engage in the smuggling of migrants for humanitarian purposes with no financial gain, the Council Directive leaves this matter to States' discretion. Article 1(2) allows Member States 'not to impose sanctions with regard to the behaviour defined in paragraph 1(a) by applying its national law and practice for cases

[69] Council Directive 2002/90/EC of 28 November 2002 Defining the Facilitation of Unauthorised Entry, Transit and Residence [2002] OJ L238/17, 5.

[70] Council Framework Decision 2002/946/JHA of 28 November 2002 on the Strengthening of the Penal Framework to Prevent the Facilitation of Unauthorised Entry, Transit and Residence [2002] OJ L238/1.

[71] ibid preamble para 3.

[72] Matilde Ventrella, *The Control of People Smuggling and Trafficking in the EU* (Routledge 2010) 45.

[73] Valsamis Mitsilegas, 'Immigration Control in an Era of Globalization: Deflecting Foreigners, Weakening Citizens, Strengthening the State' (2012) 19 Indiana Journal of Legal Studies 3, 10.

where the aim of the behaviour is to provide humanitarian assistance to the person concerned'. This exemption, which is not a mandatory provision, is of particular relevance in situations involving refugees and other asylum seekers who are fleeing from situations of persecution, discrimination, war, other human rights violations, or humanitarian disasters. Just what exactly amounts to humanitarian assistance is not clear and there is no further clarification in the Council Directive on this point. Some guidance may be offered by article 6 of the Framework Decision which recognizes Member States' obligation to protect

> refugees and asylum seekers in accordance with international law on refugees or other international instruments relating to human rights, in particular Member States' compliance with their international obligations pursuant to articles 31 and 33 of the 1951 Convention relating to the status of refugees, as amended by the Protocol of New York of 1967.[74]

Seen in this context, article 1(2) of the Council Directive, which shares similarities with article 19 of the Smuggling of Migrants Protocol, can be understood to exempt persons from liability who facilitate the illegal entry of persons who are refugees. However, article 6 of the Framework Decision only affects punishment; it does not eliminate the offence of facilitating illegal entry as such and may thus undermine the obligation under article 31 of the Refugee Convention, which requires States parties not to penalize refugees for illegal entry if they come directly from a territory where their life or freedom is threatened.[75] Neither the Council Directive nor the Framework Decision contains any safeguards to protect persons acting for other humanitarian purposes, rescue at sea, or acting in other emergency situations.[76] The fact that the Council Directive does not directly and conclusively exempt smuggling for humanitarian purposes from criminal liability has attracted criticism for leaving asylum seekers, and those who come to their aid, in limbo.[77]

Unlike the Smuggling of Migrants Protocol, the EU instruments provide no specific exemption for situations in which a person facilitates the illegal entry of a family member for no financial or other benefit. The perpetrators covered by the Council Directive, notes Ventrella, 'include migrants who regularly reside within the territory of a Member State, and who are attempting to reunite with family, prevent the persecution of relatives in war-torn countries, or aiding them in escaping unbearable economic conditions'.[78] She suggests that article 8 of the European Charter of Fundamental Rights, which protects the right to family life, can be interpreted to permit irregular migrants to be reunited with their families,[79] although it is not clear that this would exempt them from criminal liability for facilitating their illegal entry.

[74] See also EU Charter of Fundamental Rights art 18 ('right to asylum').

[75] FRA (European Union Agency for Fundamental Rights), 'Criminalisation of Migrants in an Irregular Situation and of Persons Engaging with them' (2014) 16.

[76] ibid 9. [77] Mitsilegas (n 73) 10. [78] Ventrella (n 72) 44. [79] ibid.

Neither the Council Directive nor the Framework Decision contains a specific clause on the (non-)criminalization of persons who are the object of the offences set out in paragraphs 1(1)(a) and (b) of the Council Directive. It is difficult to gauge whether or not the EU instruments endorse the non-criminalization principle advocated by article 5 of the Smuggling of Migrants Protocol. There is nothing in the EU instruments mandating or justifying the criminalization of migrants for having been smuggled. While the preambles of both instruments recognize 'that illegal immigration must be combated', it is also clear that their main focus is on 'combatting the aiding of illegal immigration'[80] and not on punishing smuggled migrants.[81]

5. Observations

International law relating to smuggling of migrants complements international refugee law, but can also run into conflict with it. The Smuggling of Migrants Protocol is a criminal justice instrument that acknowledges the rights and protection of refugees, which can be 'problematic from a human rights perspective'.[82] The Protocol supplements the UNTOC,[83] and through it States gain access to a range of criminal law and law enforcement tools designed to combat organized crime and foster international cooperation. The Smuggling of Migrants Protocol and the UNTOC add little to protect refugees and other migrants. Human rights protection was not the pre-eminent driver for those who drafted the Smuggling of Migrants Protocol and it remains a secondary goal compared to the strong criminal justice focus of this instrument.

Concerns have been raised that international law on the smuggling of migrants has contributed to the criminalization of refugees and other migrants and has thus exacerbated hostile responses to international migration.[84] The fact that many refugees actively resort to smugglers to escape persecution and/or to join their families has largely been overlooked by those proposing action against smuggling. It is now an international offence to assist any person in an illegal border crossing, regardless of whether that person is a refugee in need of protection.[85] 'By using smugglers', notes Young,

> refugees and asylees risk compromising their immigration claims because many nations regard smuggling as circumventing border control measures and associating with criminal organisations. Many nations presume smuggled migrants are economic migrants, not refugees and asylum seekers, and therefore focus on punishment rather than protection.[86]

80 Unauthorised Entry Directive preamble paras 1, 2; Prevention of Unauthorised Entry Framework Decision preamble para 2.

81 Andreas Schloenhardt, *Criminalizing the Smuggling of Migrants in International, European, and Austrian Law* (Verlag für Polizeiwissenschaft 2015) 96–7.

82 Obokata (n 10) 395.

83 Smuggling of Migrants Protocol (n 3) art 1(1).

84 Kneebone (n 1) 138.

85 Morrison (n 45) 74.

86 Young (n 6) 104–05. See also Kneebone (n 1) 139.

The human rights deficiencies of the Smuggling of Migrants Protocol are most evident in its reference to migrants as 'objects',[87] thus enabling States to describe smuggling as a victimless crime.[88] Trafficked persons, on the other hand, are referred to as 'victims' and have access to several assistance and protection measures not afforded to smuggled migrants. The distinction between different categories of irregular migrants, such as smuggled migrants, victims of trafficking, and, where applicable, refugees, has created a hierarchy of protection, with some people receiving more benefits than others. The criteria used to make these distinctions are not always certain; the consequences, however, are very severe. In some cases, this can lead to the exclusion of people who do not neatly fit into any of these categories.

Furthermore, because the Trafficking in Persons Protocol affords greater protection, States 'have additional incentives to categorize the individuals as smuggled rather than trafficked'.[89] Adding to this problem is the fact that illegal entry and smuggling of migrants are generally much easier to detect and prosecute than trafficking in persons. This means that many more persons are treated as smuggled migrants and 'illegal immigrants' rather than potential victims of trafficking or, as the case may be, as asylum seekers or refugees. 'The trafficking issue is far more complex than envisaged by policy makers'[90] and law enforcement, border control, and asylum authorities are often not well trained or equipped to identify instances of trafficking.[91]

Against this background, some authors have called for a more holistic approach that captures the full spectrum of irregular migration, while others advocate strongly for maintaining the established categories and privileging some irregular migrants over others. 'The different types of protection and assistance afforded should complement—and not compete with—each other,' remarks Elliott.[92] Those 'who fixate, for instance, on disassociating "refugee" from what it is to be a "migrant" [worker] overlook the chaotic circumstances of individuals and the common shifts in factors driving human mobility', notes McAdam.[93] 'The "one or the other" agenda fuels a destructive turf war over topic-territory that ultimately may come at the cost of meaningful protection of the people caught in its crossfire.'[94]

In 2018, two new instruments came into being that adopt a more comprehensive approach to irregular migration generally, and to the situation of refugees specifically. The Global Compact for Migration, adopted by the UN General Assembly in December 2018, seeks to improve cooperation on international migration, and enhance migration governance, human mobility, and the rights of migrants. It contains specific sections on the smuggling of migrants that echo the obligations under the Smuggling of Migrants Protocol, but that also place smuggling within the broader migration context. Importantly, the Compact contains a range of measures aimed at creating durable

[87] Smuggling of Migrants Protocol (n 3) art 5. [88] Young (n 6) 123.
[89] ibid. [90] Kneebone (n 1) 138.
[91] Idil Atak and James C Simeon, 'Human Trafficking: Mapping the Legal Boundaries of International Refugee Law and Criminal Justice' (2014) 12 Journal of International Criminal Justice 1019, 1023.
[92] Sarah Elliott, 'Call Me by My Name' (2018) 11 Anti-Trafficking Review 133, 135.
[93] McAdam (n 16) 126. [94] ibid 126–7.

solutions to irregular migration in all its forms, something the Smuggling of Migrants Protocol fails to consider. The Global Compact on Refugees, also adopted in 2018, contains a range of measures to support refugees and addresses some of the strategic and policy issues that were not predictable when the Refugee Convention and its Protocol were conceived.

Despite the criticism levelled at the Smuggling of Migrants Protocol and its many weaknesses and gaps, the Protocol nevertheless sets standards that many States have yet to reach. Conflicts between international law relating to smuggling of migrants, on the one hand, and international refugee law, on the other, are less likely to arise from the relevant treaties but rather from State practice. The Smuggling of Migrants Protocol, seen in context with other international agreements on refugees, human rights, and migration, constitutes one piece of a global framework that seeks to promote safe and managed migration. It does not endorse policies and practical measures aimed at curtailing migration, exacerbating the risks faced by migrants, or creating zones of lawlessness and impunity at borders.[95]

[95] OHCHR, 'Recommended Principles and Guidelines on Human Rights at International Borders' (2014) 1–2.

CHAPTER 30

HUMAN TRAFFICKING AND REFUGEES

CATHERINE BRIDDICK AND
VLADISLAVA STOYANOVA

1. Introduction

This chapter assesses the interactions between the international trafficking regime and international refugee and human rights law. In practical terms, refugees and other forced migrants can fall victim to trafficking when they travel irregularly in search of protection, or when they seek livelihoods while lacking legal rights, as may arise when they await the outcome of protracted status determination, or live without the right to work. The chapter takes a feminist approach, highlighting the gendered nature of trafficking and the responses thereto.[1] The major difficulties in researching trafficking notwithstanding,[2] there is much evidence that women and girls are more likely than men and boys to be trafficked, and are also more likely to be trafficked for particular forms of exploitation.[3] Consonant with this evidence and the specialist legal regimes

[1] See Chapters 3 and 40 in this volume.

[2] See Mary Bosworth, Carolyn Hoyle, and Michelle Madden Dempsey, 'Researching Trafficked Women: On Institutional Resistance and the Limits to Feminist Reflexivity' (2011) 17 Qualitative Inquiry 769.

[3] Eurostat, *Trafficking in Human Beings* (2015) 10–11, over the three-year period considered, 80 per cent of identified and registered victims of trafficking were women, 95 per cent of those trafficked for sexual exploitation were women, while 71 per cent of those trafficked for labour exploitation were men. See also Sylvia Walby and others, *Study on the Gender Dimension of Trafficking in Human Beings: Final Report* (European Commission 2016) and Committee on the Elimination of Discrimination against Women, 'DRAFT General Recommendation on Trafficking in Women and Girls in the Context of Global Migration' <https://www.ohchr.org/EN/HRBodies/CEDAW/Pages/GRTrafficking.aspx> accessed 16 October 2020.

concerned with violence and discrimination against women, this chapter takes the position that trafficking is, in some circumstances, a form of gender-based violence.[4]

This chapter argues that the international trafficking regime has negative consequences for migrants, refugees and trafficked persons themselves. While some victims of trafficking may be entitled to protection as refugees, as UNHCR acknowledges, '[n]ot all victims or potential victims of trafficking fall within the scope of the refugee definition'.[5] Recourse to international human rights law is, consequently, vital, not only to mitigate some of the trafficking regime's harmful consequences, but also to enhance the protective capacities of both the trafficking regime and refugee law, for the benefit of *all* those whose rights and statuses are determined by them.

Section 2 introduces the international trafficking regime, a complex and multilayered regime with diverse legal sources; it explores its links with the suppression of mobility and compares the limited rules that protect some refugees and trafficked persons from criminalization. Section 3 explores the links between trafficking and refugee recognition. Section 4 examines the protections provided to both refugees and trafficking victims by 'general' international human rights law and the specialist legal regimes concerned with discrimination and violence against women. Ensuring victims' residence status is one form of protection specifically considered. The chapter concludes by briefly discussing the potential of the three different bodies of law drawn on: the trafficking regime, refugee law, and human rights law, to remedy and mitigate each other's deficiencies.

2. The Trafficking Regime

The UN Trafficking Protocol supplementing the UN Convention against Organized Crime,[6] defines trafficking as:

[4] There are four main legal definitions of gender-based violence/violence against women: see Committee on the Elimination of Discrimination against Women, 'General Recommendation No 35 on Gender-Based Violence against Women, Updating General Recommendation No 19', UN doc CEDAW/C/GC/35 (26 July 2017) para 9; Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (adopted 9 June 1994, entered into force 5 March 1995) 33 ILM 1534 (1994) (Convention of Belém do Pará), art 1; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted 1 July 2003, entered into force 25 November 2005) (Maputo Protocol), art 1(j); Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (adopted 11 October 2011, entered into force 1 August 2014) 3011 UNTS 1 (Istanbul Convention), art 3(a), (d).

[5] UNHCR, 'Guidelines on International Protection No 7: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons at Risk of Being Trafficked', HCR/GIP/06/07 (7 April 2006) para 6.

[6] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (adopted 15 November 2000, entered into force 25 December 2003) 2237 UNTS 319 (UN Trafficking Protocol); United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 29 September 2003) 2225 UNTS 209 (UN Organized Crime Convention).

> the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.[7]

The definition adds that the consent of a victim of trafficking to the intended exploitation is irrelevant where any of the means (force, coercion, fraud, deception, etc) has been used.[8] For trafficking to be constituted, therefore, three elements need to be cumulatively fulfilled: (1) an action of recruitment, transportation, transfer, harbouring, or receipt; (2) by certain means (such as the threat or use of force); (3) for the purposes of exploitation. Significantly, a person can be trafficked even if he or she is not, for whatever reason, exploited. It is enough if the victim has, for example, been recruited by abusing her or his position of vulnerability 'for the purpose of exploitation'. The wrong captured by this definition is not, consequently, exploitation itself, but a process that *might* lead to it.[9]

As trafficking is 'the international supply chain into exploitation',[10] it is important to understand what 'exploitation' entails and, crucially, what severity threshold needs to be applied when determining whether someone has been, or is at risk of being, exploited. The UN Trafficking Protocol does not define 'exploitation'; it only provides examples of what exploitation might mean *at a minimum*. The term 'sexual exploitation', and whether prostitution is *per se* a form of exploitation, continues to be the subject of contestation and debate.[11] For present purposes, it suffices to observe that there is no international consensus on how prostitution should be addressed within the trafficking framework, States having highly divergent policies in this area.[12]

As to the other examples of exploitative practices in the definition, for example, forced labour, slavery, and practices similar to slavery, there is no doubt that these reflect severe forms of abuse.[13] However, as noted above, they are examples of what

7 UN Trafficking Protocol (n 6,) art 3(a). 8 ibid art 3(b).

9 Vladislava Stoyanova, *Human Trafficking and Slavery Reconsidered: Conceptual Limits and States' Positive Obligations in European Law* (CUP 2017) 292.

10 Jean Allain, *Slavery in International Law: Of Human Exploitation and Trafficking* (Martinus Nijhoff 2013) 355.

11 Stoyanova (n 9) 62. See Dissenting Opinion of Judge Koskelo in *SM v Croatia* (2019) 68 EHHR 7 (referred to the Grand Chamber).

12 The Protocol was not intended to affect national laws on prostitution: UN Office on Drugs and Crime (UNODC), *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (UN 2006) 347.

13 The meanings of these terms have been clarified by the ECtHR and the Inter-American Court of Human Rights: *Siliadin v France* (2006) 43 EHHR 16; *CN and V v France*, App No 67724/09 (ECtHR, 11 October 2012); *Case of the Hacienda Brasil Verde Workers v Brazil*, Inter-American Court of Human Rights Series C No 318 (20 October 2016) (judgment in Spanish only). See further Vladislava Stoyanova, 'United Nations against Slavery: Unravelling Concepts, Institutions and Obligations' (2017) 38 Michigan Journal of International Law 359.

'exploitation' might mean at the very minimum. The term 'exploitation' may be used to encompass and capture other, less severe, conduct. Terms like 'deception' and 'abuse of power or of a position of vulnerability' are, similarly, ambiguous. As with 'exploitation', there is also no clear conceptual framework for defining the minimum threshold of severity for the 'means' element in the trafficking definition.[14] The trafficking definition is, consequently, of only limited use in assessing the level and severity of harm that migrants may be subject to. Materially different cases might, and are, pooled together under the same heading.[15]

The ambiguities discussed in the preceding paragraph are informed by the specific legal context[16] in which the definition was adopted: transnational criminal law.[17] This branch of international law uses the tools of criminal law and enhanced international cooperation to suppress certain cross-border activities that States consider undesirable, including migration from the Global South. Similar to the UN Smuggling Protocol,[18] article 11(2)–(4) of the UN Trafficking Protocol, for example, obliges States to impose sanctions on carriers who transport passengers without the correct travel documents.[19] Together with the UN Smuggling Protocol, the UN Trafficking Protocol can, consequently, be viewed as part of an arsenal of measures designed to suppress mobility.[20]

The immigration position of trafficking victims is dealt with in articles 7 and 8 of the UN Trafficking Protocol. While article 7 briefly encourages States to consider taking measures to permit victims to remain in their territory, article 8 provides detailed guidance on 'repatriation'. States in which the trafficked person last had a right of permanent residence are to 'facilitate and accept' their return; States are also to assist in verifying a trafficked person's identity and facilitate their re-documentation.[21] Although repatriation is 'preferably' voluntary,[22] it does not have to be so, the Protocol's drafters having rejected a US proposal that required any repatriation to be both 'safe and voluntary'.[23]

[14] Stoyanova (n 9) 54.

[15] ibid 309.

[16] The UN Trafficking Protocol (n 6) was adopted with the Protocol against the Smuggling of Migrants by Land, Sea, and Air, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 28 January 2004) 2241 UNTS 507 (UN Smuggling Protocol). According to Stoyanova (n 9) 309, 'all of these intended to effectively function regardless of whether the alleged victims of human trafficking were exploited, as understood in the broad sense, or in fact enslaved'.

[17] Neil Boister, *An Introduction to Transnational Criminal Law* (OUP 2012) 278.

[18] UN Smuggling Protocol (n 16) art 11(3)–(4).

[19] See further Tilman Rodenhäuser, 'Another Brick in the Wall: Carrier Sanctions and the Privatization of Immigration Control' (2014) 26 IJRL 223.

[20] James C Hathaway, 'The Human Rights Quagmire of "Human Trafficking"' (2008) 49 Virginia Journal of International Law 1; Thomas Gammeltoft-Hansen and James C Hathaway, '*Non-Refoulement* in a World of Cooperative Deterrence' (2015) 53 Columbia Journal of Transnational Law 235, 241.

[21] UN Trafficking Protocol (n 6) art 8(1), (3), (4).

[22] ibid art 8(2).

[23] Hathaway (n 20) 3 citing the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, 'Draft Protocol to Combat International Trafficking in Women and Children Supplementary to the United Nations Convention against Transnational Organized Crime; Proposal Submitted by the United States of America', UN doc A/AC.254/4/Add.3 (25 November 1998) art 4(l)(a).

Finally, although the UN Trafficking Protocol imposes a number of clear obligations on States relating to their borders or domestic criminal laws, when it comes to victims' protection and assistance, the obligations it imposes are significantly weaker. For example, States are required to criminalize trafficking (as discussed further below),[24] but they are only encouraged to protect victims' 'privacy and identity' where 'appropriate'[25] and to '*endeavour* to provide for the physical safety of victims'.[26]

The UN Trafficking Protocol has been supplemented by a range of measures developed and adopted at the regional level. While there is no African treaty addressing trafficking, various 'soft law' initiatives have been undertaken in the region to 'fight' it.[27] Similarly, although the Inter-American system has not developed a general anti-trafficking convention, it has taken action on the trafficking of minors.[28] Trafficking-specific instruments have been adopted in both Europe and Asia.

Within Europe, two legal frameworks address human trafficking. The first is established by the Council of Europe Convention on Action against Trafficking in Human Beings (the CoE Anti-Trafficking Convention).[29] The second is established by two EU law instruments: the EU Anti-Trafficking Directive[30] and the EU Residence Permit Directive.[31]

The CoE Anti-Trafficking Convention, which reproduces the UN Protocol's trafficking definition, requires each State Party to identify, assist, and protect victims, including by not punishing them, preventing their removal and, in certain limited circumstances, providing them with renewable residence permits.[32] Asylum seekers and refugees may benefit from these provisions in parallel with the protection and assistance that is specifically applicable to them (discussed below). The CoE Anti-Trafficking Convention also establishes the Group of Experts on Action against Trafficking in Human Beings (GRETA) to monitor its application.[33] Similar to the UN Trafficking Protocol, it also imposes obligations for enhanced border control measures.[34]

[24] UN Trafficking Protocol (n 6) art 5: 'Each State Party shall adopt . . .'.

[25] ibid art 6(1).

[26] ibid art 6(5) (emphasis added).

[27] See eg Economic Community of West African States, 'Declaration on the Fight against Trafficking in Persons' (25th Ordinary Session of Authority of Heads of State and Government, Dakar, 20–21 December 2001); 'Ouagadougou Action Plan to Combat Trafficking in Human Beings, Especially Women and Children as Adopted by the Ministerial Conference on Migration and Development' (Ministerial Conference on Migration and Development, Tripoli, 22–23 November 2006).

[28] Inter-American Convention on International Traffic in Minors (adopted 18 March 1994, entered into force 15 August 1997) 33 ILM 721 (1994).

[29] Council of Europe Convention on Action against Trafficking in Human Beings (adopted 16 May 2005, entered into force 1 February 2008) CETS 197 (CoE Anti-Trafficking Convention).

[30] Council Directive 2011/36/EU of 5 April 2011 on Preventing and Combating Trafficking in Human Beings and Protecting its Victims [2011] OJ L101/1 (EU Trafficking Directive).

[31] Council Directive 2004/81/EC of 29 April 2004 on the Residence Permit Issued to Third-Country Nationals who are Victims of Trafficking in Human Beings or Who Have Been the Subject of an Action to Facilitate Illegal Immigration, who Cooperate with the Competent Authorities [2004] OJ L261/19 (EU Residence Permit Directive).

[32] CoE Anti-Trafficking Convention (n 29) ch III.

[33] ibid art 36.

[34] ibid arts 7–8.

The EU's Trafficking Directive develops[35] and clarifies the international law definition of trafficking and obliges EU Member States to criminalize it.[36] At the same time, the Directive also reproduces many of the CoE Anti-Trafficking Convention's protection and assistance measures.[37] The Directive does not, however, guarantee victims' non-removal during the identification procedure or provide for the regularization of their stay.[38] These issues have been regulated by the EU Residence Permit Directive, which provides a residence permit to some victims of trafficking who cooperate with criminal proceedings.[39] Residence permits granted pursuant to this Directive are, however, granted on a much more limited basis, and are significantly more precarious, than those provided under the CoE Anti-Trafficking Convention.[40] Under the European trafficking regime, therefore, most victims of trafficking continue to face return to their country of origin, involuntarily if necessary. The granting of a residence permit operates to defer this return for a comparatively short period of time and for particular purposes only.[41]

The Association of Southeast Asian Nations (ASEAN) has adopted the ASEAN Convention against Trafficking in Persons, Especially in Women and Children.[42] This treaty also reproduces the UN definition of human trafficking and, similar to the CoE Anti-Trafficking Convention, contains provisions on the identification and assistance of trafficking victims.[43] A comparison of the ASEAN Convention and its UN and CoE counterparts reveals that the former does not reproduce provisions that position the enhancement of border control measures as a response to trafficking. However, the ASEAN Convention is less rights-protective than its CoE counterpart and does not have a dedicated monitoring body to oversee it.[44]

Finally, the South Asian Association for Regional Cooperation (SAARC) has adopted the SAARC Convention on Preventing and Combating Trafficking in Women and

[35] EU Trafficking Directive (n 30) preamble, para 11 states that 'the exploitation of begging, including the use of a trafficked dependent person for begging, falls within the scope of the definition of trafficking in human beings only when all the elements of forced labour or services occur'.

[36] ibid arts 2–3.

[37] ibid arts 8 (non-punishment of victims), 11 (identification and assistance), 12 (protection in criminal proceedings).

[38] ibid preamble para 17; Stoyanova (n 9) 111.

[39] EU Residence Permit Directive (n 31) art 8.

[40] Stoyanova (n 9) 136.

[41] CoE Anti-Trafficking Convention (n 29) arts 14, 16; EU Residence Permit Directive (n 31) arts 8, 13, 14.

[42] ASEAN Convention against Trafficking in Persons, Especially Women and Children (adopted 21 November 2015, entered into force 8 March 2016) (ASEAN Convention) <https://www.asean.org/wp-content/uploads/2015/12/ACTIP.pdf> accessed 20 May 2020.

[43] ibid arts 2, 14. Art 14(4) refers to the possibility for victims to remain on the territory, but only 'in appropriate cases'.

[44] The ASEAN Convention (n 42) is monitored by the ASEAN Senior Officials Meeting on Transnational Crime per art 24. For a comprehensive comparison of the ASEAN Convention with the UN and the European standards, see Ranyta Yusran, 'The ASEAN Convention Against Trafficking in Persons: A Preliminary Assessment' (2018) 8 Asian Journal of International Law 258.

Children for Prostitution.[45] As the title suggests, this treaty has a limited personal scope. Its material scope is also constrained by its specific definition of 'persons subjected to trafficking' as 'women and children victimized or forced *into prostitution* by traffickers by deception, threat, coercion, kidnapping, sale, fraudulent marriage, child marriage, or any other unlawful means'.[46]

Pursuant to the international obligations described above, the main response to trafficking at the national level has been criminalization. States have, in general, reproduced the relevant international trafficking definitions in their domestic criminal laws and, in doing so, have imported those definitions' ambiguities.[47] As noted above, the international definitions only represent the *minimum* scope of criminalization required.[48] States may go beyond these in their own criminal laws.[49] Consequently, different States have developed quite different definitional approaches to trafficking.[50]

Enhanced border control measures were identified above as being an integral part of the international trafficking regime. Anti-trafficking measures purport to pursue humanitarian objectives, namely the prevention of coerced/deceptive movement and 'exploitation'. It is far from clear that enhanced border controls actually achieve this objective. A lack of legal clarity as to the relevant threshold of coercion/deception and as to what actually constitutes 'exploitation' (as discussed above) gives rise to uncertainty about what exactly it is that States should be, and are, trying to prevent.

In practice, the suppression of mobility in the name of anti-trafficking is generally indiscriminate, affecting all migrants, including those who seek, and may be entitled to, international protection. To flee persecution, refugees might be left with no option but to enter into exploitative arrangements.[51] The potential of anti-trafficking measures to affect the position of those seeking protection is recognized by the UN Trafficking Protocol, article 14(1) of which states:

[45] SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution (adopted 5 January 2002, entered into force 15 November 2005) <http://un-act.org/wp-content/uploads/2015/11/South-Asian-Association-for-Regional-Cooperation-SAARC-Convention-on-Preventing-and-Combating-Trafficking-in-Women-and-Children-for-Prostitution.pdf> accessed 20 May 2020.

[46] ibid art 1(5) (emphasis added).

[47] '[T]here exists a remarkable level of uniformity between States with respect to definitions [of human trafficking]': UNODC, 'The International Legal Definition of Trafficking in Persons: Consolidation of Research Findings and Reflection on Issues Raised, Issue Paper' (UN December 2018) 22.

[48] This is the case even for the EU, an advanced supranational legal order. EU law is limited to the adoption of 'minimum rules concerning the definition of criminal offences', Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 (TFEU), art 83(1).

[49] Doing so may be impermissible if it is contrary to the object and purpose of the relevant treaty.

[50] Jean Allain, 'No Effective Trafficking Definition Exists: Domestic Implementation of the Palermo Protocol' (2014) 7 Albany Government Law Review 111; Vladislava Stoyanova, 'The Crisis of a Definition: Human Trafficking in Bulgarian Law' (2013) 5 Amsterdam Law Forum 64.

[51] Bill Frelick, Ian M Kysel, and Jennifer Podkul, 'The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants' (2016) 4 Journal on Migration and Human Security 190.

> Nothing in this Protocol shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.

Nonetheless, there remains a fundamental tension between anti-trafficking measures and the rights of asylum seekers and refugees. As Hathaway has observed, such measures have 'resulted in significant collateral human rights damage by providing a context for developed [S]tates to pursue a border control agenda under the cover of promoting human rights'.[52] In contrast, Gallagher's 'sharply differing' perspective on the 'global battle to combat trafficking'[53] differentiates what she perceives to be the limitations of the UN's Trafficking and Smuggling Protocols from the 'failings and inadequacies of the international system for refugee protection',[54] including the absence of legal routes to seek protection. While we agree with Gallagher that a critical appraisal of the international trafficking regime should not obscure more 'obvious solutions'[55] to the needs of those seeking international protection, State practice since Hathaway's intervention on the '[q]uagmire'[56] of anti-trafficking has borne out many of his claims. Under the guise of preventing trafficking, States have adopted a number of measures suppressing mobility. For example, some States have taken steps to prevent particular groups of women from leaving their jurisdictions, justifying such restrictions as protective measures for the women concerned.[57] Countries of destination 'cooperate' with countries of origin and transit, strengthening the latter's border control capacities in an indiscriminate manner.[58] The EU's long-standing externalization of border controls,[59] often 'deceptively framed'[60] as pursuing humanitarian ends, entails much general suppression of mobility. Notably, EU documents often use the terms 'trafficking' and 'smuggling' interchangeably,[61] using trafficking's harmful and coercive nature to mask interventions that prevent refugees and others from fleeing. Such documents demonstrate that anti-trafficking border control measures are intertwined with the broader agenda of mobility suppression.

[52] Hathaway (n 20) 26.

[53] Anne Gallagher, 'Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway' (2008) 49 Virginia Journal of International Law 789, 794.

[54] ibid 846. [55] ibid. [56] Hathaway (n 20).

[57] For one regional summary of such measures see Deepa Bharathi and Smita Mitra, 'Gender and International Migration' in *Situation Report on International Migration in South and South West Asia* (Asia-Pacific RCM Thematic Working Group on International Migration including Human Trafficking 2012) 188, 195.

[58] European Commission, 'Reporting on the Follow-up to the EU Strategy Towards the Eradication of Trafficking in Human Beings and Identifying Further Concrete Actions' (Communication) COM (2017) 0728 final, 6–7.

[59] European Commission, 'Fifth Progress Report on the Partnership Framework with Third Countries under the European Agenda on Migration' (Report) COM (2017) 471 final; European Commission, 'Progress Report on the Implementation of the European Agenda on Migration' (Report) COM (2019) 481 final.

[60] Frelick, Kysel, and Podkul (51) 193. [61] See eg European Commission 2017 (n 59) 3, 4, 5, 9.

One consequence of these measures is the containment of migrants, including refugees,[62] within third countries where they suffer notable human rights violations.[63] Thus far neither the extraterritorial reach of *non-refoulement*, nor the human right to leave, have established clear legal pathways to protection that can counteract this containment. The former implies that the obligation not to remove people to a risk of persecution or other serious harm is activated once asylum seekers are in contact with agents of destination States (eg at the border or on the high seas).[64] The activation of this obligation is, however, contingent on contact with destination States' agents, a condition that is not met in circumstances of containment.

It has been claimed that the extraterritorial reach of *non-refoulement* facilitates trafficking (and smuggling), by encouraging people to undertake journeys in, for example, the hope that they come into contact with destination States' agents and are disembarked on those States' territories.[65] Such claims are, however, legally irrelevant from the perspective of the *non-refoulement* obligation which, once triggered, must be adhered to. The empirical basis of such claims is also highly questionable.[66]

Although individuals who are contained and thus prevented from leaving to seek international protection might not be protected by the extraterritorial reach of *non-refoulement*,[67] the right to leave any country, whether to seek international protection or for any other reason, is still relevant.[68] While this right may be subject to limitations on certain grounds (where provided by law, to protect public order, etc), restrictions on mobility pursuant to, or justified by, States' anti-trafficking obligations will only be in compliance with the right to leave if they are no more than is necessary to meet these objectives and do not discriminate.[69] States that limit individuals' ability to leave their territory will, under this test, have to demonstrate that such limitations actually prevent movement that is 'for the purpose of exploitation' and that there are no other, less restrictive measures available to achieve this. Crucially, however, the right to leave cannot impose an obligation upon countries of destination to ensure legal pathways to protection.[70]

[62] ibid; see eg the comments on Ethiopia, Egypt, Libya, Jordan, and Lebanon.

[63] UN Support Mission in Libya and Office of the High Commissioner for Human Rights, 'Desperate and Dangerous: Report on the Human Rights Situation of Migrants and Refugees in Libya' (20 December 2018).

[64] *Hirsi Jamaa v Italy* (2012) 55 EHRR 21.

[65] According to FRONTEX, search and rescue missions close to, or within, the 12-mile territorial waters of Libya act as a 'pull factor' for smugglers/traffickers: FRONTEX, *Risk Analysis for 2017* (2017) 32–3.

[66] For their refutation see Eugenio Cusumano and James Pattison, 'The Non-Governmental Provision of Search and Rescue in the Mediterranean and the Abdication of State Responsibility' (2018) 31 Cambridge Review of International Affairs 53.

[67] *R v Immigration Officer at Prague Airport, ex parte Roma Rights Centre* [2004] UKHL 55, [2005] 2 AC 1.

[68] ICCPR, art 12(2); American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123, art 22(2); ECHR Protocol 4, art 2(2).

[69] UN Human Rights Committee, 'General Comment No 27: Article 12 (Freedom of Movement)', UN doc CCPR/C/21/Rev1/Add.9 (1 Nov 1999) paras 11–18; see also CERD, art 5(d)(ii).

[70] It is difficult to trigger destination countries' obligations corresponding to the right to leave in relation to individuals located in third countries: Vladislava Stoyanova, 'The Right to Leave Any Country and the Interplay between Jurisdiction and Proportionality in Human Rights Law' (2020) 32 IJRL https://doi.org/10.1093/ijrl/eeaa030.

Finally, despite the tensions between anti-trafficking measures and the rights of refugees, some regional anti-trafficking instruments offer important additional forms of protection. Refugees (including those who have been trafficked) and trafficking victims (whether or not refugees) may be protected from penalization for illegal entry or for their involvement in certain criminal activities. In relation to the former group, the Refugee Convention's article 31(1) ensures that, providing certain conditions are met, asylum seekers are not punished 'on account of their illegal entry or presence'.[71] In relation to the latter, some regional anti-trafficking instruments contain non-punishment provisions to ensure that victims are not punished for their involvement in unlawful activities connected to their trafficking.[72] While the protective scope of the refugee and trafficking non-punishment provisions overlap, there are some important divergences. For example, article 31(1) of the Refugee Convention is restricted to refugees 'coming directly from a territory where their life or freedom was threatened' who 'present themselves without delay to the authorities and show good cause for their illegal entry or presence'. In contrast, article 26 of the CoE Anti-Trafficking Convention is not limited in this way.

3. Victims of Trafficking as Refugees

The trafficking regime has a direct relationship with the refugee regime when victims of trafficking seek recognition as refugees.[73] Those who have been trafficked, or fear it, turn to refugee law for protection. Often this is because the trafficking regime is preoccupied with 'victim repatriation', whereas victims often need the sort of protection refugee law offers, in particular, protection from return and a secure right of residence. In contrast to the residence permits that may be available to *some* victims of trafficking in Europe, an individual's asylum claim cannot be linked to her or his willingness to cooperate with criminal proceedings.[74]

Trafficking itself, and many of the acts associated with it, including forced labour, sexual exploitation, and reprisals from traffickers, are severe human rights violations.[75] Such violations may amount to persecution for a Refugee Convention reason where the State itself

[71] Cathryn Costello (with Yulia Ioffe and Teresa Büchsel), 'Article 31 of the 1951 Convention Relating to the Status of Refugees', UNHCR Legal and Policy Protection Series, PPLA/2017/01 (July 2017); see Chapter 51 in this volume.

[72] CoE Anti-Trafficking Convention (n 29) art 26; EU Trafficking Directive (n 30) art 8; ASEAN Convention (n 42) art 14(7). See Stoyanova (n 9) 142.

[73] Ryszard Piotrowicz, 'Victims of People Trafficking and Entitlement to International Protection' (2005) 24 Australian Year Book of International Law 159.

[74] *Tribunale di Messina, I Sezione Civile*, 316/2017 (14 July 2017) (Italy, Courts of First Instance) (unofficial translation by UNHCR).

[75] CEDAW, art 6; Charter of Fundamental Rights of the European Union [2007] OJ C303/01 (CFREU), art 5(3). Trafficking was brought within the ambit of art 4 ECHR by the ECtHR in *Rantsev v Cyprus and Russia* (2010) 51 EHRR 1. Slavery and trafficking in *women* is prohibited by art 6(1) American Convention on Human Rights (n 68). However, following *Case of the Hacienda Brasil Verde Workers v Brazil* (n 13) this provision must be interpreted as protecting *all* trafficking victims. Finally, art 5 African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 21 ILM 58 (1982) prohibits slavery and 'all forms of exploitation and degradation of man'.

either perpetrates the relevant harm, or is unwilling or unable to offer sufficient protection from it.[76] Where the harm feared is from non-State actors, internal relocation is unlikely to be a viable option where the person concerned is vulnerable to being (re)trafficked because of factors including psychological problems, isolation, or a lack of skills.[77] A victim of trafficking may also fear persecution if, on return and absent State protection, he or she would be stigmatized, discriminated against, or punished because he or she had, for example, been sexually exploited.[78] Gallagher argues that the anti-trafficking regime has 'helped refugee advocates in their efforts to explore and extend the boundaries of international refugee law', with the recognition that trafficking can found a refugee claim enabling 'reinterpretations of core aspects of the much contested refugee definition'.[79]

While this may be the case, a brief consideration of the jurisprudence reveals that it is often difficult for victims of trafficking to establish a refugee claim, in particular the required nexus with a Convention ground[80] (especially since the Convention grounds are still subject to androcentric interpretation). For example, in New Zealand, a male human rights activist's resistance to trafficking was accepted as a political opinion for Convention purposes,[81] yet the same approach has often not been applied to the (usually female) victims who resist by escaping their traffickers and seeking protection. They tend to bring their claims as members of a particular social group (PSG), which poses greater legal challenges. This has been the case in jurisdictions that take either the 'social perception' or 'protected/immutable characteristics' approach[82] to the question of what constitutes a PSG.[83] EU law's combination of these two approaches in a single test,[84] the failure of decision-makers to recognize the gendered nature of trafficking,[85] and their recourse instead to overly narrow, restrictive PSGs[86] has given rise to a complex and

[76] UNHCR (n 5) paras 14–18, 21–4.

[77] *HD (Trafficked Women) Nigeria CG* [2016] UKUT 00454 (IAC); see also *TD and AD (Trafficked Women) (CG)* [2016] UKUT 00092 (IAC).

[78] UNHCR (n 5) para 18.

[79] Gallagher (n 53) 844.

[80] Udara Jayasinghe and Sasha Baglay, 'Protecting Victims of Human Trafficking Within a 'Non-Refoulement' Framework: Is Complementary Protection an Effective Alternative in Canada and Australia?' (2011) 23 IJRL 489; Kaori Saito, 'International Protection For Trafficked Persons and Those Who Fear Being Trafficked' UNHCR New Issues in Refugee Research, Research Paper No 149 (2007).

[81] *Refugee Appeal Nos 76,478, 76,479, 76,480, and 76,481* (RSAA, 11 June 2010) paras 53, 88.

[82] For a general discussion of which see Michelle Foster, 'Why We Are Not There Yet: The Particular Challenge of a "Particular Social Group"' in Efrat Arbel, Catherine Dauvergne, and Jenni Millbank (eds), *Gender in Refugee Law, From the Margins to the Centre* (Routledge 2014).

[83] *VXAJ v Minister for Immigration and Multicultural Affairs* (2006) 198 FLR 455; *Matter of X* (United States Executive Office for Immigration Review (EOIR)) (9 August 2011) <https://www.refworld.org/cases,USIC,4ea6e2a62.html> accessed 22 May 2020. See also Jayasinghe and Baglay (n 80) 505.

[84] EU Qualification Directive (recast), art 10(1)(d). In *AZ (Trafficked Women) Thailand CG* [2010] UKUT 118 (IAC) para 134, the Upper Tribunal was 'unable to accept' that the two sub-sections should be read as alternatives.

[85] And the harms associated with it, as occurred in *Talo v Canada (Minister of Citizenship and Immigration)*, 2012 FC 478.

[86] In *AZ* (n 84) para 140, the Upper Tribunal rejected the proposed PSG of 'women in Thailand', opting instead for the 'narrower' group of 'young females who have been victims of trafficking for sexual exploitation'. In *Matter of X* (n 83) 10–12 the PSG was identified as 'young Congolese women who have participated in prostitution'.

sometimes contradictory jurisprudence that excludes many trafficking victims from refugee protection.[87] Furthermore, the trafficking regime's association of victims with crime has also led to the denial of refugee protection.[88] To conclude, while some victims of trafficking may be recognized as refugees, in reality many trafficking victims are rendered 'invisible' as refugees.[89]

Recourse to the specialist regimes concerned with violence against women may be fruitful here, as the CEDAW Committee has, for example, made a series of recommendations concerning trafficking-related refugee claims.[90] In addition to setting standards for refugee status determination processes that are gender-sensitive, these recommendations confirm that trafficking is, or may entail, gender-related persecution.[91] Such recognition may be relied upon to found a more principled and inclusive approach to the identification and delineation of PSGs in trafficking cases, and may remedy, at least in part, some of the deficiencies in the jurisprudence on PSGs outlined above.

4. Human Rights Law for Victims of Trafficking

This chapter has argued that neither the trafficking nor the refugee regime effectively protects victims of trafficking. It now turns to human rights law by first examining its general protections, in particular the positive obligations it entails to protect against violence.

The obligation to provide effective protection from violence includes the obligation to exercise 'due diligence' and respond appropriately to actual or potential rights violations, whether or not these are attributable to the State.[92] While the precise nature and scope of

[87] Satvinder S Juss, 'Recognizing Refugee Status for Victims of Trafficking and the Myth of Progress' (2015) 34(2) RSQ 107.

[88] See, for example, comments made by the Canadian Immigration and Refugee Board that 'single women who have been forced into prostitution' were victims of ordinary crime and not refugees, as discussed in Jayasinghe and Baglay (n 80) 497.

[89] Susan Kneebone, 'The Refugee–Trafficking Nexus: Making Good (The) Connections' (2010) 29(1) RSQ 137, 139.

[90] Committee on the Elimination of Discrimination against Women, 'General Recommendation No 32 on the Gender-Related Dimensions of Refugee Status, Asylum, Nationality and Statelessness of Women', UN doc CEDAW/C/GC/32 (14 November 2014).

[91] ibid paras 45–6, 50.

[92] Due diligence obligations have been found to be inherent in protected rights and have also been justified by reference to States' obligations to secure rights within their jurisdictions and provide effective remedies to victims (arts 1 and 13 ECHR): see eg *MC v Bulgaria* (2005) 40 EHRR 20. The ECtHR has referred to, but not adopted, the terminology of 'due diligence' (used by the Human Rights Committee, CEDAW Committee, the IACtHR/IACHR, and now the Istanbul Convention) when considering States' positive obligations: see eg *Opuz v Turkey* (2010) 50 EHRR 28; Vladislava Stoyanova, 'Due Diligence versus Positive Obligations: Critical Reflections on the Council of Europe Convention on Violence against Women' in Johanna Niemi, Lourdes Peroni, and Vladislava Stoyanova (eds), *International Law and Violence against Women: Europe and the Istanbul Convention* (Routledge 2020) 95.

particular positive and due diligence obligations may be difficult to ascertain, it is possible to distinguish between two types or levels: obligations of a structural or systemic nature, and obligations owed to specific individuals (or groups thereof).[93] In relation to the former, States are required to put in place laws, processes, and policies to address the 'root causes' of rights violations, to prevent/deter them and, if/when they do occur, to identify perpetrators, hold them to account, and make appropriate reparation to their victims.[94] In *Hacienda Brasil Verde Workers v Brazil*,[95] the Inter-American Court of Human Rights (IACtHR) 'went beyond' the European Court of Human Right's (ECtHR) jurisprudence in this regard, establishing State responsibility for structural inequalities, including poverty, which make people vulnerable to exploitation.[96] With respect to the latter, States are required to offer individuals, including trafficked persons and refugees, 'effective measures of prevention, protection, punishment and reparation'.[97] A State is required to take 'preventative measures' where it knows, or ought to know, that a particular individual faces a 'real and immediate risk' of harm.[98]

These 'general' human rights protections have been supplemented by the specialist legal regimes concerned with discrimination and violence against women, such regimes considering trafficking to be, in some circumstances, a form of gender-based violence.[99] The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará) requires, for example, that States 'take special account' of the vulnerability of women to violence by reason of their status as migrants, refugees, or displaced persons.[100] The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) imposes specific obligations on States in relation to trafficking, as well as for the protection of refugees and other displaced persons.[101] Finally, the Council of Europe's Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) protects migrant and refugee

[93] Rashida Manjoo, 'State Responsibility to Act with Due Diligence in the Elimination of Violence against Women' (2013) 2 International Human Rights Law Review 240, 262; Clare McGlynn, 'Rape, Torture and the European Convention on Human Rights' (2009) 58 ICLQ 565; Vladislava Stoyanova, 'Causation between State Omission and Harm within the Framework of Positive Obligations under the European Convention on Human Rights' (2018) 18 Human Rights Law Review 309, 341.

[94] Manjoo (n 93) 262–4.

[95] *Case of the Hacienda Brasil Verde Workers v Brazil* (n 13); for an overview see Tatiana Gos, 'Hacienda Brasil Verde Workers v Brazil: Slavery and Human Trafficking in the Inter-American Court of Human Rights' (*OxHRH*, 24 April 2017) <http://ohrh.law.ox.ac.uk/hacienda-brasil-verde-workers-v-brazil-slavery-and-human-trafficking-in-the-inter-american-court-of-human-rights/> accessed 17 Jan 2020.

[96] Valentina Milano, 'Human Trafficking by Regional Human Rights Courts: An Analysis in Light of *Hacienda Brasil Verde*, the First Inter-American Court's Ruling in this Area' (2018) 36 Revista electrónica de estudios internacionales 1, 23–4.

[97] Manjoo (n 93) 245.

[98] *Osman v United Kingdom*, App No 23452/94 (ECtHR, Grand Chamber, 28 Oct 1998) para 116. See Vladislava Stoyanova, 'Fault, Knowledge and Risk within the Framework of Positive Obligations under the European Convention on Human Rights' (2020) 33 Leiden Journal of International Law 601.

[99] Text to n 4. [100] Convention of Belém do Pará (n 4) art 9.

[101] Maputo Protocol (n 4) arts 4(g), (k), 10, 11.

women from discrimination, in addition to developing particular protective measures for their benefit.[102] International human rights law has, therefore, imposed obligations on States in relation to trafficking (and other) victims' needs, protection, and safety which are of a significantly higher standard than is required by the trafficking regime itself.

In addition to ensuring that, for example, victims of trafficking are protected from their traffickers, the obligation to provide effective protection from violence may be relied upon to challenge migration controls for contributing to and generating trafficking risks.[103] In *Rantsev v Cyprus and Russia*, the ECtHR examined immigration rules that subjected people to an increased risk of trafficking and (other) violence.[104] At the structural level, the court ruled that States' immigration rules must address concerns relating to the 'encouragement, facilitation or tolerance' of trafficking, and that the migration statuses such rules created must offer 'practical and effective' protection from trafficking and other forms of exploitation.[105] At the individual level, States must take operational measures to protect those who may be victims of trafficking or exploitation where they are aware, or ought to be aware, of circumstances giving rise to a credible suspicion that such victims are at risk of harm.[106]

In the cases that have followed *Rantsev*, the ECtHR has offered more detailed guidance as to the nature of such due diligence obligations, drawing at times on GRETA's work to do so.[107] In this jurisprudence, due diligence has been relied upon to improve the position of migrants who have, whether legally or not, gained access to the jurisdiction of a State party to the ECHR.[108] The complexity of the relationships between deterrence policies and trafficking notwithstanding, the 'nexus between access to safe migration routes, obligations of due diligence, and compliance with human rights standards is rarely acknowledged by [S]tates'.[109] The cases of *Hacienda Brasil Verde Workers*, *Rantsev*, and *Chowdury* establish the potential, however, of due diligence obligations to hold States responsible for structural inequalities, unsafe migration routes, and their allied and resulting failures to appropriately respond to irregular and illegalized migrants' increased vulnerability to violence.

[102] Istanbul Convention (n 4) arts 4(2), 59–61.

[103] *Rantsev* (n 75). See also *EK (Article 4 ECHR: Anti-Trafficking Convention) Tanzania* [2013] UKUT 313 (IAC) which involved a challenge to restrictive British immigration rules and the failure to follow guidance that gave rise to both a refugee claim and a claim under the CoE Anti-Trafficking Convention (n 29).

[104] *Rantsev* (n 75).

[105] ibid paras 291–3. See also Stoyanova (n 9) 369.

[106] *Rantsev* (n 75) paras 296–8.

[107] *Chowdury and Others v Greece*, App No 21884/15 (ECtHR, 30 March 2017). See Vladislava Stoyanova, 'Sweet Taste with Bitter Roots: Forced Labour and *Chowdury v Greece*' (2018) 1 European Human Rights Law Review 67.

[108] See contra Valentina Milano, 'The European Court of Human Rights' Case Law on Human Trafficking in Light of *L.E. v Greece*: A Disturbing Setback?' (2017) 17 Human Rights Law Review 701.

[109] Siobhán Mullally, 'Migration, Gender, and the Limits of Rights' in Ruth Rubio-Marín (ed), *Human Rights and Immigration* (OUP 2014) 170.

Although not discussed in these terms by the UN Human Rights Committee, IACtHR, or ECtHR, protection from *refoulement* can also be characterized as a 'preventative measure'.[110] Whether or not the harm feared is anticipated to materialize in the State's own jurisdiction or the one to which an individual may be returned, the 'removing' State's obligation to the relevant individual is triggered in comparable circumstances: where he or she faces a 'real risk' of serious or irreparable harm.[111] However, while refugees are entitled to a protective and rights-bestowing status, the same is not, as a rule, true for those trafficking victims who are protected from *refoulement* by human rights law. Human rights law does not generally require States to offer a secure migration status to those it is prohibited from returning.[112] Some trafficking victims *may* be eligible for a residence permit under the European trafficking regime (as discussed above), or the Istanbul Convention.[113] Victims of trafficking who are not recognized as refugees may, therefore, face either return (if not protected from *refoulement*) or be protected from removal without being accorded a protective status. This situation leaves them in a 'Kafkaesque stalemate',[114] unable to live within, or leave, their country of residence.

To avoid this situation, due diligence obligations and the right to a remedy[115] may be relied upon to argue that particular cases or scenarios generate more than just a right not to be removed. The IACtHR has ruled that to be reparative, a remedy must rectify and not re-establish 'the same structural context of violence and discrimination' within which the relevant violation(s) occurred.[116] While removal may appear to involve the relatively benign re-establishment of the *status quo*, it involves detention, violence, and frequently family separation. This, and the purely instrumental 'remedy' of short-term non-removal (without status or with one that is precarious), are both significantly more likely to perpetuate, rather than provide reparation for, the discrimination and violence that contribute to and sustain the conditions in which trafficking and its associated harms occur. Members of the CEDAW Committee have, consequently, opined that

[110] *Rantsev* (n 75), with the court in this case drawing on its judgment in the case of *Osman* (n 98).

[111] *MSS v Belgium and Greece* (2011) 53 EHRR 2; Human Rights Committee, 'General Comment No 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant', UN doc CCPR/C/21/Rev1/Add13 (26 May 2004) para 12. In the ECtHR system, return may also by prohibited when it results in a 'flagrant breach' of certain protected rights: see Chapter 36 in this volume.

[112] *MBB v Sweden*, UN doc CAT/C/22/D/104/1998 (21 June 1999); *Bonger v The Netherlands*, App No 10154/04 (ECtHR, 15 Sept 2005). See Chapter 36 in this volume.

[113] Istanbul Convention (n 4) art 59, where the trafficked person is a 'victim' for the purposes of the convention.

[114] Marie-Bénédicte Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (OUP 2015) 448.

[115] Under public international law and international human rights law, an action is considered reparative of a wrong when it involves three components: restitution, compensation, and satisfaction: see 'Responsibility of States for Internationally Wrongful Acts', UNGA res 56/83 (28 January 2002) arts 34–7.

[116] *Gonzalez et al ('Cotton Field') v Mexico*, Inter-American Court of Human Rights Series C No 205 (16 November 2009) para 450. See also Ruth Rubio-Marín and Clara Sandoval, 'Engendering the Reparations Jurisprudence of the Inter-American Court of Human Rights: The Promise of the *Cotton Field* Judgment' (2011) 33 Human Rights Quarterly 1062.

victims of trafficking should receive 'all necessary benefits', including, where necessary, a migration status.[117] The UN Special Rapporteur on Trafficking in Persons, Especially Women and Children has similarly recommended granting victims a temporary or permanent migration status as a transformative remedy.[118]

In the European system, the ECtHR's recourse to the CoE Anti-Trafficking Convention, as interpreted by GRETA, has the potential to yield similar benefits. In *Chowdury*, the failure of the relevant authorities in Greece to have regard to article 13 of the Anti-Trafficking Convention, which concerns the granting of recovery and reflection periods, was found by the court to give rise to a breach of the positive obligation under article 4 ECHR to conduct an effective investigation.[119] While the court in *Chowdury* did not go so far as to recognize that articles 4 and 13 ECHR (the right to a remedy) could/should give rise to a more general obligation to regularize victims' stay, the judgment is, nevertheless, a significant step in this direction.[120]

5. Conclusion

This chapter has explored the interactions between three regimes: trafficking, refugee law, and human rights law, and, in particular, the latter's specific instruments for the protection of women. In some respects, the regimes diverge sharply in their protective capacities. By adopting an integrated approach, each regime may mitigate some of the others' deficiencies. As the chapter has explored, recourse to human rights standards concerned with gender-based violence should ensure that more victims of trafficking are recognized as refugees. Anti-trafficking measures that suppress mobility may be challenged by reference to human rights law's protection of the right to leave, as well as extraterritorial protection from *refoulement*. Human rights law offers trafficked persons greater protections than the trafficking regime, providing a much-needed protective corrective to the latter's focus on criminalization and migration control. Conversely, human rights law's general failure to establish secure residence rights (even for those protected against *refoulement*) may be mitigated for some victims in Europe by the Istanbul Convention's provisions on regularization. Accordingly, this chapter demonstrates the value of using human rights law to bolster protection for victims of trafficking.

[117] *Zheng v The Netherlands*, UN doc CEDAW/C/42/D/15/2007 (14 November 2008), dissenting opinion of Committee members Mary Shanthi Dairiam, Violeta Neubauer, and Silvia Pimentel (the majority finding the trafficking complaint inadmissible) para 8.7.

[118] UN Human Rights Council, *Report Submitted by the Special Rapporteur on Trafficking in Persons, Especially Women and Children, Joy Ngozi Ezeilo*, UN doc A/66/283 (9 August 2001) paras 16, 41; see also draft principle 7(b).

[119] *Chowdury* (n 107) paras 121–2. See also *EK* (n 103).

[120] The court's reference to GRETA may be crucial here, as GRETA has consistently 'stressed the importance of ensuring that unconditional assistance is provided to victims': GRETA, '8th General Report on GRETA's Activities Covering the Period 1 January to 31 December 2018' (Council of Europe 2019) 6.

CHAPTER 31

REFUGEE STATUS DETERMINATION

BRUCE BURSON

1. Introduction

Refugee status determination (RSD) is the post-Second World War-era term to describe a process by which the asylum norm, now expressed primarily through the Refugee Convention, is operationalized. While the concept of offering sanctuary from harm—'asylum'—is old, little has been written about the surrounding decision-making processes in the Convention's historical antecedents or precursors. This chapter begins by examining the origins of RSD. It charts how contemporary RSD reflects its historical antecedents and questions the robustness of a dichotomy between group and individual determination as a marker of development. It then outlines the increased systemization of RSD through dedicated status determination structures comprising both State and mandate RSD, and juridification via an ever-denser body of law and guidance. It then considers inherent and contextual challenges faced by RSD before detailing various proposals for reform to ensure that RSD is a 'fit-for-purpose' protection mechanism in the twenty-first century.

2. The Origin and Development of RSD

While this section focuses on developments within the European tradition, the concept of 'asylum' is of polycentric provenance. It is rooted in religion: for example, the Ashgabat Declaration observes that 'over 14 centuries ago, Islam laid down the bases for granting refuge, which is now deeply ingrained in Islamic faith, heritage and tradition'.[1] It is also rooted in the conduct of ancient civilizations.[2]

The word 'asylum', however, derives from the Greek *asylia*—inviolability—something enjoyed by persons whose work necessitated travel outside their own State.[3] Significantly, the right to claim or invoke *asylia* was surrounded by a process. At its core was the obligation on the person seeking protection to enter a place of sanctuary, such as a temple or shelter (*asylia hieron*) and perform a rite of supplication (*hiketeia*). Nor was the grant of *asylia* automatic. Rather, supplicants:

> also had to convince the God's priest that they deserved protection, and if they failed to do so, they could be turned away. . . . the God was not obliged to accept and protect every supplicant, just those who had a just claim.[4]

Within the European context this classical practice had, by the Middle Ages, become embedded in 'the custom of kings, princes and potentates, free cities and the church to grant asylum—i.e. protection from pursuit—at will in respective territories or in the holy places'.[5] With the emergence of the nation-State, such long-standing religious or cultural traditions of offering shelter and sanctuary became rooted in an emergent body of international law which now located the asylum norm in terms of extending asylum to erstwhile members of another territorial entity in the nascent system of autonomous States.[6]

The process surrounding granting asylum changed in fundamental ways from its classical progenitors. Whereas earlier processes had been individualized, the newly internationalized system came to embrace group-based recognition. Further, in contrast to the classical tradition, recognition of 'refugee status' entitling asylum in the receiving territory occurred before, rather than post-flight. Recognition took the form of an expression of sovereign power through *ex-ante* declarations of willingness to admit to their territory categories of persons whose refugee-like character had *already* been recognized due to well understood conflict between the group's beliefs and the religious character of the territory of origin.

[1] 'Ashgabat Declaration of the International Ministerial Conference of the Organization of Islamic Cooperation on Refugees in The Muslim World' in 'Letter Dated 23 May 2012 from the Permanent Representative of Kazakhstan to the United Nations Addressed to the Secretary General,' UN doc A/66/816 (12 May 2012) para 2. See further Arafat Madi Shoukri *Refugee Status in Islam: Concepts of Protection in Islamic Tradition and International Law* (IB Tauris 2011).

[2] See Chapter 6 in this volume.

[3] Matthew E Price, *Rethinking Asylum: History, Purpose and Limits* (CUP 2009) 26–31.

[4] Kent J. Rigsby, *Asylia: Territorial Inviolability in the Hellenistic World* (University of California Press 1966) 10, cited in Price (n 3) 27.

[5] Atle Grahl-Madsen, 'The European Tradition of Asylum and the Development of Refugee Law' in Peter Macalister-Smith and Gudmundur Alfredsson (eds), *The Land Beyond: Collected Essays of Refugee Law and Policy by Atle Grahl-Madsen* (Martinus Nijhoff 2001) 34.

[6] Price (n 3) 35–44.

These developments stemmed from the persecution of religious minorities in the pre-modern era. Louis XIV's 1685 Edict of Fontainebleau, prohibiting Protestant Huguenots from leaving France in breach of the understanding reached in the Peace of Westphalia—*jus emigrandi*—which allowed subjects of a religion different to that of their Prince to seek sanctuary in another territory, provided particular impetus.[7] What would now be described as recognition of the refugee-like character of persons exercising their right to *jus emigrandi*, was contained in edicts or proclamations by German princes,[8] English kings,[9] Dutch city magistrates,[10] and Swiss cantons.[11] Some described the beneficiaries of such proclamations as 'refugees'. For example, the 1709 decree by the Estates-General of the United Provinces of the Netherlands stated that 'Protestant refugees shall be acknowledged and received for the future as our subjects; and they shall enjoy the right of Naturalization'.[12] The 1690 Declaration of Privileges for Hamelin confers privileges on '*fluchtlinge*'—the German word for 'refugee'.[13]

In some instances, special privileges were conferred, and financial assistance and material benefits were provided. For example, in England, 'the Queens Charity' amounted to 9d per day for subsistence and lodging;[14] tariff exemption, housing assistance, and support for establishing businesses and manufactories under the Edict of Potsdam;[15] while Dutch city magistrates issued financial grants and discounted rental of specially constructed housing.[16]

Presaging the use of country information in contemporary RSD, these edicts and proclamations often followed a sophisticated lobbying campaign by trans-territorial networks of confessionalized diaspora/refugee populations, which utilized printing presses to 'publish accounts of the refugees' persecution, their sufferings, flight and exile'.[17]

There is also some evidence of a dedicated administrative process operationalizing such recognition. Hornung states 'the refugees usually moved in convoys from their home towns and arrived as groups at the assembly points where all immigrants were registered and their means and circumstances were recorded'. Hornung notes that the Edict of Potsdam instructed Huguenots to head to Amsterdam, Frankfurt, or Cologne where they would be met by a delegate who would transport them in convoys to their

7 Phil Orchard, *A Right to Flee* (CUP 2014) 53.

8 Warren C Scoville, 'The Huguenots and the Diffusion of Technology, Part II' (1952) Journal of Political Economy 392, 399–400. For records of the German edicts, and links to the original texts, see 'Huguenot Edicts' (*The German Huguenot Museum*) <www.huguenot-museum-Germany.com/huguenots/edicts/index.php> accessed 20 December 2018.

9 Warren C. Scoville, 'The Huguenots and the Diffusion of Technology, Part I' (1952) Journal of Political Economy 294, 299.

10 Scoville (n 8) 392–3. 11 ibid 405. 12 ibid 392.

13 The German Huguenot Museum (n 8).

14 The Supplement (Issue 228, 29 June 1709) cited in Orchard (n 7) 66 n 18.

15 Erik Hornung, 'Immigration and the Diffusion of Technology: The Huguenot Diaspora in Prussia' (2014) 1(1) American Economic Review 91.

16 Scoville (n 8) 393.

17 Susanne Lachenicht, 'Refugees and Refugee Protection in the Early Modern Period' (2017) 30(2) JRS 269.

assigned colony or place of settlement.[18] Struggling to cope with the influx of Huguenots, cantonal officials in Geneva opened a 'French Exchange', while their Bernese counterparts established a 'Chamber of Refugees' 'to aid the most necessitous newcomers and to try and find ways to resettle them in other Swiss areas or Germany'.[19] While the exact modalities surrounding Huguenot flight to safety are unclear, it seems reasonable to assume that Huguenot refugees, leveraging connections with trans-territorial networks and taking advantage of the protection and benefits extended under other edicts or proclamations, would also likely have met with some administrative authority on an *ad hoc* basis at the very least, particularly when members of the group were entitled to receive material assistance of some kind.

Yet, it would be a mistake to regard such dealings as a process of 'determination' of a refugee-like status. Given the *ex-ante* nature of the edicts and proclamations, the individual's refugee-like character was largely constituted by their membership of the group and their presence in the receiving territory. To the extent that an individual had to explain their presence, this appears to have involved establishing that they formed part of the subject group. Such an approach to status recognition is reflected in the comment by Sir Erskine May on the English tradition of the 'right' to asylum that 'disaffection to the rulers of his own country is natural to a refugee: his banishment attests it'. [20]

Both group and individuated approaches to recognition have remained elements of RSD in the modern era. Both featured in the inter-war League of Nations regime. The inter-State 'Arrangements' and Conventions of this regime echo historical antecedents by defining a refugee by reference to ethnicity or country of origin. Beyond a requirement that the person be without national protection, these instruments generally made no mention of the reasons for flight, or of an unwillingness to return. This, however, did not wholly preclude individuated assessment. After reviewing reports of the League's Advisory Committee and the international conference leading to the 1938 Convention concerning the Status of Refugees coming from Germany,[21] Jackson argues that while the:

> ... presumption resulting from the general determination of group refugee character involved a lighter burden of proof ... the individual had to show that he had in fact left his country for reasons leading to the *prima facie* determination of group refugee character and to otherwise show that he was a bona fide refugee, e.g. that he had not left his former home country for reasons of pure personal convenience and that he did not continue to maintain relations with the authorities of his country of origin.[22]

[18] Hornung (n 15) 95–6. [19] Scoville (n 8) 405.

[20] Sir Erskine May, 'Liberty of the subject' in *Constitutional History of England*, vol 3 (Longman, Green and Co 1906) 54–7; cited in NW Sibley and Alfred Elias, *The Aliens Act and the Right of Asylum* (Clowes and Sons 1906) 128–9.

[21] Convention Concerning the Status of Refugees Coming from Germany (adopted 10 February 1938) 192 LMTS 59.

[22] Ivor C Jackson, *The Refugee Concept in Group Situations* (Martinus Nijhoff 1999) 25.

Group and individuated elements were again present in the status determination procedures of the International Refugee Organization (IRO). The IRO's 1950 Eligibility Manual outlines a complex eligibility determination process comprising three stages.[23] The first inquired into whether the claimant fell within the IRO constitutional definition of a refugee, for example, as 'victims' of the Nazi, fascist, and associated regimes. Stage two examined whether the applicant was disqualified from being a person of concern, for example as a war criminal. The third stage involved an assessment of 'valid objections to repatriation'. To be a person of concern to the IRO, a person who refused repatriation and who fell within the definition of refugee, must produce 'valid objections to repatriation based on adequate information'.[24] This was an individualized assessment involving the consideration of information provided by the government of the claimant's country of origin to refugees, as well as the claimant's subjective reasons for not wanting to return.

Both group-based and individual determination continues to this day. Group-based RSD, typically comprising *prima facie* recognition, forms a significant component of global RSD. *Prima facie* recognition is utilized by both UNHCR and States where 'readily apparent, objective circumstances' in the claimant's country of origin or habitual residence establish the requisite risk to bring the claimant within the applicable refugee definition.[25] In fact, *prima facie* recognition of refugee status has been a common practice of both States and UNHCR for over 60 years and the majority of the world's refugees are recognized on a *prima facie* basis.

While there is nothing in principle preventing *prima facie* recognition being applied in non-group situations, *prima facie* RSD typically occurs in a group setting where the volume of refugee claimants, or potential claimants, sharing a common characteristic such as national origin, ethnicity, or religion, overwhelms the host State's RSD capacity. *Prima facie* RSD continues to be deployed by both UNHCR[26] and by States[27] when dealing with the arrival of large numbers of asylum seekers. Some African States ground their *prima facie* RSD practice in national asylum legislation, under which a Minister is given legislative power to declare 'refugee status of all individuals belonging to a specific group'.[28] This approach has been applied by a number of African States to

[23] International Refugee Organisation, 'Eligibility Manual' (1950) 5.

[24] Constitution of the International Refugee Organization (adopted 15 December 1946, entered into force 20 August 1948) 18 UNTS 3, annex 1, pt 1, s C(1).

[25] UNHCR, 'Guidelines on International Protection No 11: Prima Facie Recognition of Refugee Status' UN doc HCR/GIP/15/11 (24 June 2015) para 1.

[26] For example, by Jordan in 2005 and Egypt in 2006 dealing with influxes of Iraqi refugees; see Rochelle Davis, Grace Benton, Will Todman, and Emma Murphy, 'Hosting Guests, Creating Citizens: Models of Refugee Administration in Jordan and Egypt' (2017) 36 RSQ 1, 16, 29.

[27] For example, by Germany when dealing with the arrivals of refugees from Syria. See European Council on Refugees and Exiles, 'Asylum Information Database, National Country Report: Germany' (November 2015) 18, 46 <www.refworld.org/docid/565bf04c4.html> accessed 15 September 2019.

[28] UNHCR (n 25) para 30; Matthew Albert, 'Prima Facie Determination of Refugee Status: An Overview and its Legal Foundation' (Refugee Studies Centre 2010) 26.

claims by asylum seekers from Burundi, the Central African Republic, Mali, Nigeria, and South Sudan, amongst others.[29]

This reality is reflected in the Global Compact on Refugees, which recognizes:

> In the context of large refugee movements, group-based protection (such as prima facie recognition of refugee status) can assist in addressing international protection needs, where considered appropriate by the State.[30]

This is not to say that the recognition is conferred on the group, as a group. Rather, recognition of all group members remains individuated. Echoing historical antecedents, the claimant's individual refugee character is recognized by establishing their belonging to a similarly situated group whose refugee-like character is clearly established by objective country information. However, the RSD process may be limited to a registration interview and will typically only deal with matters of inclusion.[31]

This historical overview indicates that the Refugee Convention did not, as is sometimes thought, break new ground by heralding a shift towards individuated status determination from hitherto group-based approaches. Rather, it is possible to see the history of RSD, from historical precursors through to its modern incarnations, involving an ongoing interplay along two intersecting axes of: (a) pre and post-arrival determinations of status; and (b) between group-based, *prima facie* recognition and fully individuated assessments. Depending on the specific national and historical context, the form deployed may have been predominantly one or the other, but both have always been within the toolbox of decision-makers.

3. Systemization of RSD

These historical processes constitute primordial forms of what we now call RSD. Transition to its contemporary form came with the birth of the modern nation-State, which led to an increased systemization of the decision-making process.

This transition was spurred by two trends. First, the emergence of democratic modes of governance in newly established or reconstituted States: Revolutions in France and America, and the break-up of nineteenth-century Europe, created new flows of 'political' refugees, disenfranchised from the State;[32] Secondly, the trend towards regulation of international migration by States throughout the late nineteenth century

[29] UN Executive Committee of the High Commissioner's Programme, 'Refugee Status Determination' EC/67/SC/CRP.12 (31 May 2016) para 8.

[30] UNGA, *Report of the United Nations High Commissioner for Refugees, Part II: the Global Compact on Refugees* UN doc A/73/12(Part II) (2 August 2018) para 61.

[31] UNHCR (n 25) paras 34–6. For overview of Prima Facie Refugee Status Determination see Albert (n 28) 9–14.

[32] Orchard (n 7) 71–6.

and the re-tooling of asylum to include not simply protecting certain fugitives from justice in other States, but also protecting persons who could establish a risk of harm for reasons unconnected to the commission of any crime. As noted by Price: 'in a world of open borders, asylum was needed only by those facing extradition; other persecuted persons were admitted as migrants.'[33] However, as States increasingly codified their immigration laws, asylum progressively expanded 'from an element of international criminal law (a defense to extradition) to a subset of immigration policy (a defense to deportation)'.[34]

The ensuing systemization of status determination has occurred along two broad planes: through the development of a dedicated administrative apparatus for determining status and through increased juridification of the asylum norm, both procedurally and substantively.

a. Administrative Systemization

While early instances of a dedicated State machinery for regularizing the status of refugees existed, the re-tooling of asylum to include persons other than fugitives raised administrative problems. Tellingly, one concern articulated in respect of Britain's 1905 Aliens Act was how its new asylum clause could be implemented in the absence of a pre-existing administrative structure.[35] This stemmed from the fact that the principle of asylum had functioned as traditional policy throughout the nineteenth century 'not by law but by the absence of laws'.[36] Although short-lived, the 1905 Act established an Immigration Board with power to hear appeals against a refusal of entry by an immigration officer.[37] It is unclear whether the Board had power to hear appeals in relation to asylum.[38] However, given that the Act expressly prohibited refusal of entry to 'an immigrant who proves that he is seeking admission' on refugee-like grounds,[39] it seems likely that there would have been a right of appeal to the Board had entry been refused contrary to that prohibition.

Despite large numbers of refugees being produced in the early twentieth century, this did not, on the whole, give rise to dedicated systems of RSD in refugee-receiving League of Nations Member States. Nevertheless, in some instances, concern over the potential admission of a broader range of persons as 'refugees' did lead to a bespoke individuated assessment process. In Belgium, for example, the government established an inter-

[33] Price (n 3) 25. [34] ibid.

[35] Mackenzie Chalmers, 'Minute' in 'Report of the Royal Commission of Alien Immigration—Comments' (HO 45/10241/B37811, Home Office 30 September 1903) cited in Jill Pellew, 'The Home Office and the Aliens Act 1905' (1989) 32 The Historical Journal 372, n 16.

[36] Alison Bashford and Jane McAdam, 'The Right to Asylum; Britain's 1905 Aliens Act and the Right to Asylum' (2014) 33(2) Law and History Review 309, 323, citing Bernard Porter, *The Refugee Question in Mid-Victorian Politics* (CUP 1979) 3.

[37] Sibley and Elias (n 20) 51. [38] ibid appendix II.

[39] Aliens Act 1905 (5 Edw 7 c 13) s 1(3)(d). Sibley and Elias do not explicitly address this.

ministerial commission, presided over by a judge, to decide each case on an individual basis with the applicant being represented by an expert who set out the grounds on which the person claimed to be a refugee.[40]

The move towards a dedicated RSD structure began in earnest with the establishment of the IRO. As Holborn notes, the IRO provided services 'to individuals; and eligibility to receive them would require quite as much investigation as would the eligibility of the recipients of any social benefits'.[41] Foreshadowing contemporary RSD best practice, the IRO developed a sophisticated two-tiered structure involving a first instance interview and decision by an Eligibility Officer, and a right of review to an 'autonomous semi-judicial review board' at which an oral hearing could be requested.[42] Standardized forms were utilized for notification of outcomes and appeals.[43] There was a registration procedure in which the identity of the applicant was established through consideration of available documentation.[44]

The impetus towards systemization was, to some extent, ameliorated by the exigencies of the Cold War, during which status recognition became weaponized as another Cold War tool.[45] State interest in embarrassing Cold War adversaries led to the political weighting of asylum policy and status determination. This was particularly pronounced in the United States where, despite the passing of the 1980 Refugee Act, political weighting of admissions and status determination, which prioritized the admission of persons fleeing communist or communist-dominated countries, endured even after its entry into force.[46] The United States was not alone in this regard. In Canada, too, a 'bureaucratically formulated refugee definition, which focussed on the admission of ideological émigrés from the East Bloc' dominated until Canada's accession to the Refugee Convention and Protocol in 1969.[47]

Administrative systemization of RSD again deepened towards the end of the Cold War era, as intra-State conflict and associated State fragility or failure bred generalized insecurity and violence.[48] While the overwhelming majority of refugees fled—just as today—to proximate States in the Global South, increasing numbers of claimants from a

[40] Jackson (n 22) 23.

[41] Louise W Holborn, *The International Refugee Organisation: A Specialised Agency of the United Nations: It's History and Work 1946–1952* (OUP 1956) 203–4.

[42] IRO, 'Operations Manual' UN/IRO/25 (UNHCR Archives, Geneva (20 April 1950) pt A para A12(02) and appendix 2, 31 viewed 1 February 2019.

[43] ibid 32. [44] ibid pt A, para 11. [45] Orchard (n 7) 2.

[46] Deborah E Anker and Michael H Posner, 'The Forty Years Crisis: A Legislative History of the Refugee Act of 1980' (1981–82) 19 San Diego Law Review 9, 12–20, 69–70; Norman L Zucker and Naomi Flink Zucker, 'From Immigration to Refugee Redefinition: A History of Refugee and Asylum Policy in the United States' in Gil Loescher (ed), *Refugees and the Asylum Dilemma in the West* (Penn State Press 1992) 63; Kathryn M Bockley, 'A Historical Overview of Refugee Legislation: The Deception of Foreign Policy in the Land of Promise' (1995) 21 North Carolina Journal of International Law and Commercial Regulation 253, 282–3.

[47] James C Hathaway, 'The Conundrum of Refugee Protection in Canada: From Control to Compliance to Collective Deterrence' in Gil Loescher (ed) (n 46) 63.

[48] See Theo Farrell and Oliver Schmitt, 'The Causes, Character and Conduct of Internal Armed Conflict and the Effects on Civilian Populations, 1990–2010' Volker Türk, Alice Edwards, and Cornelis Wouters (eds), *In Flight from Violence: UNHCR's Consultations on Refugee Status and Other Forms of International Protection* (CUP 2017) 25–58.

broader variety of source countries sought asylum in developed countries, raising issues which transcended the Cold War 'political refugee' paradigm. In response, status determination in developed countries moved decisively towards a more fine-grained and individuated process than had existed under any historical antecedent, in no small measure driven by a desire to distinguish between genuine and so-called 'bogus' refugee claimants.[49] Specialist refugee decision-making bodies, including at both first instance and appellate level, were established in Canada in 1989,[50] in the United States in 1990,[51] in New Zealand in 1991,[52] and in Australia in 1993.[53]

Other factors have also spurred increased administrative systemization at the national level. For example, in Brazil the establishment in 1991 of specific procedures for processing refugee claims and the establishment in 1997 of the National Committee for Refugees (CONARE) were linked to Brazil's return to democratic governance after decades of dictatorship.[54] In yet other instances, it is the transition of RSD responsibility from UNHCR to the State that has driven systemization. States in the Global South, including those hosting large refugee populations such as Turkey, Kenya, and South Africa, as well as a number of Southeast Asian States such as the Philippines and Cambodia, have also now established specialist administrative RSD units and/or appellate bodies.

Sitting alongside these developments and reflecting the centrality of country information to the assessment of risk, an increasingly sophisticated—and not infrequently contentious—system of country of origin information-reporting has also developed. Well-known examples include the Canadian Immigration and Refugee Board's 'Responses to Information Requests', and the Austrian Centre for Country of Origin and Asylum Research and Documentation (ACCORD). One of the key objectives of the European Asylum Support Office (EASO) is the provision of common country of information bundles and analysis for use in EU Member State RSD.[55]

b. Mandate RSD

A critical component of the administrative systemization of RSD, which emerged in the inter-war period, was the creation of a High Commissioner for Refugees. The

[49] Orchard (n 7) 205.

[50] Rebecca Hamlin, 'International Law and Administrative Insulation: A Comparison of Refugee Status Determination Regimes in the United States, Canada, and Australia' (2012) 37(4) Law and Social Inquiry 933, 947–9.

[51] Deborah Anker and Josh Vittor, 'International Human Rights and US Refugee Law' in Bruce Burson and David James Cantor (eds), *Human Rights and the Refugee Definition: Comparative Legal Practice and Theory* (Brill 2016) 116.

[52] Bruce Burson, 'Give Way to the Right: The Evolving Use of Human Rights in New Zealand Refugee Status Determination' in Burson and Cantor (eds) (n 51) 26–7.

[53] Migration Act 1968 (Cth) s 166J, as repealed by Tribunals Amalgamation Act 2015 (Cth) sch 2.

[54] Liliana Lyra Jubilut, Camila Sombra Muiños de Andrade, and Camila Marques Gilberto, 'Human Rights and Refugee Protection in Brazil' in Burson and Cantor (eds) (n 51) 212–16.

[55] See European Asylum Support Office, 'Country Guidance' <www.easo.europa.eu/country-guidance> accessed 8 April 2019.

transformation of this office into what, post-Second World War, has become UNHCR, is a critical step in the global systemization of RSD, by providing a status determination mechanism where this would otherwise be absent. The UNHCR Statute of 1950[56] excluded the High Commissioner from taking over the IRO's function of determining and certifying individual eligibility, at least on a general basis, meaning that 'the only thing that was left was for the contracting States to determine "refugee character" according to the Refugee Convention 1951'.[57] States were thus intended to assume the primary responsibility for RSD under the contemporary international refugee regime. However, many Contracting States lack any implementing domestic legislation,[58] while others lack the human, technological, and financial resources necessary to competently perform RSD. Significantly, many of the world's refugees are located in countries such as Jordan and Pakistan, which are not parties to the Refugee Convention.

It is into this highly variegated landscape that UNHCR has come to undertake status determination under its mandate—the so-called 'mandate RSD'. According to UNHCR figures, in 2017 it conducted 87,400 status determinations, or some 6 per cent of the global total. While both the volume and percentage fluctuate, mandate RSD comprises a significant part of the global RSD caseload and UNHCR frequently performs more RSD assessments that any other determination body.[59]

Yet, it is a mistake to see global RSD in binary terms, performed by either the State or UNHCR. Rather, RSD systems exist on a structural spectrum, with State-administered RSD at one end and mandate RSD at the other. In between, a variety of forms exist. These include RSD performed by ministerial or inter-agency committees on which UNHCR representatives may sit or provide advice, or where the UNHCR is an *ex officio* member of specialist appellant tribunals.[60] In some national settings in the Global South, UNHCR performs RSD for certain caseloads, with national bodies performing RSD for others, as is the case in Turkey.[61]

c. Juridification

Juridification of RSD began in earnest under the IRO. Decisions by Eligibility Officers were collated in the IRO's Geneva headquarters, which produced, at first in 1948, a

[56] 'Statute of the Office of the High Commissioner for Refugees', UNGA res 428(v) (14 December 1950) para 2.

[57] Atle Grahl-Madsen, 'The Emergent International Law Relating to Refugees' in Macalister-Smith and Alfredsson (eds) (n 5) 197.

[58] eg Egypt; Davis and others (n 26) 28.

[59] See, by way of illustration, UNHCR, 'Global Trends: Forced Displacement in 2017' (2018) 40, table 2.

[60] As in New Zealand, Immigration Act 2009 s 219(1)(c).

[61] UNHCR, 'Turkey: Strengthening a Quality Asylum System' (August 2018) <www.unhcr.org/tr/wp-content/uploads/sites/14/2018/09/03.-UNHCR-Turkey-Strengthening-a-Quality-Asylum-System-Fact-sheet-Au....pdf> accessed 25 September 2019.

Policy Guide which was expanded in May 1950 to a Manual for Eligibility Officers.[62] The Manual was a sophisticated document, running to 163 pages. It deals with matters of process, evidence, and the burden of proof, as well as substantive interpretive guidance drawn from individual eligibility decisions, brief summations of which are set out in each section. The Manual provided detailed guidance on matters of both inclusion and exclusion, often in terms that foreshadow many issues that resonate in contemporary RSD. For example, the Manual noted that:

> . . . not only is proof or disproof extraordinarily hard, but also motives of the objector are usually mixed, and the expressed statement likely inadequately to represent the true objection or contain relevant points by implication only. Every attempt should be made to discover what are an applicant's real objections . . .[63]

Juridification of RSD was significantly boosted in the late 1980s and early 1990s as refugee cases began to feature increasingly in judicial caseloads. Courts and the newly established specialist tribunals were required to grapple with the fundamentals of the Convention's refugee definition with increasing sophistication as industrialized States, confronted with increased refugee flows, pushed back through a range of restrictive interpretations. This has led to an increasingly dense body of refugee law. The post-Cold War phase witnessed an explosion of international jurisprudence with national jurisdictions examining various elements of the refugee definition, including the nature of the well-founded fear element, the degree of risk to be established,[64] and the meaning of 'being persecuted'.[65] This phase also witnessed the publication of influential legal texts, such as Goodwin-Gill's *The Refugee in International Law* in 1983 and Hathaway's *The Law of Refugee Status* in 1992, as well as the emergence, in January 1989, of the *International Journal of Refugee Law*.[66] In 1997, the International Association of Refugee Law Judges (IARLJ), a forum to promote inter-jurisdictional dialogue, was established, with one of its principal aims being to ensure that RSD is 'subject to the rule of law'.[67]

[62] IRO, 'Manual for Eligibility Officers' (UNHCR Archives, Geneva, viewed 1 February 2019).

[63] ibid 22–3, para 11. In relation to exclusion, the Manual refers to the difficulty in preventing a 'flagrant breach of the IRO constitution' by allowing war criminals to receive assistance, when the IRO 'was not equipped to conduct [a] criminal investigation' (36, para 6).

[64] eg *INS v Cardozo-Fonseca*, 467 US 407 (1987) (US Supreme Court); *R v Secretary of State for the Home Department, ex parte Sivakumaran* [1988] AC 958, [1988] 1 All ER 193 (House of Lords); *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 (High Court of Australia).

[65] eg *Canada (Attorney General) v Ward* 1993 Carswell Nat 1382, [1993] 2 SCR 689 (Supreme Court Canada).

[66] The maiden editorial proclaims the Journal's 'primary objective being to stimulate research and thinking on refugee law and its development, and to provide a natural, though by no means exclusive forum for discussion and dissemination of the results or research', 'Refugee law and the Protection of Refugees' (1989) 1(1) IJRL 2. See Guy S Goodwin-Gill, *The Refugee in International Law* (1st edn, OUP 1983); James C Hathaway, *The Law of Refugee Status* (1st edn, CUP 1992).

[67] The Constitution of the International Association of Refugee and Migration Judges (adopted 18 September 1997, entered into force 16 November 2018) para 1(2)(1) <https://www.iarmj.org/images/2019/constitution_2019/IARMJConstitution_English_Final_19March2019.pdf> (accessed 1 April 2019).

Further juridification has come in the form of Guidance Notes issued to manage caseloads in high-volume systems, specifying how to deal with types of claim or thematic issues such as credibility assessment.[68] General country guidance cases have also contributed. Developed in 2004–05, the United Kingdom has perhaps the most well-known, comprehensive approach.[69]

At the global level, the issuing of UNHCR's Handbook in 1979 constituted an early form of guidance.[70] Over the following years, UNHCR has periodically supplemented the Handbook with thematic position papers and, from 2002 following the global consultations process, with a series of Guidance Notes on International Protection (GIPs).[71] GIPs are intended to provide 'UNHCR's authoritative legal position on the various interpretive issues that arise and to provide legal guidance for governments and [legal] practitioners'.[72] UNHCR also periodically issues Eligibility Guidelines on a country-specific basis, setting out UNHCR's position as to categories of persons who, taking into account UNHCR's assessment of country conditions, should be regarded as being eligible for recognition as refugees. While acknowledged by courts and tribunals as an important source of guidance, the persuasive force of the Handbook is undermined by its age, lack of reference to case law and, in places, internal inconsistencies.[73] Concerns have been raised that UNHCR's guidance, more generally, also suffers from relevance, consistency and impartiality-related concerns, meaning 'UNHCR guidance is not always embraced with enthusiasm' by decision-makers or courts.[74]

4. Challenges

RSD faces challenges as increasing numbers of persons seek protection abroad due to the effects—often combined—of conflict and violence, socio-economic marginalization and poverty and, increasingly, disasters and the adverse effects of climate change.

[68] Examples include the Canadian Immigration and Refugee Board 'Chairperson's Guidelines' <https://irb-cisr.gc.ca/en/legal-policy/policies/Pages/chairperson-guideline.aspx> accessed 12 March 2018; Guidelines of the Australian Administrative Appeal Tribunal, Migration and Refugee Division, 'Guidelines on the Assessment of Credibility' <https://www.aat.gov.au/AAT/media/AAT/Files/MRD%20documents/Legislation%20Policies%20Guidelines/Guidelines-on-Assessment-of-Credibility.pdf> accessed 24 December 2019.

[69] Sir Nicholas Blake, 'Luxembourg, Strasbourg and the National Court: The Emergence of a Country Guidance System for Refugee and Human Rights Protection' (2013) 25 IJRL 349.

[70] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/1P/4/ENG/REV.4 (1979, reissued 2019).

[71] GIPs 1–13 can be found in ibid 83–252.

[72] Volker Türk, 'Introductory Note to UNHCR Guidelines on International Protection' (2003) 15 IJRL 303, 303.

[73] Katie O'Byrne, 'Is there a *Need* for Better Supervision of the Refugee Convention?' (2013) 2 JRS 330, 339–41.

[74] ibid; Guy S Goodwin-Gill, 'The Search for the One, True Meaning…' in Guy S Goodwin-Gill and Hélène Lambert (eds), *The Limits of Transnational Law: Refugee Policy Harmonization and Judicial Dialogue in the European Union* (CUP 2010) 224–7.

a. Limits of Access

Only a small portion of the world's refugees have access to sophisticated RSD systems. The vast majority—by reason of geography and limited financial capacity—are located in countries proximate to the country of origin with no or limited RSD systems. Yet, since the 1990s, refugee-receiving developed States have established many—and often highly controversial—policies aimed at making it more difficult and less desirable for persons to seek access to their RSD systems. Examples include the use of accelerated procedures, safe third country and country-of-first-asylum practices, the imposition of carrier sanctions, increased detention, interdiction, and, perhaps most controversially, off-shore processing.[75]

As Kagan pointedly observes, 'individual status determination is extremely resource intensive, at least when done fairly'.[76] Yet, continued under-resourcing contributes to backlogs within RSD systems, which further limits access. Other factors also contribute. In his recent study, Barbour points to 'systemic issues that result in inefficiencies or reduced output over a sustained period'.[77] These include inadequate management, case management tools and techniques, scheduling deficiencies and prejudice against RSD itself.[78] Backlogs are an enduring and significant problem as the decision-making capacity of RSD systems—both mandate and State—fall far short of caseload flows.[79]

b. 'Refugee Roulette/Lottery'

Fundamentally, the 'refugee roulette' (or lottery) concept speaks to the concern that:

> The outcome of an application for asylum should not be a lottery depending on which country the asylum seeker lands up in or who the asylum Judge is. The least [he/she] can expect is that a decision will be taken on the merits of the case, and not the demerits of the system making the decision.[80]

The problem derives, in part, from a lacuna in the 1951 Refugee Convention. While containing a universally applicable refugee definition,[81] it prescribes no process by which States parties are to determine to whom that definition applied. Instead, States

[75] See Chapters 27, 32, and 48 in this volume.

[76] Michael Kagan, '(Avoiding) The End of Refugee Status Determination' (2017) 9 Journal of Human Rights Practice 199.

[77] Brian Babour, 'Refugee Status Determination and Backlog Prevention and Reduction', UNHCR Legal and Protection Policy Research Series, PPLA/2018/3 (January 2018) 4.

[78] ibid 6.

[79] See Kagan's 'Decision Capacity Ratio' analysis in Michael Kagan, 'UNHCR Faces an RSD Crisis', *RefLaw* (10 November 2014) <www.reflaw.org/unhcr-faces-an-rsd-crisis> accessed 26 March 2019.

[80] Geoffrey Care, 'Judicial Remedies on the Merits' in Geoffrey Care and Hugo Storey (eds), *Report and Papers of the First International Judicial Conference on Asylum Law* (Steering Committee of the Judicial Conference on Asylum Law 1996) 163.

[81] Albeit one in which in its original form of events occurring before January 1951 and which gave States parties the options of declaring that definition will be related to events occurring only in Europe as opposed to Europe and elsewhere—see Refugee Convention art 1B(1).

have developed their own RSD processes. International human rights law jurisprudence of both universal and regional human rights treaty bodies,[82] regional frameworks,[83] and domestic law have to some extent filled the gap by providing some minimum access and process-related guarantees. Something of a 'consensus has emerged concerning the constituent elements of RSD', prevalent in RSD practice in both the Global North and South. This includes the need for an interview, the possibility of legal representation, and an opportunity for an independent review.[84]

Nevertheless, concerns remain that State reform of domestic RSD processes has emphasized efficiency and deterrence over fairness.[85] Variations in RSD structures and processes continue to perpetuate refugee roulette. Hamlin's comparative study of RSD outcomes in respect of the same caseload in Australia, the United States, and Canada concluded that the structure of the RSD system in each country was one of the most important variables in explaining the difference in outcomes, in particular the degree of 'administrative insulation' RSD decision-making bodies enjoyed 'from the exclusionary politics of deterrence'.[86] Hamlin argues:

> when administrative insulation is low, courts engage in turf wars as they try to limit legislative and executive interference. Thus, RSD outcomes depend on the institutional players that end up dominating the process, the level of contention between actors, and the degree of simplification in the decision-making process.[87]

Beyond the structuring of RSD systems, the use of binding legislative and/or regional overlays to the Convention definition feeds disjuncture between the intended definitional universalism and a national-level determinism of RSD. Divergent national contexts and operating frameworks, as well as differing conceptualizations and methodologies, impact upon the potential of international human rights law to advance the quest for the 'single autonomous meaning' of the Convention definition.[88] This creates the potential for an increased fragmentation of global RSD into jurisdictional silos and dissonance in the global refugee protection regime in terms of outcomes, particularly in those cases outside the classical 'political' refugee paradigm, such as domestic and gender-based violence.

[82] See discussion by David James Cantor, 'Reframing Relationships: Revisiting the Procedural Standards of Refugee Status Determination in Light of Recent Human Rights Treaty Body Jurisprudence' (2014) 34 RSQ 79.

[83] For example, the Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status [2005] OJ L326/13.

[84] Martin Jones and France Houle, 'Building a Better Refugee Status Determination System: Introduction' (2008) 25(2) Refuge 3, 5.

[85] ibid 7; Peter V Billings, 'A Comparative Analysis of Administrative and Adjudicative Systems for Determining Refugee Claims' (2000) 52 Administrative Law Review 253.

[86] Hamlin (n 50) 395. See also, relating to Australia: Linda Kirk, 'Island Nation' Bruce Burson and David James Cantor (eds) (n 51) 49.

[87] Hamlin (n 50) 395.

[88] Bruce Burson and David James Cantor, 'Interpreting the Refugee Definition via Human Rights Standards' Bruce Burson and David James Cantor (eds) (n 51) 22.

The development of the Common European Asylum System has contributed to greater harmonization at the regional level, with the Court of Justice of the European Union now able to provide, on referral, an advisory opinion as to the correct interpretation of the refugee definition in the EU Qualification Directive. Nevertheless, even in this regional system, 'as asylum processes remain national, many divergences in outcomes and treatment of refugees persist'.[89]

An in-depth study of RSD in the United States revealed wide-ranging disparities in outcomes between different decision-makers. Studies in relation to Canada[90] and the Netherlands[91] raise similar concerns. Describing 'amazing disparities in grant rates', the United States study demonstrated how:

> the chance of winning asylum was strongly affected not only by the random assignment of a case to a particular immigration judge, but also in very large measure by the quality of an applicant's legal representation, by the gender of the immigration judge, and by the immigration judge's work experience prior to appointment.[92]

Beyond these macro-structural issues, at the micro-level, RSD based on individualized decision-making carries an inherent potential to perpetuate the refugee roulette syndrome. RSD is a difficult exercise. A senior United Kingdom judge has characterized RSD as involving making 'a possible life-and-death decision extracted from shreds of evidence and subjective impressions', in a jurisdiction that 'has neither the falsifiability of a science nor the completeness of an art'.[93] Language and information barriers, as well as sociocultural disconnects between the claimant and decision-maker, each play a part. Numerous studies have highlighted concerns around credibility assessments, a central component of the RSD process.[94]

Steps have been taken to ameliorate the roulette or lottery potential that inheres in individualized decision-making. The training of judges and decision-makers takes place both domestically and via organizations such as the IARMJ.[95] As already noted, in some jurisdictions, guidelines have been developed and 'country guidance' cases issued.

[89] Cathryn Costello and Minos Mouzourakis, 'The Common European Asylum System: Where Did It All Go Wrong?' in Maria Fletcher, Ester Herlin-Karnell and Claudio Matera (eds), *The European Union as an Area of Freedom, Security and Justice* (Routledge 2017) 265.

[90] Sean Rehaag, 'Troubling Patterns in Canadian Refugee Adjudication' (2008) 39 Ottawa Law Review 335.

[91] Peter Mascini, 'Explaining Inequality in the Implementation of Asylum Law' (2008) 25(2) Refuge 164.

[92] Jaya Ramji-Nogales, Andrew I Schoenholtz, and Phillip G Schrag, 'Refugee Roulette: Disparities in Asylum Adjudication' (2007) 60 Stanford Law Review 295.

[93] Sir Stephen Sedley, 'Asylum: Can the Judiciary Maintain its Independence?' in *Stemming the Tide or Keeping the Balance—The Role of the Judiciary* (International Association of Refugee Law Judges 2003) 324–5.

[94] See eg Hilary Evans-Cameron, *Refugee Law's Fact Finding Crisis; Truth Risk and the Wrong Mistake* (CUP 2018).

[95] Now the International Association of Refugee and Migration Judges.

Nevertheless, it is unlikely that such initiatives will entirely eliminate disparities in individualized and credibility-centred RSD decision-making.

Significant criticism of mandate RSD emerged in a 1999 article,[96] which highlighted how underfunding, institutional culture and process-related deficiencies including a lack of general guidelines, limited access to legal representation and files, and inadequate reasoning undermined its integrity. Ongoing concerns about the quality of mandate RSD has been repeatedly voiced, with catalytic effect.[97] In 2003, UNHCR issued procedural guidelines that cover all aspects of the RSD process, from reception and registration of asylum seekers through to substantive determination.[98] Elements relating to issues such as legal representation[99] and the use of interpreters[100] were updated in 2016.

c. First amongst Equals? RSD as but one Protection Tool

RSD is a means to a protection end, not an end in itself. Whether State or mandate, group-based/*prima facie*, fully individuated, or something in between, RSD is but one protection-oriented tool. Indeed, most refugees obtain some form of protection without ever going through anything other than a basic registration procedure. In some instances, refugees themselves question the need for RSD to achieve a protection outcome. One recent study has shown a clear preference to avoid applying for refugee status where the benefits can be obtained through relying on other processes, both formal and informal.[101]

Even when RSD is a potentially available tool, in some instances and particularly in situations of mass influx, refugees are dealt with outside RSD procedures altogether, with States relying on temporary protection mechanisms or bilateral/regional agreements conferring rights of entry, stay, and livelihood entitlements.[102]

These realities are recognized by UNHCR, which affirms that where a refugee 'is assured of all the safeguards of refugee status, including protection from refoulement

[96] Michael Alexander, 'Refugee Status Determination Conducted by UNHCR' (1999) 11(2) IJRL 251.

[97] See eg Michael Kagan, 'Frontier Justice: Legal Aid and UNHCR Refugee Status Determination in Egypt' (2006) 19(1) JRS 45–68.

[98] UNHCR, 'Procedural Standards for Refugee Status Determination under the UNHCR's Mandate' (November 2003) <www.unhcr.org/4317223c9.pdf> accessed 7 March 2019.

[99] UNHCR, Procedural Standards for Refugee Status Determination under the UNHCR's Mandate: 2.7 Legal Representation in UNHCR's RSD Procedure' (2016) <www.refworld.org/docid/56baf2c84.html> accessed 7 March 2019.

[100] UNHCR, 'Procedural Standards for Refugee Status Determination under UNHCR's Mandate: 2.5 Interpretation in UNHCR RSD Procedure' (2016) <www.refworld.org/docid/56baf2634.html> accessed 7 March 2019.

[101] Georgina Cole, 'Questioning the Value of "Refugee" Status and its Primary Vanguard: The Case of Eritreans in Uganda' (Refugee Studies Centre May 2018). See Chapter 37 in this volume.

[102] For example, the treatment of Sudanese refugees in Egypt prior to 1995 and the treatment of Syrian refugees by Jordan; see Davis and others (n 26) 19.

and access to rights' there may be little need to engage in RSD.[103] To this end, UNHCR is currently exploring 'alternative protection interventions' that do not require RSD for every individual, but ensure protection and lay foundations for durable solutions.[104] That appropriate protection outcomes for refugees may be derived from non-RSD processes is also expressly contemplated by the Global Compact on Refugees.[105]

For most of the world's refugees, RSD is a luxury good. Many of the countries in the Middle East and Asia are not parties to the Refugee Convention, and yet four of the top six refugee-hosting States are in these regions. Despite being a 'zone of exception' to the Refugee Convention, refugee protection is nevertheless extended through a 'law of asylum', which draws on 'a variety of sources: international human rights law, local constitutional law, local legislation and delegated legislation, and other local legal norms'.[106]

5. Reform

Enduring concerns about the functioning and quality of global RSD has spurred repeated calls for overhaul. A key concern is whether a system based on individuated assessment is politically and financially sustainable. Recognizing the need for reform to relieve pressure on global RSD systems, UNHCR has proposed a new strategic direction revolving around three key areas: increasing the efficiency of RSD, improving the quality of RSD, and sustaining State assumption of responsibility for RSD. UNHCR argues:

> The urgency to implement a more strategic approach to case processing was also underscored by the global rise in refugee numbers and the need to enhance the capacity of UNHCR to respond to the increased number of individual applications. It is important therefore to review the circumstances under which it is essential to conduct RSD, consider how it can be streamlined, and where protection might be provided through other frameworks.[107]

Proposals for reform have included an enhanced role for the International Court of Justice, which under article 38 of the Refugee Convention and article IV of the 1967 Protocol, has jurisdiction to settle disputes between the parties as to matters of interpretation. While this might be a decisive way to resolve disputes, no referrals have been made to date and there is a general reluctance amongst States to resort to advisory

[103] UN Executive Committee of the High Commissioner's Programme (n 29) para 5.

[104] ibid para 7.

[105] UNGA (n 30) para 94.

[106] Martin Jones, 'Expanding the Frontiers of Refugee Law: Developing a Broader Law of Asylum in the Middle East and Europe' (2017) 9 Journal of Human Rights Practice 212, 213–41. A similar point is made by David James Cantor, 'The End of Refugee Law' (2017) 9 Journal of Human Rights Practice 203.

[107] UN Executive Committee of the High Commissioner's Programme (n 29) para 5.

opinions.[108] The formation of an international judicial RSD body under the auspices of UNHCR has also been mooted.[109]

More process-related proposals for reform argue for a greater role for group-based determination. Concerned with problems caused by backlogs and delays associated with individualized RSD, Kagan proposes the random sampling of cases from selected refugee populations within a year of arrival on an individual basis, from which the results would be used for group-based determination in respect of the remainder. Under this approach:

> …individual status determination might function somewhat like an audit; by pulling cases at random for closer evaluation, a government could be reassured that a group based system of refugee recognition could be justified.[110]

Durieux also makes the case for greater efficiency in RSD via enhanced group-based approaches, albeit in conjunction with an individualized assessment. He proposes a 'group-at-risk' methodology, by which *prima facie* refugee groups are identified which, he argues, offers 'interesting evidentiary shortcuts in refugee status determination, thereby reducing the complexity and opacity of procedures and lightening the burden of proof for the applicant'.[111]

Finally, States may increasingly seek the greater use of technology in RSD. States are already making use of artificial intelligence (AI) and automated decision-making systems in the immigration sphere, including a pilot project in Latvia, Hungary, and Greece which uses AI to monitor passengers' faces for signs of lying.[112] As to these, Molinar raises general concerns including issues of consent, data-security, bias, and lack of accountability. Of more specific concern to the extension of these technologies into RSD, Molinar rightly questions, can 'an automated decision-making system account for trauma and its effects on an asylum seeker's memory, or for cultural differences in communication'.[113]

A human-centred approach to credibility and risk assessment certainly has its flaws. Yet, it remains far from clear that automated decision-making would perform any better and, more importantly, that claimants would welcome their predicament being assessed

[108] Walter Kälin, 'Supervising the 1951 Refugee Convention' in Erika Feller, Volker Türk, and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on Refugee Protection* (CUP 2003) 613, 655.

[109] Anthony M North and Joyce Chia, 'Towards Convergence in the Interpretation of the Refugee Convention: A Proposal for the Establishment of an International Judicial Commission for Refugees' (2006) 25 Australian Year Book of International Law 105; 'Roundtable of the Future of Refugee Convention Supervision: Summary Conclusions' (2013) 26(3) JRS 327, 328 para 5.

[110] Kagan (n 76) 201.

[111] Jean-François Durieux, 'The Many Faces of "Prima Facie": Group-Based Evidence in Refugee Status Determination' (2008) 25(2) Refuge 154.

[112] Petra Molinar, 'New Technologies in Migration: Human Rights Impacts' (2019) 61 Forced Migration Review 7, 8 <www.fmreview.org/ethics/molnar> accessed 19 September 2019.

[113] ibid 8. See also Chapter 56 in this volume.

by a machine. Great caution is warranted. Moreover, removing the human element from a decision-making process which has the protection of *human* rights as a core objective, devalues the process as a means by which the legal content of the shared humanity of claimant and decision-maker is able to be affirmed.

6. Conclusion

The phenomenon of RSD has deep historical roots grounded in processes that give effect to ancient norms of offering asylum or sanctuary. While under enormous pressure, and something available to only a fraction of the world's refugees, it is wrong to regard RSD as an anachronism or past its 'use-by date'. Challenges—both inherent and structural in nature—undoubtedly exist, but RSD will continue to be a critical tool—whether conducted by States or by UNHCR—for dealing with claims for protection in the twenty-first century.

CHAPTER 32

ASYLUM PROCEDURE

ÁLVARO BOTERO AND JENS VEDSTED-HANSEN

1. Introduction

This chapter examines the standards on asylum procedures that apply within various regulatory contexts. In terms of thematic delimitation, the focus is on the standards pertaining to the examination of those applications for asylum that have been submitted to the authorities of the State from which protection is sought. Thus, the issue of access to jurisdiction, be it territorial or otherwise, and to the examination procedures of the relevant State, as well as procedural safeguards in connection with border controls, will not be further explored.[1]

The chapter's normative focus includes not only the standards for determination of refugee status under the Refugee Convention and Protocol, but also those concerning the examination of applications for complementary or subsidiary forms of protection as well as those operationalizing the regional refugee definitions. Nonetheless, the legal interaction between asylum procedures and Convention refugee status will be the starting point (Section 2).[2] As the Refugee Convention is scant on procedural standards, soft law standards that partly fill the normative gap will be discussed (Section 3). In addition, procedural standards concerning subsidiary or complementary protection that have been developed on the basis of human rights norms prohibiting *refoulement* beyond the scope of the Refugee Convention will be examined (Section 4). Human rights treaties generally include the right to effective remedies at national level and are therefore relevant for the administrative or/and judicial procedures that apply when States parties to such treaties examine asylum applications. Although directly linked to

[1] See Chapters 27 and 48 in this volume.

[2] The term 'asylum procedures' is used when referring in general to the standards dealt with in this chapter. The terms 'asylum procedures' and 'determination of refugee status' will be used interchangeably in specific references to the procedures aimed at operationalizing the Refugee Convention definition. For an examination of the latter, see also Chapter 31 in this volume.

the protection against *refoulement* under human rights treaties, the requirement of effective remedies has indirect effect for procedures concerning the determination of Convention refugee status.

2. The Refugee Convention and Asylum Procedures

Procedural standards are apparently absent from the Refugee Convention. The existence of asylum procedures at national level is, however, presupposed in article 9 of the Convention according to which provisional measures considered essential to national security in time of war or other grave and exceptional circumstances may be taken in the case of a particular person 'pending a determination by the Contracting State that that person is in fact a refugee'. Similarly, article 31 allows Contracting States to apply necessary restrictions on refugees' movements 'until their status in the country is regularized or they obtain admission into another country', again alluding to national procedure to examine the legal status of (persons claiming to be) refugees. Although the Refugee Convention does not include any procedural requirements, it imposes an implicit duty to establish administrative or judicial mechanisms that are able to deal meaningfully with applications for asylum.[3] The alternative would arguably be for States to treat any asylum seeker[4] in accordance with the protection standards laid down in the Refugee Convention until properly deciding that the applicant falls outside the scope of the Convention refugee definition.[5]

The obligation to establish asylum procedures does not include any specific requirements as to their design or implementation, hence the Refugee Convention creates a duty of result rather than one of formalized process. This duty is to be seen in the light of the general principle that recognition of refugee status is a *declaratory* act, as explained in the UNHCR dictum:

[3] cf Andreas Zimmermann and Claudia Mahler, 'Article 1 A, para 2' in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. A Commentary* (OUP 2011) 314.

[4] Having no specific meaning in international law, the term 'asylum seeker' is used as a general reference to persons requesting protection under the Refugee Convention or any other international instrument providing for international protection as mentioned in this chapter.

[5] cf James C Hathaway, *The Rights of Refugees under International Law* (CUP 2005) 184–5, 278; Rainer Hofmann and Tillmann Löhr, 'Introduction to Chapter V: Requirements for Refugee Determination Procedures' in Zimmermann (ed) (n 3) 1126; James C Hathaway and Michelle Foster, *The Law of Refugee Status* (2nd edn, CUP 2014) 1, 26.

> A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. *Recognition of his refugee status does not therefore make him a refugee* but declares him to be one. He does not become a refugee because of recognition, but is *recognized because he is a refugee*.[6]

As recognition is not constitutive of refugee status and therefore immaterial to the acquisition of such status, States' obligations towards refugees under the Refugee Convention are not contingent on formal recognition.[7] Hence, the procedures to be established by each State serve the crucial purpose of identifying persons who fall within the definition in article 1 of the Convention and who are therefore entitled to be treated in accordance with articles 2 to 34 of the Convention.[8] In practice, such procedures also serve to identify persons in need of complementary or subsidiary protection under regional refugee definitions or human rights treaties, often by way of an alternative examination if the applicant is found not to be eligible for Convention refugee status.[9]

In line with this purpose, while individual States will differ in form and style,[10] national examination procedures must be designed and conducted in such a way as to ensure compliance with the obligations undertaken by Contracting States to the Refugee Convention, in accordance with the obligation to perform treaty obligations in good faith and the principle of effectiveness as generally recognized in international law.[11] Due to the absence of specific procedural requirements in the Convention itself, a number of 'soft law' standards have been adopted by various international and regional bodies in order to supplement the Refugee Convention and provide States with guidance on how to comply with their obligations under the Convention. The following sections will account for the most important amongst those standards.

[6] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/1P/4/ENG/REV.4 (1979, reissued 2019) para 28 (emphasis added).

[7] cf Hathaway (n 5) 158–9, 184–5, 278; Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (2nd edn, OUP 2007) 158–60, 184, 278; Zimmermann and Mahler (n 3) 299, 314; Hathaway and Foster (n 5) 1, 25–6.

[8] cf Zimmermann and Mahler (n 3) 313–14; Jens Vedsted-Hansen, 'The Asylum Procedures and the Assessment of Asylum Requests' in Vincent Chetail and Céline Bauloz (eds), *Research Handbook on International Law and Migration* (Edward Elgar 2014) 439–41; see also UNHCR (n 6) para 189.

[9] cf Ruma Mandal, 'Protection Mechanisms Outside of the 1951 Convention ("Complementary Protection")', UNHCR Legal and Protection Policy Research Series, PPLA/2005/02 (2005) 49–55 <https://www.unhcr.org/435dfoaa2.pdf> accessed 22 April 2020. On asylum systems examining eligibility for both forms of protection in one single procedure, see Section 3.d.

[10] A significant distinction in this regard is to be made between adversarial and inquisitorial procedures; see Rebecca Hamlin, *Let Me be a Refugee: Administrative Justice and the Politics of Asylum in the United States, Canada and Australia* (OUP 2014) 18.

[11] cf article 26 of the Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331; see also Hofmann and Löhr (n 5) 1100.

3. Standards for the Determination of Refugee Status

a. Individual versus *Prima Facie* Recognition of Refugee Status

Reflecting the Refugee Convention's focus on individuals meeting the criteria in the refugee definition,[12] asylum procedures have traditionally aimed at the determination of the status of each individual applicant, particularly in the Global North. This has resulted in the development of detailed procedural safeguards for asylum seekers as well as the often strict scrutiny of the evidence presented by asylum seekers and of their individual credibility.[13]

At the same time, however, it is widely recognized that such individualized procedures are not always practically feasible and also not always necessary. In situations where entire groups have been displaced, often on a large scale, under circumstances indicating that members of the group can be considered individually as refugees, States as well as UNHCR have resorted to 'group determination' of refugee status in which each member of the group is considered *prima facie* as a refugee.[14] Thus, members of the group in question are presumed to be refugees in the absence of evidence to the contrary relating to individual persons, including possibly the basis for application of the exclusion clauses in article 1F of the Refugee Convention.[15]

Importantly, however, *prima facie* recognition may also be an appropriate approach in individualized asylum procedures where the presumption of refugee status can facilitate evidentiary assessment with a view to simplifying or accelerating the examination of individual applications for asylum.[16]

b. Status Determination by States, by UNHCR, and Jointly by States and UNHCR

As stated above, it is incumbent on the Contracting States to the Refugee Convention to have in place Refugee Status Determination (RSD) procedures, yet their organizational design and operation have been largely left to States, with domestic constitutional and administrative structures determining both first instance and appeal proceedings.[17]

[12] cf James C Hathaway, *The Law of Refugee Status* (Butterworths 1991) 24–7.

[13] See Chapter 33 in this volume.

[14] cf UNHCR (n 6) para 44; UNHCR, 'Guidelines on International Protection No. 11: Prima Facie Recognition of Refugee Status,' HCR/GIP/15/11 (24 June 2015).

[15] cf UNHCR (n 14) paras 18–21.

[16] cf ibid paras 40–1.

[17] cf UNHCR (n 6) para 189.

Some States have received technical or legal assistance from UNHCR, ranging from assistance during the establishment of national asylum systems to UNHCR itself carrying out RSD. In some instances UNHCR is involved in the conduct of national asylum procedures by participating in State-run RSD processes.[18]

If operating in States that are not parties to the Refugee Convention, UNHCR carries out RSD on the basis of the mandate laid down in the organization's Statute.[19] The organizational modalities and procedural standards for such mandate RSD activities have been decided by UNHCR itself, partially influenced by recommendations from the UNHCR Executive Committee (ExCom).[20] Notably, while UNHCR procedures also focus on individual persons, UNHCR frequently determines eligibility for refugee status on a 'group basis', in particular in situations of large-scale refugee movements or where conditions have substantially the same effect on a large population.[21]

By 1977, UNHCR ExCom '[n]oted that only a limited number of States Parties to the 1951 Convention and the 1967 Protocol had established procedures for the formal determination of refugee status under these instruments'.[22] Since then, States have increasingly established asylum or RSD procedures, moving from 148 States or territories with asylum procedures in 2002 to at least 173 with these kinds of procedures by the end of 2018.[23] Over the years, there has also been a decreasing shift in the joint procedures (those conducted between governments and UNHCR) from 11 in 2002 to five in 2018.[24]

c. Soft Law Standards relating to the Refugee Convention

In order to fill the normative gap resulting from the absence of procedural standards in the Refugee Convention, UNHCR's ExCom, composed of Contracting States as well as some non-parties to the Convention, has adopted minimum recommended standards. As the basic requirements for national determination of refugee status, ExCom adopted as early as 1977 a number of recommended standards. These include (1) ensuring that

[18] On the various forms of UNHCR cooperation with States, see Chapter 31 in this volume.

[19] 'Statute of the Office of the United Nations High Commissioner for Refugees', UNGA res 428 (V) (14 December 1950); the personal scope of competence of the UNHCR is defined in paras 6 and 7, largely reflecting the refugee definition laid down in article 1 of the Refugee Convention, and the protection mandate is described in paras 8 and 9 of the Statute.

[20] See in particular UNHCR, 'Procedural Standards for Refugee Status Determination under UNHCR's Mandate' (2005) <https://www.unhcr.org/4317223c9.pdf> accessed 29 March 2020; on criticism raised against UNHCR status determination, see Chapter 31 in this volume with further references.

[21] ibid 1–1 Introduction.

[22] UNHCR ExCom Conclusion No 8 (XXVIII), 'Determination of Refugee Status' (1977) para (b).

[23] UNHCR, *UNHCR Statistical Yearbook 2002* (July 2004).

[24] UNHCR, 'Population Statistics' (2018) <http://popstats.unhcr.org/en/overview> accessed 14 March 2020.

border officials are instructed to act in accordance with the principle of *non-refoulement*; (2) assigning a clearly identified authority with responsibility for examining requests for refugee status; (3) providing applicants with adequate facilities including the services of a competent interpreter and UNHCR representation; and (4) providing a right to appeal, including permission to remain pending the appeal.[25]

In the same Conclusion, ExCom requested UNHCR prepare a Handbook relating to procedures and criteria for determining refugee status, which was meant to serve as guidance for governments.[26] When issued two years later, the Handbook restated the basic requirements recommended by the ExCom for such procedures, reflecting the special situation of applicants for refugee status.[27] UNHCR ExCom has subsequently reiterated the importance of national procedures for the determination of refugee status as a means to implement the Refugee Convention.[28]

The content and tenor of the procedural recommendations issued by UNHCR ExCom have changed somewhat over time. Thus, since the early 1990s, the ExCom has included certain quality ambitions or organizational ideals for the asylum procedures to be in place, such as 'fair and efficient',[29] 'fair and effective',[30] and 'fair and expeditious'.[31] As another feature, the recommendations have increasingly focused on especially vulnerable categories of asylum seekers, especially women and children.[32]

The ExCom has further expanded the scope of its recommendations so as to address procedures not only for the determination of Convention refugee status, but also for the examination of applicants' need for complementary or subsidiary forms of protection,[33] thereby drawing on standards that have gradually been adopted by human rights bodies at both the universal and regional levels.[34]

At the regional level, attempts have also been made to harmonize national law and practice relating to asylum procedures by way of non-legally binding instruments. Some of these have been adopted within the Council of Europe where the first recommendation on asylum procedures was adopted by the Committee of Ministers

[25] ExCom (n 22) para (e)(i)–(vii). [26] ibid para (g). [27] UNHCR (n 6) para 192.

[28] See eg ExCom Conclusion No 11 (XXIX) (1978) para (i); ExCom Conclusion No 14 (XXX) (1979) para (f); ExCom Conclusion No 28 (XXXIII) (1982) para (c); ExCom Conclusion No 71 (XLIV) (1993) para (i); ExCom Conclusion No 74 (XLV) (1994) para (i); ExCom Conclusion No 93 (LIII) (2002) para (a).

[29] ExCom Conclusion No 65 (XLII) (1991) para (o); ExCom (1993) (n 28) para (i); ExCom (1994) (n 28) para (i); ExCom Conclusion No 103 (LVI) (2005) para (r).

[30] ExCom Conclusion No 81 (XLVIII) (1997) para (h); ExCom Conclusion No 82 (XLVIII) (1997) para (d).

[31] ExCom (2002) (n 28) para (a).

[32] See eg ExCom Conclusion No 64 (XLI) (1990) para (a)(iii); ExCom Conclusion No 73 (XLIV) (1993); ExCom Conclusion No 105 (LVII) (2006); ExCom Conclusion No 107 (LVIII) (2007).

[33] ExCom Conclusion No 85 (XLIX) (1998) para (r); ExCom (2005) (n 29) paras (b), (g). See more recently UNHCR, 'Key Legal Considerations on Access to Territory for Persons in Need of International Protection in the context of the COVID-19 Response' (16 March 2020) para 4.

[34] See Section 4. For an overview of procedural standards, referring also to the Draft Declaration on Minimum International Standards for Refugee Procedures, adopted by the International Law Association, see Hofmann and Löhr (n 5) 1119–25.

in 1981.[35] While reflecting UNHCR ExCom Conclusion No 8 (1977), the standards adopted by the Council of Europe were both more specific and more firm, not least as regards asylum applicants' right to remain in the territory during the examination of their case, both at first instance and during appeals procedures.[36] At the same time, however, the Recommendation provided for exceptions from these standards insofar as manifestly unfounded applications are concerned.

Later, the Council of Europe adopted a Recommendation on the procedural safeguards for rejected asylum applicants, flowing from the requirement of effective remedies in article 13 in conjunction with article 3 of the ECHR, most notably the requirement that for a remedy to be effective, it has to be accessible and to have suspensive effect.[37] Notwithstanding the non-binding nature of the Recommendation, these requirements are based on settled case law of the European Court of Human Rights (ECtHR) concerning article 13 ECHR.[38]

In the Americas, various factors have favoured the emergence and strengthening of asylum procedures. In the American continent, there are several models of asylum procedures, with administrative procedures being the predominant model in the region and with the possibility of judicial review, either through constitutional remedies (*amparo*, *tutela*, habeas corpus, habeas data) or administrative litigation. In this context, refugee protection has been strengthened by a series of regional processes, as well as the role of the Organization of American States (OAS), in particular the integrative approach of the bodies of the Inter-American Human Rights System.[39]

Regarding regional processes, it is important to highlight that the Cartagena Declaration on Refugees, adopted by the Colloquium on International Protection of Refugees in Central America, Mexico, and Panama in 1984,[40] seeks to 'to promote within the countries of the region the adoption of national laws and regulations facilitating the application of the Convention and the Protocol and, if necessary, establishing internal procedures and mechanisms for the protection of refugees'.[41]

More recently, the Comprehensive Regional Protection and Solutions Framework (known as MIRPS in Spanish), which is a pioneering initiative in the implementation of

[35] Council of Europe, Committee of Ministers Recommendation No R (81) 16 on the Harmonization of National Procedures relating to Asylum (5 November 1981).

[36] ibid paras 4, 5.

[37] Council of Europe, Committee of Ministers Recommendation No R (98) 13 on the Right of Rejected Asylum Seekers to an Effective Remedy against Decisions on Expulsion in the context of Article 3 of the European Convention on Human Rights (18 September 1998).

[38] See Section 4.c.x.

[39] cf Juan Carlos Murillo González, 'El derecho de asilo y la protección de refugiados en el continente americano' in Alto Comisionado de las Naciones Unidas para los Refugiados y Oficina del Alto Comisonado de las Naciones Unidas para los Derechos Humanos, *La Protección Internacional de Refugiados en las Américas* (ACNUR & OACNUDH 2011) 54.

[40] cf Juan Ignacio Mondelli, 'La fuerza vinculante de definición regional de la Declaración de Cartagena sobre Refugiados (1984)' (2018) para 4 <https://www.refworld.org.es/docid/5d03d0b54.html> accessed 15 May 2020.

[41] Cartagena Declaration, conclusion III(1).

the Comprehensive Refugee Response Framework (CRRF) and a State-led regional application of the Global Compact on Refugees, has also identified the need to strengthen asylum procedures.[42]

Another factor that has been highly relevant in the Americas, especially for countries in Latin America and the Caribbean, has been the integrating role of the bodies of the Inter-American Human Rights System, composed of the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights (IACtHR). The IACtHR has held that, in order to interpret and apply the provisions of the American Convention on Human Rights (American Convention) in cases relating to asylum seekers and refugees, it takes into account the significant evolution of international refugee law, based also on the authorized statements of agencies such as UNHCR.[43]

In Africa, the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa is an important regional complement to the Refugee Convention. Nonetheless, it does not establish specific provisions in terms of asylum procedures. In this regard, on the basis of an interpretation of article 26 of the 1981 African Charter on Human and Peoples' Rights on 'the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms', Zard has stated that the obligation of States to establish institutions and fair procedures for RSD could be developed.[44]

The various procedural standards established at regional level shall be accounted for in Section 4.

d. Specific Procedural Issues

As a result of the absence of procedural standards in the Refugee Convention, a number of more specific issues relating to the examination of asylum applications has been settled by regulatory measures at regional level, often in the context of securing effective remedies as required by human rights treaties which indirectly apply to refugee claims especially in single combined procedures.[45]

[42] Marco Integral Regional para la Protección y Soluciones (MIRPS) (2017) <https://acnur.org/5b50d83b4#_ga=2.4268535.514613400.1589682029-1940678519.1589552681> accessed 15 May 2020.

[43] *Pacheco Tineo Family v Bolivia*, Inter-American Commission on Human Rights Report No 136/11, Case No 12.474 (31 October 2011) para 143. In this sense, see Mark Manly, 'La consagración del asilo como derecho humano: Análisis Comparativo de la Declaración Universal, la Declaración Americana y la Convención Americana de Derechos Humanos' in Alto Comisionado de las Naciones Unidas para los Refugiados, *El Asilo y la Protección Internacional de los refugiados en América Latina: Análisis crítico del dualismo 'asilo-refugio' a la luz del Derecho Internacional de los Derechos Humanos* (ACHNUR 2004).

[44] Monette Zard, 'Refugees and the African Commission on Human and Peoples' Rights' (2003) 16 Forced Migration Review 33, 34.

[45] See, as an example, the EU standards of the Common European Asylum System as laid down in EU Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection (recast) [2013] OJ L180/60 recital 11, arts 3, 10(2) (EU Asylum Procedures Directive).

An important distinction should be made between *admissibility decisions* and the examination in substance of applicants' need for international protection. The risk of conflating the two distinct issues is particularly acute in systems that operate *border procedures*. Border procedures are generally not suitable for the proper examination of protection needs, as clearly reflected in the recommendations on asylum procedures mentioned above.[46] In order to prevent a violation of the Refugee Convention as well as the protection obligations under human rights treaties, it is therefore crucial that border procedures are operated with caution and only exceptionally include decisions on substance, if at all.[47]

The risk of *refoulement* inherent in border procedures may also arise where one State returns an asylum seeker to another State assuming that the responsibility for examining the application lies with the latter State. In order to reduce the risk of indirect *refoulement* to the country of origin without any substantive examination of the need for protection, it is important that the returning State expressly states that the decision exclusively deals with the admissibility issue. Furthermore, in order to prevent situations of *refugees in orbit*, there ought to be agreed criteria and practical arrangements for the division of inter-State responsibility for the examination of asylum applications. Despite the most serious failures of the Dublin system established by the EU and the arguable deficiencies of both design and implementation of this system,[48] it could be seen as an advantage in the formal sense of specifying that one single EU Member State is to be identified as responsible for examining each application before the asylum seeker can be returned to the country of origin.[49]

As a procedural device potentially forming the basis of inadmissibility decisions, the notions of '*safe third country*' and '*first country of asylum*' also need to be clearly defined and cautiously applied in order to prevent violation of States' obligations under the Refugee Convention and human rights treaties. If operated in connection with pre-procedure returns of asylum seekers to another State considered responsible for examining the case and protecting the asylum seeker, these notions have to presuppose an actual connection between the asylum seeker and the third country in question, as well as genuine prospects of readmission into that country. In addition, and crucially, the asylum procedures, the reception conditions, and the standards of protection for persons granted asylum in the 'safe third country' must be in compliance with the inter-

46 ExCom Conclusion No 8 (XXVIII) (1977) para (e)(iii); Council of Europe (n 35) paras 2, 3.

47 As an illustration, see article 43 of the EU Asylum Procedures Directive (n 45) which allows for border procedures only to decide on the admissibility of applications and on the substance of applications considered manifestly unfounded, cf articles 31(8), 32(2), in any case requiring that procedures be in accordance with the basic principles and guarantees of chapter II of the Directive.

48 See UNHCR, 'Left in Limbo: UNHCR Study on the Implementation of the Dublin III Regulations' (2017).

49 See EU Regulation No 604/2013 of the Council of 26 June 2013 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in one of the Member States by a Third-Country National or a Stateless Person (recast) [2013] OJ L180/31.

national obligations under both the Refugee Convention and human rights treaties, including protection against *refoulement* as well as the various civil, social, and economic rights enshrined in these instruments.[50]

When it comes to substantive examination of asylum cases, the relevance of *accelerated procedures* for asylum cases that are so obviously without foundation as not to merit full examination at every level of the procedure has been widely recognized, yet with the proviso that they are applied to narrow and objectively defined cases. In an early recommendation on the problem of manifestly unfounded or abusive applications for asylum, UNHCR ExCom defined such cases as 'those which are *clearly fraudulent* or *not related to the criteria for the granting of refugee status* [under the Refugee Convention] *nor to any other criteria justifying the granting of asylum*'.[51] The tendency in recent years seems to be that many States have extended the scope of application of such accelerated procedures, in some instances combining them with less objective criteria or with generalized assumptions of specified countries as being 'safe countries of origin'.[52] In particular when operated in the context of border procedures, there is a clear risk that this approach to asylum applications may lead to summary examinations, implying enhanced risk of erroneous rejections.

4. Procedural Standards under Human Rights Treaties

a. The Human Rights Systems: The UN, African, Inter-American, and European Systems

The treaty bodies in the United Nations Human Rights System and those in the regional systems—the European Human Rights System, the Inter-American Human Rights System, and the African Human Rights System—have developed standards pertaining to asylum procedures through interpretation and application of their respective human rights instruments in judgments, cases, and other mechanisms such as country reports, thematic reports, and resolutions. Specifically, in relation to asylum procedures, treaty bodies have interpreted rights to an effective national remedy, due process, fair trial, and judicial protection in order to determine the procedural guarantees that must be observed in these procedures. Based on their evolutive interpretation of certain rights, most relevantly *non-refoulement*, regional human rights bodies have developed a

[50] cf Hofmann and Löhr (n 5) 1110–14; Hathaway (n 5) 328–33; on 'safe third countries', see also Chapter 28 in this volume.

[51] ExCom Conclusion No 30 (XXXIV) (1983) para (d) (emphasis added).

[52] See eg EU Asylum Procedures Directive (n 45) arts 31(8), 36, 37.

minimum set of procedural guarantees that must be respected in the framework of asylum procedures. In this sense, Chetail has indicated that 'the substantial overlap between the principle of *non-refoulement* under refugee law and human rights law has a critical impact by compensating for the absence of procedural guarantees in the Geneva Convention'.[53]

b. Developing a Right to an Asylum Procedure

The ECtHR's jurisprudence on procedural standards for RSD hinges not only on the risk of expulsion that may violate article 3, but also on article 13 that guarantees the right to an effective remedy.[54]

In the case of *MSS v Belgium and Greece* concerning the return of an Afghan asylum seeker from Belgium to Greece where he was exposed to degrading treatment, the ECtHR determined that in order to be considered an effective remedy in the context of the expulsion of an asylum seeker, such a procedure must integrate the following elements: access to a competent national authority; independent and rigorous scrutiny of the complaint; a particularly prompt response; and automatic suspensive effect of appeals against the expulsion measure.[55] Thus, procedural guarantees deriving from the right to an 'effective remedy' have to govern initial decision-making and appeals.[56]

In order to attract such guarantees, a claim must be 'arguable', that is, 'a claim which could have some merit and which is based on an alleged violation of a right protected by the ECHR'.[57]

In the Inter-American System, the IACtHR has understood that, '... the international protection regime has become imbued with a human rights approach. An example of this is the incorporation of due process guarantees in refugee status determination procedures.'[58] Likewise, the bodies of the Inter-American System have considered that in cases of persons seeking asylum or the expulsion or deportation of a refugee, the analysis of compliance of the State's obligations under the American Convention entails a combined assessment of the rights to seek and be granted asylum (article 22.7), prohibition of *refoulement* (article 22.8) with the rights to a fair trial (article 8) and

[53] Vincent Chetail, 'Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law' in Ruth Rubio-Marín (ed), *Human Rights and Immigration* (OUP 2014) 53.

[54] *MSS v Belgium and Greece* (2011) 53 EHRR 2, para 286. See also *TI v the United Kingdom*, App No 43844/98 (ECtHR, 7 March 2000); *Müslim v Turkey* (2006) 42 EHRR 16, paras 72–6.

[55] *MSS v Belgium and Greece* (n 54) para 293.

[56] *Vilvarajah v United Kingdom* (1992) 14 EHRR 248, para 126; *MSS v Belgium and Greece* (n 54) paras 318–20.

[57] UNHCR, 'Manual on Refugee Protection and the ECHR' (1 August 2006) part 2.1, para 2.8.

[58] *The Institution of Asylum and its Recognition as a Human Right in the Inter-American System of Protection* (Advisory Opinion OC-25), Inter-American Court of Human Rights Series A No 25 (30 May 2018) para 42.

judicial protection (article 25), which guarantees that the person seeking refugee status has access to due process and judicial protection.[59] In the case of the *Pacheco Tineo Family*, the IACHR asserted that any refugee determination process implies an assessment and a decision on the possible risk of impairment of the most basic rights, such as the rights to life, personal integrity, and personal liberty.[60]

Finally, the African Commission on Human and Peoples' Rights has also held that procedural guarantees must be applied in the framework of procedures relating to asylum seekers, in accordance with the 'right to a fair trial', established in article 7(1) of the African Charter on Human and Peoples' Rights.[61]

In contrast, the jurisprudence of the Human Rights Committee has been based on the fact that certain procedural parameters apply to the refugee status determination procedure by virtue of article 7 (or 6) of the ICCPR, concerning the harm involved, and not by virtue of the standards developed by article 14 ICCPR on the right to a fair trial, which is similar to the approach taken by the ECtHR.[62]

c. Standards on Asylum Procedures

i. *Access to the Asylum Procedure*

Access to the procedure for asylum seekers must be guaranteed[63] from the arrival of the applicant at the border. Thus, in *Sharifi v Italy and Greece*, concerning 32 Afghan nationals, two Sudanese nationals, and one Eritrean national, who alleged that they had entered Italy irregularly from Greece and been returned to that country immediately, the ECtHR noted that Greece had not informed asylum seekers of their right to apply for asylum, by omitting this right in information leaflets.[64] The ECtHR considered that Greece's omission constituted a violation of the right of access to procedure, through article 13 in conjunction with article 3.

In addition, the ECtHR has considered that the material impossibility of submitting an application for asylum is contrary to the Convention. For example, in the case of *AEA v Greece*, the Court noted the difficulties in registering asylum applications that had resulted in hundreds of people lining up in Athens, unable to file applications for months.[65]

[59] *Pacheco Tineo Family v Bolivia* (n 43) para 113.

[60] ibid para 136. See also *Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination*, Inter-American Commission on Human Rights, OEA/Ser.L/V/II.106. Doc.40.Rev.1 (28 February 2000) para 52.

[61] See *Good v Republic of Botswana*, African Commission on Human and Peoples' Rights, Comm No 313/05 (26 May 2010) paras 160–80; *Organisation mondiale contre la torture v Rwanda*, African Commission on Human and Peoples' Rights, Comm Nos 27/89; 46/91; 49/91; 99/93 (1996) para 34.

[62] David James Cantor, 'Reframing Relationships: Revisiting the Procedural Standards for Refugee Status Determination in Light of Recent Human Rights Treaty Body Jurisprudence' (2015) 34(1) RSQ 87.

[63] *Sharifi v Italy and Greece,* App No 16643/09 (ECtHR, 21 October 2014) para 85.

[64] ibid paras 177–81.

[65] ibid para 77.

On the other hand, more recently, the ECtHR issued the judgment in the case of *ND and NT v Spain*, heavily criticized for its finding that 'hot returns' from Spain to Morocco do not constitute a violation of the prohibition on collective expulsions, as established in article 4 of Protocol 4. Provided the existence of 'genuine and effective access to means of legal entry', the Grand Chamber held that States may refuse entry to their territory to aliens, including potential asylum seekers who have crossed the border, without cogent reasons, in an unauthorized manner.[66]

In the Inter-American System, the scope of the right of access to the procedure has been developed through the right to seek asylum. The IACtHR, in the framework of its consultative competence, considered:

> for the right to seek asylum to take effect in practice, host States are required to allow persons to apply for asylum or refugee status, which is why such persons cannot be rejected at the border or returned without an adequate and individualised analysis of their claims with due guarantees.[67]

ii. *Screening and Identification of International Protection Needs and Special Needs*

The bodies of the European and Inter-American systems have stated their position on the obligation to identify international protection needs and special needs, such as the situation of unaccompanied children, victims of human trafficking, amongst others. In this regard, the IACHR in its Inter-American Principles has understood that 'States should configure and apply instruments that allow for the detection of situations of vulnerability on a case-by-case basis, as well as mechanisms of referral to the appropriate agents to address the needs identified in the short, medium, and long term'[68] and that 'States should ensure the prompt identification and referral to competent asylum authorities or relevant protection procedures of those in need of any form of international protection or who are unaccompanied or separated children'.[69]

The IACtHR has considered that 'the establishment of procedures for the identification of protection needs is a positive obligation of States and failure to institute them would constitute a lack of due diligence'.[70] Further, States must ensure that the persons involved in such procedures are properly trained to identify special protection needs,[71]

[66] *ND and NT v Spain,* App Nos 8675/15 and 8697/15 (ECtHR, Grand Chamber, 13 February 2020) paras 209–10.

[67] Advisory Opinion OC-25 (n 58) para 122. See also Inter-American Commission on Human Rights (IACHR), 'Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons, and Victims of Human Trafficking: Resolution 04/19' (7 December 2019) principle 56.

[68] IACHR (n 67) principle 47.

[69] ibid principle 57.

[70] *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection* (Advisory Opinion OC-21), Inter-American Court of Human Rights Series A No 21 (19 August 2014) para 82.

[71] ibid para 121.

and that, if risks and needs are identified, the person should be given access to procedures that are suitable for specific protection and care according to the circumstances of each case.[72]

Similarly, the ECtHR has referred to the obligation to identify and adequately cater for the special needs of asylum seekers. In particular, in the case of *OM v Hungary*, concerning an asylum seeker who had fled from Iran because he was persecuted for being a homosexual, the Court considered that it was contrary to the ECHR to detain an asylum seeker whose particular circumstances had not been taken into account. In this case a homosexual person such as the applicant was unsafe when detained with others from countries with widespread cultural or religious prejudice against LGBTIQ+ persons.[73]

iii. *Access to Legal Assistance and Representation*

European case law has established that the State must guarantee access to justice *de jure* and *de facto*, so that if it does not provide a free legal aid system, it must inform the applicant about organizations that do so.[74] For its part, the bodies of the Inter-American System have stated the right to receive legal aid in the event of an application. In its leading case on refugees, the case of the *Pacheco Tineo Family v Plurinational State of Bolivia*, the IACtHR held that States must guarantee access to legal advice and representation, which includes receiving necessary guidance as to the procedure to be followed, in a language and format that can be understood by the applicants.[75] In addition, the bodies of the Inter-American System have held that the applicant must have the opportunity to contact a UNHCR representative.[76]

Finally, article 7 of the African Charter on Human and Peoples' Rights states that the right to a fair trial includes the right to be defended. The African Commission has established the right to be defended in administrative cases, so free legal assistance must also be guaranteed in migration procedures.[77]

iv. *Access to Translator or Interpreter*

The ECtHR has highlighted the need to provide, when necessary, the assistance of an interpreter in order to guarantee access to effective remedies for the processes of asylum

[72] ibid para 261. [73] *OM v Hungary,* App No 9912/15 (ECtHR 5 July 2016) para 53.

[74] *MSS v Belgium and Greece* (n 54).

[75] *Case of the Pacheco Tineo Family v Plurinational State of Bolivia* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 272 (25 November 2013) para 159. See also IACHR (n 67) principle 50. Migration processes must offer the migrant at least the following guarantee: Assistance and legal representation by a competent legal representative selected by the migrant (including in any process related to his/her migration status) and free of charge when the migrant lacks the means to pay for private representation.

[76] *Case of the Pacheco Tineo Family v Plurinational State of Bolivia* (n 75) para 159; IACHR (n 67) principle 50.

[77] *Media Rights Agenda v Nigeria*, African Commission on Human and Peoples' Rights, Comm No 224/98 (2000).

seekers.[78] In this regard, the IACtHR has determined that article 8 of the American Convention entails the duty to provide free access to a translator or interpreter in case of lack of knowledge of the language. Additionally, the IACtHR has indicated that, in the case of asylum seekers, the assistance of a translator must be provided free of charge, as one of the impassable limits of administrative action, and to ensure the effective access to communication.[79]

v. *Confidentiality of the Procedure*

The ECtHR has found that the lack of sufficient protection of confidentiality could constitute a breach of article 8 of the ECHR. In this regard, the European Court has highlighted the need to guarantee asylum seekers the confidentiality of the asylum procedure, in particular between States.[80] For its part, the IACtHR has stressed that in the conduct of procedures, the protection of asylum seekers' data and applications must be respected at all stages, based on the principle of confidentiality, with the aim of protecting the rights of applicants who might be at risk.[81]

vi. *Individualized and Personal Interviews*

The ECtHR has understood that for the RSD procedure to be individual, fair, and effective, it must necessarily provide for a personal interview with the asylum applicant before the decision on the application is taken.[82] Likewise, the IACtHR has held that the right to be heard, in all cases, requires the holding of a hearing or personal interview.[83]

The IACHR has expressed its concern about the use of video conferencing for interviews and hearings on the merits. In particular, it has indicated that the use of video conferencing would be contrary to human rights standards if there were (1) reduced interaction between the interviewer and the interviewee;[84] (2) inhibiting asylum officials from observing body language and behaviour;[85] (3) reducing the quality of legal representation;[86] and (4) obstacles to interpretation from another language.[87]

[78] *MSS v Belgium and Greece* (n 54) para 301; *Saadi v Italy* (2009) 49 EHHR 30, para 52; *Hirsi Jamaa v Italy* (2012) 55 EHRR 21, para 202.

[79] Advisory Opinion OC-21 (n 70).

[80] *X v Sweden,* App No 36417/16 (ECtHR, 9 January 2018) para 47.

[81] *Juridical Condition and Rights of Undocumented Migrants* (Advisory Opinion OC-18), Inter-American Court of Human Rights Series A No 19 (17 September 2003).

[82] *MSS v Belgium and Greece* (n 54) para 301.

[83] *Case of the Pacheco Tineo Family v Plurinational State of Bolivia* (n 75) paras 159, 172; Advisory Opinion OC-21 (n 70) para 252.

[84] *Human Rights Situation of Unaccompanied Migrant and Refugee Children and Adolescents in the United States of America*, Inter-American Commission on Human Rights OAS/Ser.L/V/II.155 (24 July 2015) para 160.

[85] ibid.

[86] *Report on Immigration in the United States: Detentions and Due Process*, Inter-American Commission on Human Rights OEA/Ser.L/V/II (30 December 2010) para 406.

[87] ibid.

vii. *Information and Length of Proceedings*

In respect of asylum seekers, the ECtHR has found, in particular, that individuals need to have adequate information about the asylum procedure to be followed and their entitlements in a language they understand.[88] This requires the existence of a reliable system of communication between the authorities and the asylum seeker.[89]

In the Inter-American System, it has been held that States are under the obligation to guarantee that the person seeking refugee status is heard by the State to which he or she is applying, within a reasonable period of time, which is verified by the prompt and timely conduct of a personal interview.[90] Likewise, the ECtHR has paid particular attention to the speed of the remedy. In that sense, in the case of *IM v France*, concerning the deportation of a Sudanese asylum seeker from France, the ECtHR indicated that an unreasonably short time limit to submit a claim, such as in the context of accelerated asylum procedures, can undermine the exercise and the effectiveness of the remedy. In particular, the ECtHR considered that a reduced period of five days was contrary to the ECHR.[91]

viii. *Burden of Proof*

The ECtHR has developed a detailed case law in respect of the burden of proof. The court clarified in the case of *JK v Sweden* that it is the shared duty of the asylum seeker and the immigration authorities to ascertain and evaluate all relevant facts in the asylum procedures.[92] However, the burden remains on asylum seekers to adduce evidence as regards their own personal circumstances although the ECtHR recognized that it was important to take into account all of the difficulties which an asylum seeker may encounter in collecting evidence.[93]

ix. *Psychological Assistance during the Procedures*

Recognizing the importance of maintaining and preserving mental health, the IACtHR has stressed that the lack of protection for asylum seekers constitutes a violation of their mental integrity.[94] In addition, the IACtHR has highlighted the importance of protecting the mental health and psychological well-being of children in the midst of asylum procedures.[95]

[88] *Abdolkhani v Turkey,* App No 50213/08 (ECtHR, 27 July 2010).

[89] *MSS v Belgium and Greece* (n 54).

[90] *Case of the Pacheco Tineo Family v Plurinational State of Bolivia* (n 75); *Human Rights of Migrants, Refugees, Stateless Persons, Victims of Human Trafficking and Internally Displaced Persons: Norms and Standards of the Inter-American Human Rights System*, Inter-American Commission on Human Rights OEA/Ser.L/V/II.Doc.46/15 (31 December 2015).

[91] *IM v France,* App No 9152/09 (ECtHR 2 February 2012) para 144.

[92] *JK v Sweden* (2017) 64 EHRR 15, para 91.

[93] *JK v Sweden* (n 92) para 92.

[94] *Case of the Pacheco Tineo Family v Plurinational State of Bolivia* (n 75) para 207.

[95] Advisory Opinion OC-21 (n 70).

x. *Decisions and Appeals Proceedings*

The ECtHR has highlighted the need to ensure that the authority responsible for deciding the asylum application carries out a rigorous examination of each element of the application and its merits.[96] In relation to appeals proceedings, the ECtHR has established that article 13 also requires automatic suspensive effect of the remedy, which means that the planned expulsion must be put on hold until the final decision is taken.[97] Also, the mere possibility of requesting suspensive effect, or a remedy which has such effect 'in practice' only, is not sufficient.[98] In addition, the ECtHR has indicated that an unreasonably short time limit to appeal a subsequent removal decision can render a remedy practically ineffective. Thus, in the case of *IM v France*, the 48-hour time limit for appeal was found to be contrary to international law.[99] Meanwhile, the IACHR has expressed its concern about a reduced period of three days.[100]

Along these lines, the IACHR and the IACtHR have found that the remedy of review or appeal must have suspensive effect and the asylum seeker must be allowed to remain in the country until the decision in the case is made by the competent authority, even while the means of challenge is pending, unless the application is proven to be manifestly unfounded.[101]

xi. *Specific Provisions for Children and Adolescents*

The ECtHR has held that any procedure in which children are involved must be carried out in the best interests of the child.[102] This has also been emphasized in the Joint General Comment of the UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and the UN Committee on the Rights of the Child.[103] The IACtHR has extensively discussed the specific provisions that States must adopt for children and adolescents seeking asylum, referring to the State's obligation to institute and follow fair and efficient proceedings; to provide necessary guidance as to the procedure to be followed; to ensure legal representation should be free of charge and have specialized training; to conduct the interview in a location appropriate to the needs and safety of the children, meaning a non-threatening space, and by a specially trained professional; and to use the interview to identify immediate needs for assistance, such as clothing, food, and hygiene.[104] The IACtHR, the Committee on Migrant Workers and the Committee on the Rights of the Child have emphasized that children have the right

[96] *Chahal v United Kingdom* (1997) 23 EHRR 413.

[97] *Čonka v Belgium* (2002) 34 EHRR 54.

[98] *Gebremedhin v France* (2010) 50 EHRR 29.

[99] *IM v France* (n 91) para 150.

[100] *Forced Migration of Nicaraguan Persons to Costa Rica*, Inter-American Commission on Human Rights OAS/Ser.L/V/II (8 September 2019) para 179.

[101] See *Case of the Pacheco Tineo Family v the Plurinational State of Bolivia* (n 75) para 159.

[102] *Tarakhel v Switzerland* (2015) 60 EHRR 28.

[103] Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), 'Joint General Comment No 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No 22 (2017) of the Committee on the Rights of the Child on the General Principles Regarding the Human Rights of Children in the Context of International Migration', UN doc CMW/C/GC/3-CRC/C/GC/22 (16 November 2017) paras 31, 35.

[104] Advisory Opinion OC-21 (n 70) paras 247–55.

to be heard in their application for asylum or refugee status, regardless of whether they are with their parents or whether they are unaccompanied or separated from their parents.[105]

With regard to legal guardianship, the ECtHR has pointed out that children and adolescents are amongst the vulnerable groups that require special protection.[106] Likewise, the IACtHR has reiterated the States' position as guarantors with regard to persons within their territory, especially those in their custody,[107] as might be the case of separated or unaccompanied children. For its part, the African Human Rights System has determined the obligation of States to provide adequate assistance to children, whether accompanied by their families or not.[108]

Furthermore, the ECtHR has indicated the prohibition of arbitrary detention of minors and vulnerable groups.[109] In relation to the above, the IACtHR has emphasized the prohibition of the deprivation of liberty of children who are with their parents as well as of children who are alone or unaccompanied.[110]

5. Concluding Remarks on Procedural Safeguards and the Influence of International Human Rights Bodies

As shown above, procedural requirements and standards developed by human rights bodies play a crucial role in filling the normative gap that results from the absence of such standards in the Refugee Convention. In this regard, there are significant differences in legal approach and protective levels between the various regional human rights systems. In general, it would seem safe to say that the Inter-American Human Rights System tends to set the higher procedural standards.[111]

[105] *Case of the Pacheco Tineo Family v Plurinational State of Bolivia* (n 75) para 207. Advisory Opinion OC-21 (n 70); CMW (n 103) para 37.

[106] *Thimothawes v Belgium,* App No 39061/11 (ECtHR 4 April 2017). See also *Hussein v Netherlands and Italy*, App No 27725/10 (ECtHR, 2 April 2003); *Tarakhel v Switzerland* (n 102).

[107] *Case of Bulacio v Argentina*, Inter-American Court of Human Rights Series C No 100 (18 September 2003) paras 126, 138.

[108] The African Charter on the Rights and Welfare of the Child (adopted 11 July 1990, entered into force 29 November 1999) art 23 <https://www.un.org/en/africa/osaa/pdf/au/afr_charter_rights_welfare_child_africa_1990.pdf> accessed 21 May 2020.

[109] *Rahimi v Greece,* App No 8687/08 (ECtHR, 5 April 2011).

[110] *Expelled Dominicans and Haitians v Dominican Republic*, Inter-American Court of Human Rights Series C No 282 (28 August 2014).

[111] cf Marie-Bénédicte Dembour, *When Humans Become Migrants. Study of the European Court of Human Rights with an Inter-American Counterpoint* (OUP 2015) 503–12; Pablo Ceriani Cernadas, Ricardo Fava, and Diego Morales, 'Políticas migratorias, el derecho a la igualdad y el principio de no discriminación: Una aproximación desde la jurisprudencia del Sistema Interamericano de Derechos Humanos' in Pablo Ceriani Cernadas and Ricardo Fava (eds), *Políticas migratorias y derechos humanos* (Ediciones de la UNLa 2009) 143–4.

In the Americas, the interplay amongst State authorities, UNHCR, the bodies of the Inter-American Human Rights System, non-government organizations, litigants, scholars, asylum seekers, and refugees has shaped the measures that have been taken for the protection of refugees, including the establishment of asylum procedures. An interesting trend in the Americas, in particular in Latin America, relates to how national courts and judges have started to internalize in their jurisprudence the standards developed by the bodies of the Inter-American Human Rights System and also the doctrine of UNHCR. This cascade effect between international and regional standards has been favoured by the concept of 'control of conventionality' developed by the IACtHR, that is, when applying domestic rules, the courts and judges must verify that these rules are compatible with the American Convention on Human Rights.[112] This empowers courts at the national level to review the compliance of asylum procedures with the provisions of the American Convention and the standards developed by the IACtHR.

Enforcing international standards in domestic law is crucial to the effective procedural protection of asylum seekers. Regardless of how ambitious the standards adopted at the international or regional level are, they cannot work effectively if enforcement lies primarily with the respective human rights bodies at these levels. This is amply demonstrated by the Common European Asylum System, which includes probably the most detailed standards on asylum procedures in supranational instruments,[113] yet their effects are being hampered by inefficient enforcement at the EU level combined with dysfunctional asylum systems and, not least importantly, barriers to accessing the asylum procedures in a number of Member States.

The history of refugee protection is one that has developed as a result of, and despite, humanity's major crises. Recent protection crises are occurring in the context of rising nationalism and populism in many countries across the world. Since the 1980s, States in the Global North have introduced a range of policies to deter or prevent migrants and refugees from arriving on their territories or to limit access to their asylum systems by increasing border controls, introducing extraterritorial controls, and restricting procedural safeguards.[114] Within an increasing context of large mixed migration movements, the ability of asylum procedures to have an *effet utile* lies in their capacity to adapt, respecting the obligations derived from refugee law and human rights law while developing simplified and differentiated procedures that meet actual protection needs.

[112] cf Silvia Serrano, *El control de convencionalidad en la jurisprudencia de la Corte Interamericana de Derechos Humanos* (Colección Sistema Interamericano de Derechos Humanos, Comisión Nacional de los Derechos Humanos, México 2013) 59; Analía Banfi and Felipe Micheline, *Introducción al Derecho Internacional de los Derechos Humanos* (3rd edn, FCU 2017) 164.

[113] cf Jens Vedsted-Hansen, 'Common EU Standards on Asylum—Optional Harmonisation and Exclusive Procedures' in Elspeth Guild and Paul Minderhoud (eds), *The First Decade of EU Migration and Asylum Law* (Brill 2012) 255–71.

[114] On the 'deterrence paradigm', see Chapter 27 in this volume.

CHAPTER 33

CREDIBILITY, RELIABILITY, AND EVIDENTIAL ASSESSMENT

GREGOR NOLL

1. Introduction

How are we to recognize the facts that make a person a refugee? While various forms of group-based recognition, including *prima facie*, dominate the practice of refugee recognition worldwide, it is individual assessment in refugee status determination (RSD) that has established itself as the main point of reference in evidential issues.[1] This form of assessment is often conducted by States in the Global North, although not exclusively so. In these States, in particular, it plays an important limitative role, restricting access to asylum, and so is the focus of this chapter. Evidential assessment in asylum law differs from that in other fields of law in that at the heart of the asylum procedure is a single source, bearing witness in its own interest, about future events. Each of these three factors is problematic in their own right, but in asylum law, they come as a threefold unit. Let us look at them one by one.

A single source dominates evidential assessment in the asylum procedure, that is, the applicant's testimony. Relevant personal documentation is often sparse, and may raise complex questions of authenticity. Directly inquiring with the authorities of the home State on the issue at hand is out of the question; at worst, this might play into the persecutor's hand. With the applicant's testimony being the dominant source, cases are to a large degree decided on the assessment of credibility and reliability. The

[1] See Chapter 31 in this volume.

decision-maker may not have the benefit from the usual interplay between different evidential sources that characterizes other fields of law. The asylum process resembles a monologue interspersed with a few footnotes. The question of the applicant's credibility, how reliable her statements are, takes central ground. This, in turn, augments the overall impact of the decision-maker's discretionary judgment on credibility and reliability. This risks deciding cases on credibility that could have been decided on other evidence, and at worst, findings of a lack of credibility used as a strategy to reject applications and render these rejections appeal-proof.

In an effort to widen their cognitive resources, decision-makers collect country of origin information (COI), send experts on exploratory missions to important countries of origin,[2] and take expert testimony on the country of origin,[3] medical[4] or psychological[5] issues. All this seeks to compensate for the absence of a shared world between the applicant and decision-maker, which is a given in wholly domestic legal matters. However, COI is general, and does not relate to the single events at issue in a particular case. While it may provide broader, contextual evidence, it may also be used to assess the applicant's credibility and reliability. A gap remains between its generality and the specificity of the case.

Secondly, the applicant testifies in her own interest, in particular where neither COI nor other evidence goes to the heart of the matter. Delivering evidence *about oneself* as the sole witness has been considered dubious or invalid since Antiquity. Socrates' trial[6] and the trial of Jesus suggest as much: '[t]hou bearest record of thyself; thy record is not true'.[7] Throughout Western legal history, it seems that combination of testifying as sole witness *and* in one's own interest has disqualified testimony or greatly diminished its value. *Testis unus, testis nullus* states a principle of Roman law that can be traced back to a constitution by Constantine in AD 334: one witness is no witness.[8]

[2] On COI see Femke Vogelaar, 'Principles Corroborated by Practice? The Use of Country of Origin Information by the European Court of Human Rights in the Assessment of a Real Risk of a Violation of the Prohibition of Torture, Inhuman and Degrading Treatment' (2016) 18 EJML 302; and Femke Vogelaar, 'The Eligibility Guidelines Examined: The Use of Country of Origin Information by UNHCR' (2017) 29 IJRL 617.

[3] For an overview of the problems of cultural expertise, see Anthony Good, 'Cultural Evidence in Courts of Law' (2008) 14 Journal of the Royal Anthropological Institute 47.

[4] See eg Rebecca MM Wallace and Karen Wylie, 'The Reception of Expert Medical Evidence in Refugee Status Determination' (2013) 25 IJRL 749.

[5] For a study on Australian practice, see Alvin Kuowei Tay, Naomi Frommer, Jill Hunter, Derrick Silove, Linda Pearson, Mehera San Roque, Ronnit Redman, Richard A Bryant, Vijaya Manicavasagar, and Zachary Steel, 'A Mixed-Method Study of Expert Psychological Evidence Submitted for a Cohort of Asylum Seekers Undergoing Refugee Status Determination in Australia' (2013) 98 Social Science & Medicine 106.

[6] Plato, 'The Apology' in John M Cooper (ed), *Plato: Complete Works* (Hackett 1994) 17–36.

[7] John 8:13, King James Version; Michael Azar, *Vittnet* (Glänta Produktion 2008) 9–20.

[8] 'We now manifestly sanction that the testimony of only one witness shall not be heard at all, even if such witness should be resplendent with the honour of the glorious council'. Codex Justinianum 4.20.9, AD 334, as quoted in Antonino Metro, 'Unus Testis, Nullus Testis' in John Cairns and Olivia Robinson, *Critical Studies in Ancient Law, Comparative Law and Legal History* (Hart 2001) 110.

Thirdly, a refugee fears a future event: being persecuted upon return. This pushes her testimony towards prophecy, an altogether different mode of speech than evidencing the past or present. It puts the applicants in Cassandra's position in Agamemnon, Aeschylus's play: displaced to a foreign country as a subaltern, and predicting outrageous events to an audience that rejects her testimony as incredible.[9] While contemporary law cannot be reduced to these traditions, strong scepticism against a single source speaking about herself in the future tense is a force to be reckoned with. The question is whether refugee law succeeds in tempering that sceptical force.

Credibility assessment in asylum appears to be constrained by a conceptual framework, as are other fields of law. Refugee law offers a particular constellation of the burden of proof, the standard of proof, and the benefit of the doubt that we shall present. However, this chapter argues that there are serious logical deficiencies in the way that these three concepts interact in asylum law, with the result that they are unable to restrain discretion and regulate the decision-making (Section 2). If we look beyond these legal concepts and rules in search for restraint in proxies for credibility, scientific studies in psychology and traumatology suggest that standard credibility criteria, such as behaviour or the coherence and plausibility of statements, are also deficient. These studies in effect undermine the validity of standard criteria used in the UNHCR Handbook ('the Handbook')[10] and the EU Qualification Directive[11] (Section 3). Without functioning legal constraints and valid credibility criteria, the discretion of decision-makers occupies too much space. Empirical studies confirm that the allocation of a case to an individual judge is the weightiest factor in dictating the outcome of an asylum case, leading to the conclusion that evidential assessment actually plays a minor role (Section 4), suggesting that evidential assessment in asylum law is deeply dysfunctional. This leaves refugee law with the question of which strategy to adopt for the future (Section 5).

A number of terminological notes and delimitations are in order. First, in this chapter, 'credibility' denotes the capability of a human to be believed, while 'reliability' denotes the capability of a statement to be relied upon. When the term 'credibility' is used by other authors, it is not always clear which of these capabilities is referred to. Secondly, the term 'refugee law' is used in a wide sense, encompassing the Refugee Convention, relevant human rights treaties and EU law, and the related asylum practices. Thirdly, the female pronoun is intended to cover all genders, unless indicated otherwise by the context in which it appears. Fourthly, both quasi-judicial refugee status determination by authorities and judicial determination by courts are considered in this chapter. While jurisdictions in Europe and North America dominate my references, it is reasonable to expect that similar problems as the ones described in the following will emerge in other jurisdictions as well, as other chapters attest.[12]

[9] Aeschylus, *Orestia. Agamemnon* (Ian Johnston trans) lines 1073–148 <http://johnstoniatexts.x10host.com/aeschylus/agamemnonhtml.html> accessed 11 June 2020.

[10] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/IP/4/ENG/REV.4 (1979, reissued 2019) (UNHCR Handbook).

[11] EU Qualification Directive, art 4.5.c.

[12] See eg discussion of Japan and Korea in Chapter 23 in this volume.

2. Legal Constraints on Evidential Assessment

Evidential assessment is constrained by law. In common law, formal rules may govern the introduction and use of evidence, while in civil law, the principle of free evidential assessment prevails, with conceptual constraints in place. A common denominator for both types of legal systems is the concepts of the burden of proof, the standard of proof, and the benefit of the doubt. Their understanding is frequently taken for granted, or merely hinted at in the Handbook.[13] Doctrinal analysis of evidence within asylum law remains sparse, and the field of procedural law research has not taken more than a fleeting interest in the oddities of asylum adjudication.

Procedural doctrines from other legal fields appear to be influential in asylum. From administrative procedure, asylum borrows the idea that as the applicant is claiming a benefit, she carries a burden of proof for eligibility.[14] But from the perspective of international refugee law, which imposes explicit and implied obligations of *non-refoulement* on States, that makes no sense. These obligations are not formulated as an individual benefit. In sharp contrast, they are obligations directed at States, and do not make their applicability contingent on a particular procedural performance by the applicant.[15] In international law terminology, they are obligations of result, not obligations of conduct.[16] This might explain why the European Court of Human Rights has refrained from placing the burden of proof on individual applicants.[17] Public international law and domestic public law may have two very different takes on this procedural issue, troubling the comparison between asylum and domestic administrative procedure.

[13] UNHCR Handbook (n 10) paras 196, 203–4, 210.

[14] The term 'burden of proof' is at times reserved for adversarial trials and considered less appropriate for refugee status determination to the extent it is performed in an inquisitorial setting. But, as Kirby J has pointed out, 'the forensic context still reflects the reality of a decision-making process. If a party that could be expected to present material in support of its case fails to do so, that party cannot then complain if the decision-maker decides that a basis for the relief claimed has not been established.' *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* [2006] HCA 53, para 136.

[15] Refugee Convention, art 33; ECHR, arts 3, 13.

[16] An example of an obligation of result would be 'see to it that no one is removed to a situation of torture'. An example of an obligation of conduct would be: 'see to it that there is a legal procedure for individuals to claim international protection'. Article 33 Refugee Convention, article 3 CAT and the implied prohibitions of *refoulement* in article 7 ICCPR and article 3 ECHR are like the former and unlike the latter. This reading of *non-refoulement* obligations explains why para 28 of the UNHCR Handbook casts refugee status determination as being declaratory rather than constitutive. For an analysis of the two types of obligations in international law see Rüdiger Wolfrum, 'General International Law (Principles, Rules and Standards)' Max Planck Encyclopedia of Public International Law 1408, paras 66–93.

[17] 'As a general rule, post admissibility, the burden of proof is not always borne by one or the other party as is usually the case before other international tribunals with an adversarial procedure'. Michael O'Boyle, 'Proof: European Court of Human Rights (ECtHR)' Max Planck Encyclopedia of International Procedural Law 3437, para 33.

At first sight, analogies with criminal procedure also seem inapt, as the criminal procedure is about past events, while asylum revolves around a future state of affairs. Yet the concept of the benefit of the doubt figures prominently in both fields. In criminal law, the benefit of the doubt is shorthand for the requisite standard to which the prosecutor has to prove the case. If it has to be proven beyond reasonable doubt that the accused perpetrated the crime, any measure of reasonable doubt is beneficial for the accused, who then goes free. In asylum law, however, the benefit of the doubt denotes an alleviation of the evidential burden otherwise imposed on the applicant.[18] In the criminal procedure, the accused has the right to remain silent, which the asylum seeker does not. Therefore, the context in which the term 'benefit of the doubt' operates is so different in the two procedures that this terminological loan seems unsuitable.

The asylum procedure remains a phenomenon *sui generis*, not susceptible to analogies from the administrative or criminal procedure. This leaves us with a set of mainstream views in refugee law, influenced by the Handbook.[19] As mentioned above, it is widely held that the burden of proof is on the applicant, but that she enjoys a benefit of the doubt.[20] To this, the Handbook adds that 'the duty to ascertain and evaluate the relevant facts is shared by the applicant and the examiner',[21] reminding of the evidential strategy of the ECtHR.[22] Case law from both Germany and the UK stipulates a low standard of proof.[23] In combination, these positions invite us to consider the central concepts used in them—the burden of proof, the standard of proof, and the benefit of the doubt—in greater depth. It is helpful to start with the most evocative, and most enigmatic of the three: the benefit of the doubt.

What evidential burden does the benefit of the doubt alleviate? It cannot be the burden of proof, which has to remain with one particular party so as to offer meaningful guidance. Either this one party has that burden, and loses the case if the standard of proof is not met, or the other party has that burden and will lose if the standard of proof is not met. In refugee law as we know it, the benefit of the doubt certainly cannot amount to a reversal of the burden of proof.[24] This would make it the duty of the State to furnish

[18] This supposed alleviation comes at too high a price for the applicant, as I shall argue below. UNHCR Handbook (n 10) paras 196, 203–4. See also article 4.5 of the recast EU Qualification Directive, which permits Member States to make it 'the duty of the applicant to substantiate the application for international protection'.

[19] See n 13.

[20] An analogous understanding is expressed by the ECtHR in its line of cases on rejected asylum cases and article 3. See, amongst other authorities, *Collins and Akaziebie v Sweden*, App No 23944/05 (ECtHR, 8 March 2007); and *Hakizimana v Sweden*, App No 37913/05 (ECtHR, 27 March 2008). *JK and Others v Sweden*, App No 59166/12 (ECtHR, Grand Chamber, 2016) para 51.

[21] UNHCR Handbook (n 10) para 196.

[22] O'Boyle (n 17).

[23] International Association of Refugee and Migration Judges, 'Assessment of Credibility in Refugee and Subsidiary Protection Claims under the EU Qualification Directive: Judicial Criteria and Standards' (Haarlem 2012) 82–3. Expressing the standard of proof in a certain percentage is meaningless, unless it can be practically ensured that we all relate the same state of affairs to 0 per cent and 100 per cent.

[24] The idea of a reversible burden appears at times in case law. This is usually a reference to the *evidential* burden one party needs to shoulder if it wishes to prevent the other party from satisfying the burden of proof in a given evidential situation. As a rule, this is done through the invocation of additional facts and evidence disproving the claim of the other party. For an example, see the Grand Chamber judgment of *JK and others v Sweden* (n 20) para 51. For the stated reasons, the burden *of proof* can never be reversible.

evidence to the requisite standard, and the asylum seeker would in fact enjoy a right to remain silent, flying in the face both of the practice of States and the Handbook. But neither can it be that the standard of proof is alleviated. As earlier touched upon, the term 'benefit of the doubt' is a conceptual loan from criminal law, where it provides an alternative expression for a standard of proof 'beyond reasonable doubt'. In refugee law, one influential formulation of the standard of proof derives from EU law, stating that the applicant 'may reasonably fear, in light of his individual situation, that he will in fact be subject to acts of persecution'.[25] It is illogical to think of the 'benefit of the doubt' as an 'alleviation' of this standard, though. We cannot know what it would mean to lower the standard of proof to 'less than reasonable fear'. I conclude that it remains unclear exactly which evidential burden the benefit of the doubt is supposed to alleviate. In practice, it might not have any alleviating effect.

That does not mean, however, that it has no effect at all. The Handbook describes giving the benefit of the doubt as follows:

> After the applicant has made a genuine effort to substantiate his story there may still be a lack of evidence for some of his statements. As explained above (paragraph 196), it is hardly possible for a refugee to 'prove' every part of his case and, indeed, if this were a requirement the majority of refugees would not be recognized. It is therefore frequently necessary to give the applicant the benefit of the doubt.
>
> The benefit of the doubt should, however, only be given when all available evidence has been obtained and checked and when the examiner is satisfied as to the applicant's general credibility. The applicant's statements must be coherent and plausible, and must not run counter to generally known facts.[26]

Put otherwise, few asylum applicants satisfy the evidential requirements that they would have to respond to, were it not for the benefit of the doubt. The benefit of the doubt, however, is conditional on the 'general credibility' of the asylum seeker, expressed through the combination of three proxies (coherency, plausibility, freedom from external contradiction). If we run this in the reverse, it is only the generally credible applicant that, as a rule, is able to satisfy the procedural requirements in place for her recognition as a refugee. The same logic features in EU law,[27] and there are likely to be similar ripple effects in other parts of the world.

Would the benefit of the doubt make more sense if combined with a duty to produce evidence that were 'shared' between the claimant and the State authorities? The concept of shared evidential duties cannot be reconciled with a logically stringent conception of the burden of proof. 'The claimant has the burden of proof' and 'the duty to produce evidence is shared' cancel each other out, unless I am told exactly what each party has to

[25] Note how the chosen formulation operationalizes the term 'well-founded fear' of the refugee definition. Cases C-71/11 and C-99/11, *Germany v Y and Z* (CJEU, 5 September 2012) para 76.

[26] UNHCR Handbook (n 10) para 203, 204.

[27] For an extensive analysis, see Gregor Noll, 'Evidentiary Assessment in Refugee Status Determination and the EU Qualification Directive' (2006) 12 European Public Law 295.

do in order to satisfy its share of the duty of production. A burden of proof staying with one party for the whole of the procedure always relates to a standard of proof. A shared duty to produce evidence lacks the linkage to the standard of proof. It also lacks a particular standard which tells us when this duty shifts from one party to the other.[28] This instability is further exacerbated if we introduce the concept of a benefit of the doubt into such an environment. It leaves us with the question of how to alleviate a non-existent standard: a question that cannot be answered.

The two formulations of the benefit of the doubt in the Handbook and EU law condition the benefit of the doubt on 'the applicant's general credibility' and on his 'statements [being] coherent and plausible' and 'not running counter to generally known facts'. The alleviating evidential rule in EU law adds that the applicant needs to have made 'a genuine effort to substantiate his application' and has applied for protection at the earliest point in time, unless there are good reasons to the contrary.[29] The benefit of the doubt is granted, if we follow a first impression, if and only if the applicant has satisfied three criteria in the Handbook, and/or five criteria in EU law. From a strictly formalist perspective, here is what we have:

a. A burden of proof that is routinely deemed to be on the applicant.
b. A standard of proof that is believed to be low.
c. As soon as there is doubt about at least on one part of the statement, which the applicant cannot dispel with further evidence on the relevant *factum probandum*, something is added to the process.

If we cast these added elements as a set of three or five new *facta probanda* in the procedure (genuineness of the effort to substantiate, exhaustiveness of substantiation, coherence, plausibility, timeliness of the application and general credibility), this confronts us with the question of how an applicant is to prove these added elements pertaining to her general credibility and so on. Logically, this is untenable, because it mixes up facts with their evaluation, and evidence with proof. The applicant cannot be supposed to prove to the judge that she has just proven herself as credible. The alternative is that these added elements are as an escalated standard of proof. This is analytically more satisfying, but the outcome is dreadful in reality. It means that RSD operates with a low standard of proof, but, in reality, we apply a high standard of proof, because most cases trigger doubt. Knowing to what extent something needs to be proven is of value only if we know who is supposed to prove it to that standard. As this is what we do not know in refugee law, there is no point in specifying the standard of proof further.

To conclude, the interaction of the burden of proof, standard of proof, and benefit of the doubt in asylum is vague and logically deficient. The benefit of the doubt works

[28] This indicates that the introduction of additional norms to clarify an indeterminate standard of proof falls victim to the same systemic indeterminacy from which the standard suffers. Sebastían Reyes Molina, *Legal Interpretation and Standards of Proof. Essays in Philosophy of Law and Evidence Law Theory* (Uppsala University 2020) ch III.

[29] EU Qualification Directive, art 4.5.

against the applicant in making acceptance of a less than fully corroborated claim conditional on a positive credibility finding. In comparison with criminal or administrative proceedings, both factors—the logically deficient interaction of the three core concepts, and the escalated focus on credibility—widens the space for the personal discretion of the decision-maker.

3. Do We Have Criteria for Credibility?

Refugee law does not provide us with an intelligible framework on evidential questions. With credibility being so central an issue, we are left with the question on how to assess it. This section examines whether seemingly common-sense criteria suggested in refugee law and related doctrine are supported by scientific research.

Criteria for credibility assessment appear in the Handbook and EU law. The Handbook conditions the benefit of the doubt on the 'general credibility' of the applicant, and then suggests that her 'statements must be coherent and plausible, and must not run counter to generally known facts'.[30] For decision-makers subject to EU law, the black letter law of article 4.5 of the Qualification Directive is far more demanding. It states that documentation for certain aspects of the claim can be foregone if five conditions are cumulatively met: (a) the genuine character of the applicant's effort to substantiate her application; (b) submission of all relevant elements, satisfactory explanation of any lacunae: (c) coherence, plausibility, and external non-contradiction; (d) filing of the protection claim at the earliest possible time, unless there are good reasons for not doing so; and (e) the 'general credibility of the applicant'.

Both the Handbook and EU law use the problematic term 'general credibility', which opens up for an assessment of the applicant's personality beyond the statements she makes relating to her protection claim.[31] The Handbook, however, limits that assessment through a follow-up sentence listing coherence, plausibility, and external consistency as credibility criteria; all of them relating to the reliability of the applicant's statement rather than to her personality at large. Article 4.5.e of the Qualification Directive, by contrast, mixes statement reliability under its points (b) and (c) with the personal credibility criteria under points (a) and (e). General credibility is set out as a criterion in itself, as the genuineness of the applicant's efforts. With that, the decision-taker has to perform a much more comprehensive assessment; as we will see, it is one far beyond the competencies of any decision-maker.

This brings us to the question of how general credibility assessments and the use of more specific reliability criteria relate to the sciences. One strategy is to seek support in psychology and traumatology for the way credibility and reliability is assessed in refugee

[30] UNHCR Handbook (n 10) para 204.

[31] Jennifer Beard and Gregor Noll, 'Parrhesia and Credibility: The Sovereign of Refugee Status Determination' (2009) 18 Social and Legal Studies 455.

law, another to check whether research suggests that certain practices or criteria in refugee law are invalid. Research on deception detection is relevant for both strategies. Rooted in behavioural psychology, this field seeks to identify criteria to separate truth-telling from lies. This research tells us that humans are generally not very good lie detectors. In most empirical studies, accuracy rates fall below 60 per cent.[32] A 2006 metastudy by psychologists Charles Bond and Bella Depaolo synthesized research results from 206 earlier studies representing experiments with a total of 24,483 judges with no special aids or training.[33] In these circumstances, an average of 54 per cent correct lie–truth judgments was achieved. With an accuracy rate of 50 per cent expected by chance alone, this is unimpressive. But how about experienced asylum decision-takers? A 2006 study by Per Anders Granhag, a cognitive psychologist, compared the beliefs on lie detection cues held by staff at the first instance Swedish Migration Board to those of a group of random students.[34] Beliefs amongst Migration Board staff were 'not more in tune with research findings on objective cues to deception than were the beliefs of the students'.[35] Clearly, asylum decision-makers do not enjoy any professional privilege when telling lies from the truth.

Are there any objective cues to deception, then? Researchers distinguish between non-verbal cues (such as gestures or body movements) and verbal cues (such as words or expressions chosen in an oral statement). The 51 authors of a 2019 article underscore that 'scholars who have scientific expertise in lie (and truth) detection agree that there are no nonverbal behaviours that are present in all liars and are absent in all people who tell the truth'.[36] This rejection of nonverbal cues also undermines the rationality of 'general credibility' assessments proposed by refugee law and related doctrine. What distinguishes credibility from reliability is that it reaches beyond the statement: and therewith precisely for the nonverbal cues that scholars reject.[37] Therefore, the general credibility criterion is renounced as 'lack[ing] empirical support'.[38]

[32] Kraut and Vrij are standard references. Robert Kraut, 'Humans as Lie Detectors: Some Second Thoughts' (1980) 30 Journal of Communication 209; Aldert Vrij, *Detecting Lies and Deceit: The Psychology of Lying and the Implications for Professional Practice* (Wiley 2000).

[33] Charles Bond and Bella Depaolo, 'Accuracy of Deception Judgments' (2006) 10 Personality and Social Psychology Review 214. Here, the term 'judges' refers to those persons endowed with the task to tell lies from truth in experiments, not to judges of courts or tribunals.

[34] Per-Anders Granhag, Leif Strömvall, and Maria Hartwig, 'Granting Asylum or Not? Migration Board Personnel's Beliefs about Deception' (2005) 31 Journal of Ethnic and Migration Studies 29.

[35] ibid.

[36] Vincent Denault and others, 'The Analysis of Nonverbal Communication: The Dangers of Pseudoscience in Security and Justice Contexts' (2020) 30 Anuario de Psicología Jurídica 1. For a recent elaboration see Aldert Vrij, Maria Hartwig, and Per-Anders Granhag, 'Reading Lies: Nonverbal Communication and Deception' (2019) 70 Annual Review of Psychology 295, showing 'that the nonverbal cues to deceit discovered to date are faint and unreliable and that people are mediocre lie catchers when they pay attention to behavior'.

[37] 'Research shows that the assessment of credibility runsthe risk of being very subjective'. Per-Anders Granhag, Sara Landström, and Andreas Nordin, 'Evaluation of Oral Evidence: A Scientifically Based Decision-Aid for Migration Cases' (University of Gothenburg 2017) 17.

[38] ibid 45.

The 2005 ECtHR judgment in *N v Finland*, a rare ECtHR case touching on evidential assessment in asylum, also supports the rejection of general credibility as a criterion.[39] The court accepted parts of the applicant's statement central to the claim of protection need, while quite forcefully rejecting the veracity of other parts.[40] In brief, *N v Finland* supports a narrow interpretation of 'general credibility', reducing it to the reliability of statements central to the protection claim.

Concerning the assessment of reliability, verbal cues are at the centre of deception researchers' efforts and are seen as having potential. While there are some cues for truth-tellers (the level of detail being a prime example), deception researchers yet have to agree on cues for liars. But even cues as the level of detail are discussed with great caution by researchers, as not every researcher has the same conception of what constitutes richness in detail.[41] In a 2017 research publication distilling findings from deception research into concrete advice for migration caseworkers, all verbal cues are immediately problematized, and most to the point where their practical usefulness is becoming doubtful. By way of example, it is pointed out that richness in detail may indicate that a statement is true. However, the authors underscore that there are strong counter-indications if speakers have witnessed sexual violence. Such speakers offer accounts devoid of detail that are nonetheless true.[42] Before a criterion such as 'the level of detail' can be used, a decision-taker would need to decide whether the claimant may have witnessed sexual violence. This would make the evaluation of earlier persecution into a pre-condition for a credibility criterion, reversing the sequence of method and outcome. In all, its laudable advances notwithstanding, deception research is not at a stage today where its most promising results can be readily transposed into practical advice. This is acknowledged by the field itself.[43]

The research makes it outright inadvisable to employ two of the three criteria used in the Handbook and EU law. Everyone, including asylum seekers, struggles to recall temporal information, verbal exchanges, proper names, the appearance of common objects, and peripheral memory.[44] Autobiographical memory changes over time in anyone, suggesting that we are all incoherent.[45] Trauma and post-traumatic stress disorder may have a negative impact on recall and narrative.[46] Post-traumatic stress

[39] *N v Finland*, App No 38885/02 (ECtHR, 26 July 2005).

[40] ibid paras 152–7.

[41] Galit Nahari, Tzachi Ashkenazi, Ronald P Fisher, Par-Anders Granhag, Irit Hershkowitz, Jaume Masip, Ewout H Meijer, Zvi Nisin, Nadav Sarid, Paul J Taylor, Bruno Verschuere, and Aldert Vrij, '"Language of Lies": Urgent Issues and Prospects in Verbal Lie Detection Research' (2019) 24 Legal and Criminal Psychology 1 (see Commentary #6 by Verschuere, Meijer, and Kleinberg).

[42] Granhag, Landström, and Nordin (n 37) 45.

[43] Nahari and others (n 41) (see Commentary#11 by Nisin).

[44] For a well-structured discussion with further references, see Hilary Evans Cameron, 'Refugee Status Determination and the Limits of Memory' (2010) 22 IJRL 469.

[45] ibid 495.

[46] Jane Herlihy, 'Evidentiary Assessment and Psychological Difficulties' in Gregor Noll, *Proof, Evidentiary Assessment and Credibility in Asylum Procedures* (Martinus Nijhoff 2005) 123, 126–8.

results in changes in account over time.[47] Research in a population of unaccompanied minor asylum seekers shows that accuracy and consistency are unrelated.[48] These findings not only suggest that the 'coherence' criterion is an unrealistic precondition for credibility, but also that the least coherent applicants may be most in need of protection, in particular if their claim and the traumatic event are linked, as they so often are.

'Plausibility' cannot be shared interpersonally, because our plausibility judgments are dependent on our past experiences, biases, and assumptions about the world.[49] This is why 'plausibility' as a credibility criterion is useless, inviting subjective judgment under a deceptive label. In contrast to coherence and plausibility, the Handbook criterion of a statement 'not running counter to known facts' is acceptable. However, it presupposes that we consider the overall quality of what is taken as 'known facts' first, raising the question of how COI and expert evidence have been produced. When comparing Western narratives of COI and expert evidence with the often interpreted or translated narrative of an asylum seeker, who may not have been fully informed about the asylum procedure, the risk for intercultural miscommunication is particularly acute.

Coherence, plausibility, and general credibility are written into the black letter of EU law. Is there a way to interpret these provisions in light of their refugee protective aim? To arrive at an interpretation 'in accordance with' the Refugee Convention as required by EU Treaty law,[50] we might read article 4.5 of the Qualification Directive through the lens of the term 'well-founded fear' in the Refugee Convention, drawing on treaty interpretation norms.[51] To conclude that a finding of 'well-founded fear' is contingent on the black letter requirements of article 4.5 of the Qualification Directive is a 'manifestly absurd' interpretation, because it would require the judge to act in contravention with what science and scholarship has now made common knowledge. As a manifestly absurd interpretation opens the door to the broader means of interpretation under article 32 of the Vienna Convention on the Law of Treaties, we could draw on the medical, cognitive, and psychological studies referred to. This would then reduce the scope of the terms 'coherent', 'plausible', or 'general credibility' to a minimalist reading, *de facto* incapacitating them. To be sure, this is not to say that the current formulation of article 4.5 of the Qualification Directive always leads to violations of the Refugee Convention. If, and only if, it is interpreted in the limitative way suggested here, it may be applied consistently with the Convention.

[47] McNally reported that soldiers were not consistent in reporting the same traumatic memories over time. Richard J McNally, *Remembering Trauma* (Harvard University Press 2003).

[48] Philip Spinhoven, Tammy Bean, and Liesbeth Eurelings-Bontekoe, 'Inconsistencies in the Self-Report of Unaccompanied Refugee Minors' (2006) 19 Journal of Traumatic Stress 663, 663.

[49] Daniel Kahneman and Shane Frederick, 'A Model of Heuristic Judgment' in Keith J Holyoak and Robert G Morrison, *The Cambridge Handbook of Thinking and Reasoning* (CUP 2005).

[50] Treaty on the Functioning of the European Union [2012] OJ C326/47, art 78.1.

[51] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

4. Divergences in Recognition and Empirical Studies of Refugee Adjudication

So far, we have shown that the legal process for assessing the credibility of asylum applicants provides little constraint on the subjective discretion of decision-takers. Against that background, we may reasonably expect that recognition rates should vary across actors assessing these applications. It is well known that recognition rates vary widely amongst Member States in the European Union.[52] Even though international and EU law norms might be expected to harmonize outcomes,[53] domestic legislation and procedural traditions in Member States diverge, which might explain why recognition rates do so as well. Yet recognition rates *within* Member States may also vary significantly, as a 2017 study on recognition divergences in the German asylum system found.[54] This undermines an explanation based on insufficient harmonization, as the same procedural tradition and the same legislation are applied by authorities and courts in the German *Länder*.

What is known about the causes for divergences? The asylum system of the US is well researched. In their seminal 2007 study, Ramji-Nogales, Schoenholtz, and Schrag found that, in many cases, 'the most important moment in an asylum case is the instant in which a clerk randomly assigns an application to a particular asylum officer or immigration judge'.[55] Their analysis of some 400,000 decisions and judgments in the US asylum system indicated that outcomes varied significantly between decision-takers on one and the same country of origin, even within one and the same authority or court. The likelihood of being granted asylum increased if the applicant had a spouse or a minor child in the US, if a female judge decided a case, if there was legal assistance, or if the case was decided by a judge who earlier worked in private practice, at an NGO or as an academic teacher. The likelihood for being granted asylum decreased if the judge was male, or if the judge earlier worked for the US Department of Homeland Security.[56] These differences were not trivial: female judges granted asylum at a rate that was 44 per

[52] A 2019 Report in ECRE's AIDA database states that 'asylum seekers continue to face an "asylum lottery" in Europe'. AIDA, 'Asylum Statistics 2018: Changing Arrivals, Same Concerns' <https://asylumineurope.org/news/25-01-2019/asylum-statistics-2018-changing-arrivals-same-concerns> accessed 2 April 2020.

[53] See generally Cathryn Costello and Emily Hancox, 'The Recast Asylum Procedures Directive 2013/32/EU: Caught between the Stereotypes of the Abusive Asylum Seeker and the Vulnerable Refugee' in Vincent Chetail, Philippe De Bruycker, and Francesco Maiani (eds), *Reforming the Common European Asylum System: The New European Refugee Law* (Martinus Nijhoff 2016) 375–445.

[54] Lisa Riedel and Gerald Schneider, 'Dezentraler Asylvollzug diskriminiert: Anerkennungsquoten von Flüchtlingen im bundesdeutschen Vergleich, 2010–2015' (2017) 58 Politische Vierteljahresschrift 21.

[55] Jaya Ramji-Nogales, Andrew I Schoenholtz, and Philip G Schrag, 'Refugee Roulette: Disparities in Asylum Adjudication' (2007) 60 Stanford Law Review 295, 295. Further reasoning 378.

[56] ibid.

cent higher than that of their male colleagues.[57] Also, Rehaag's study of the outcome divergences produced by the Canadian asylum system highlights the importance of the judge assigned to the case to the outcome.[58] A 2000 study on Switzerland shows that recognition rates vary between its cantons, explained partly by their different asylum system organizations.[59] Hamlin's study of the RSD regimes of Australia, Canada, and the US argues that recognition rates vary due to their particular ways of conceptualizing and organizing administrative justice.[60] Martén's 2015 study of 16,000 Swedish judgments found evidence that lay judges' partisan affiliation measurably impacted outcomes across the Swedish system.[61] A 2020 study on the German federal system by Schneider, Segadlo, and Leue uncovers 'considerable spatial inequities', not only amongst authorities, but even at court level.[62]

These studies suggest that discrepancies cannot be explained by rational, protection-related factors alone. The considerable legal space for discretion demonstrated above is consonant with these patterns of outcome variation, leading to the conclusion that the individual decision-taker is often the most important determinant factor.[63] Knowing that, we could ask a different type of question: can we predict a final outcome if we know the identity of the decision-taker? Dunn, Sagun, Sirin, and Chen's 2018 machine-learning study of some 21 million records of US asylum decisions, affecting some 800,000 cases, confirms this possibility. Only using information on the identity of the judge and the applicant's nationality, their algorithm could predict the outcome of the asylum claim with 80 per cent accuracy.[64] It is distressing that a degree of predictive accuracy this high can be reached *without* having examined the evidence or its assessment by the judge. The conclusion is that that evidential assessment plays a minor role in

[57] Ramji-Nogales, Schoenholtz, and Schrag (n 55) 367. In a 2017 machine learning study of a larger dataset by Chen and Eagel, female judges had an average grant rate of 45 per cent compared to males, which had just a 30 per cent grant rate. Daniel L Chen and Jess Eagel, 'Can Machine Learning Help Predict the Outcome of Asylum Adjudications?' (2018) Proceedings of the ACM Conference on AI and the Law.

[58] Sean Rehaag, 'Judicial Review of Refugee Determinations: The Luck of the Draw?' (2012) 38 Queen's Law Journal 1.

[59] Thomas Holzer, Gerald Schneider, and Thomas Widmer, 'Discriminating Decentralization: Federalism and the Handling of Asylum Applications in Switzerland, 1988–1996' (2000) 44 Journal of Conflict Resolution 250–75.

[60] Rebecca Hamlin, 'International Law and Administrative Insulation: A Comparison of Refugee Status Determination Regimes in the United States, Canada, and Australia' (2012) 37 Law & Social Inquiry 933.

[61] Linna Martén, 'Political Bias in Court? Lay Judges and Asylum Appeals' (2015) Working Paper Series from Uppsala University No 2015/2 <https://www.econstor.eu/handle/10419/125543> accessed 2 April 2020.

[62] Gerald Schneider, Nadine Segadlo, and Miriam Leue, 'Forty-Eight Shades of Germany: Positive and Negative Discrimination in Federal Asylum Decision Making' (2020) German Politics 1.

[63] Apart from Ramji-Nogales, Schoenholtz, and Schrag (n 55), see also Andy J Rottman, Christopher J Fariss, and Steven C Poe, 'The Path to Asylum in the US and the Determinants for Who Gets In and Why' (2009) 43 International Migration Review 3.

[64] Daniel L Chen, Matt Dunn, Levent Sagun, and Hale Sirin, 'Early Predictability of Asylum Court Decisions' (2018) Proceedings of the ACM Conference on AI and the Law.

the outcome, save for being a door-opener for subjective discretion. When outcome variations are so large, and driven predominantly by the individuals taking asylum decisions, another object of credibility is at issue: that of the asylum system itself.

5. Which Strategy for Credibility Assessment?

Evidential assessment in the asylum procedure is dysfunctional. It confronts challenges acknowledged in ancient traditions of legal witnessing; its rules on the burden and standard of proof are inconclusive at best, deceptive at worst; and its protective track record is dismal with significant variations between individual decision-makers persisting over years. This puts into doubt the larger project of rendering asylum outcomes more predictable and harmonized, be it through international or regional law. For observers outside the legal field, the conclusion should be clear: law is far from delivering justice on a central issue of global reach: that of membership in protective communities. In the asylum field, it is not law that rules, but individual decision-makers.

Which strategies might we adopt in this situation, and which are unsuitable? First, as we found that law is contradictory and cannot guide decision-maker, requiring them to undergo more legal training would not make a difference. It might be worthwhile exposing them to findings from psychology and trauma research on regular intervals, and to offer them more training on interviewing technique and cross-cultural communication. This might warn them away from the worst fallacies (such as the belief that there are cues for liars) and weed out clearly unsuitable and irrational ideas (such as the use of 'coherence' and 'plausibility' as credibility criteria). Yet weeding out irrationality is not enough, unless we have a rational and intelligible legal framework to fall back on. This we do not have. Therefore, overall outcome variations would not diminish significantly even if such training programmes were implemented widely.

A second strategy would be to acknowledge the paramount role of the individual decision-taker, and to cultivate an ethos of individual responsibility with the persons passing a credibility judgment. This would displace the problem into the hiring of suitable staff[65] and the method of assigning decision-makers to cases. While being honest about the subjective dimension of asylum adjudication is a good thing, building a moral meritocracy is less attractive an option as it begs the question of its ultimate foundation.

[65] Ramji-Nogales, Schoenholtz, and Schrag (n 55) 380 propose more rigorous hiring standards for US judges working on asylum cases.

A third strategy would be to build a new and more coherent doctrine of evidential assessment in asylum cases.[66] Evans Cameron has usefully proposed to base assessment practices on abductive reasoning, which looks for the best explanation instead of the truth or a threshold of probability. Between considering the evidence 'in the round' and applying the standard of proof, she asks for a crucial step to be taken:

> Throughout the hearing, a decision maker using abductive reasoning will be looking to infer, from among 'all the relevant possibilities' about what happened to the claimant in her homeland, the one that best explains what the decision-maker is seeing and hearing. In deciding the claim, he will be looking to infer, from among 'all the relevant possibilities' of what might be awaiting the claimant on return, the one that best explains the totality of the evidence.[67]

Evans Cameron's suggestion rests on the authority of evidential theorists who think of proof as that which best explains the evidence. For the purposes of RSD, she endorses the use of a set of factors for considering the strength of a leading hypothesis as proposed by Josephson, an evidence theorist.[68] In fact, this is no less than a set of second-order rules intended to clarify how first-order rules on the standard of proof and the benefit of the doubt are to be applied. More rules are added to the legal system. However, there are powerful arguments against second-order rules formulated within the 'best explanation' approach. If the problem is that the standard of proof in RSD is currently too vague, the second-order norms proposed by Evans Cameron will not resolve it. Reyes Molina has shown that such norms do not say anything about the setting of the quantum of evidence, which is at the heart of the matter. Their meaning, he argues, is as indeterminate as that of the first-order norm they seek to elucidate.[69] While his critique is not geared against the best explanation approach as such, it renders the strategy of building a better normative doctrine into a questionable pursuit.

With a fourth strategy, we could move to the other end of the spectrum. Algorithmic machines allowed us to analyse the malaise, so why not let them provide the remedy? Babic, Chen, Evgeniou, and Fayard have proposed a human-machine collaboration where Artifical Intelligence (AI) nudges human decision-takers along the lines of their

[66] For an early example, see Aleksandra Popovic, 'Evidentiary Assessment and Non-Refoulement: Insights from Criminal Procedure' in Noll (n 46).

[67] Hilary Evans Cameron, *Refugee Law's Fact-Finding Crisis. Truth, Risk, and the Wrong Mistake* (CUP 2018) 198.

[68] ibid 203, referring to John R Josephson, 'On the Proof Dynamics of Inference to the Best Explanation' in Marilyn MacCrimmon and Peter Tillers (eds), *The Dynamics of Judicial Proof: Computation, Logic, and Common Sense* (Springer 2012) 291–2.

[69] Reyes Molina (n 28) ch III, 24–7. His argument objects against second-order norms as proposed by Pardo (whom Evans Cameron also quotes), but it applies to the argument made by Evans Cameron with reference to Josephson as well.

earlier decisions, or those of their colleagues.[70] Even here, the problem would be displaced: primarily into system design, an area opaque for most lawyers, and secondarily into staff hiring and case assignment. Also, as machine nudging becomes more intrusive, judicial independence would seem to be compromised.

Finally, a fifth strategy would be to move to group-based determination in the Global North. This might reduce the problematic role played by individual credibility to an extent. Still, the system would need to identify whether particular individuals belong to the risk groups deemed eligible for protection under the Refugee Convention or other instruments. Individual evidential assessment would come back through that door.[71] To be sure, the overall cognitive load handled by RSD would be no less than today, but differently distributed. Powers that are allocated to individual decision-takers in individualized procedures would be concentrated at an aggregate level, with a concomitant shift in the magnitude of error risks.

We have a number of alternative avenues to choose from, some reformist, other more radical in the changes they demand. None of them offers a clear-cut resolution to the problems of evidential assessment in the asylum procedure mapped in earlier sections of this chapter. It will take time to properly consider all conceivable options and their consequences. At the systemic level, though, we have enough information to reject the way evidence and credibility is currently assessed in asylum cases.

[70] Boris Babic, Daniel L Chen, Theodoros Evgeniou, and Anne-Laure Fayard, 'A Better Way to Onboard AI' 2020 (11) Harvard Business Review (https://hbr.org/2020/07/a-better-way-to-onboard-ai). A nucleus of the nudging element can be found in Ramji-Nogales, Schoenholtz, and Schrag (n 55) 381, where the authors suggest that adjudicators with particularly high and particularly low grant rates should confer with each other to find out the reasons for their discrepancy.

[71] By way of example, doubts on the real nationality or permanent residency of an applicant have been addressed by questionable means as language tests.

PART V

THE SCOPE OF REFUGEE PROTECTION

CHAPTER 34

THE INTERNATIONAL AND REGIONAL REFUGEE DEFINITIONS COMPARED

TAMARA WOOD

1. Introduction

When the modern refugee protection regime first began to emerge in the early twentieth century, refugees were generally identified by group according to specific situations or nationalities—for example, agreements relating to Russian and Armenian refugees in 1926.[1] In the years leading up to the adoption of the Refugee Convention, this *ad hoc*, political decision-making about refugee protection was gradually replaced by a more individual, and 'legalized', approach to identifying refugees using generic, pre-determined criteria.[2] This culminated in the adoption of the Refugee Convention's article 1A(2) 'universal refugee definition', which defines a 'refugee' as a person with 'a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion'.[3]

While the universal refugee definition remains the cornerstone of the international refugee protection regime, it is far from the final word, as 'states parties [to the Refugee Convention] have not infrequently agreed by either regional accord or national law to *extend* the scope of refugee status to other persons'.[4] The most widely recognized regional refugee definitions are found in Africa and Latin America, where multilateral

[1] See eg Arrangement relating to the Issue of Identify Certificates to Russian and Armenian Refugees (adopted 12 May 1926) 84 LNTS 2004.

[2] Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, OUP 2007) ch 2.

[3] See the full definition in Section 2.a. Article 1A(2) of the Refugee Convention is described as the 'universal' refugee definition due to its international applicability and widespread ratification by States.

[4] James C Hathaway and Michelle Foster, *The Law of Refugee Status* (2nd edn, CUP 2014) 2 (emphasis in original).

arrangements between regional State groupings have extended refugee protection beyond those with a well-founded fear of being persecuted to people fleeing other, more widespread situations and harms, such as generalized violence, massive human rights violations and serious disturbances to public order.[5] Other regions have also considered alternative conceptions of a refugee, even if they have not always been formally applied.[6]

The scope of protection provided by the Refugee Convention's universal refugee definition has been supplemented in other ways as well. At the national level, some Contracting States to the Refugee Convention have expanded the scope of the definition within their own legislation—for example, by recognizing 'sex' or 'tribe' as an additional ground of persecution.[7] At the international and regional levels, 'complementary' or 'subsidiary' protection frameworks based on international human rights law have extended States' non-return (*non-refoulement*) obligations to those at risk of torture, cruel, inhuman, or degrading treatment, or arbitrary deprivation of life.[8] Broader still, notions of 'non-returnability' based on principles of temporary or humanitarian protection have further extended the category of people who may have a claim to special treatment or status in a country outside their own.[9] Over time, the scope of protection provided by the universal refugee definition itself has also changed. The changing nature of displacement since 1951, and evolving meanings of the definition's terms in international law, mean that the universal refugee definition now extends protection to persons not necessarily thought to be 'refugees' at the time of its drafting.[10]

Developments in international protection since 1951, and in particular the regional refugee definitions in Africa and Latin America, have often been praised for their generous scope and humanitarian spirit, and for addressing the perceived limitations of the Refugee Convention.[11] Not every such development has led to the *expansion* of protection, however. In Europe, for example, the 2004 European 'Qualification Directive',[12] which provides interpretative guidance to European Member States on the scope and application of the universal definition, has been criticized for promoting a 'lowest common denominator' approach to the definition that limits its interpretation

[5] See Section 2 of this chapter for the full African and Latin American refugee definitions.

[6] See Part III, particularly Chapters 18 and 23, in this volume.

[7] Refugee Act 2006 (Kenya) s 3(1)(a); Refugee Act 1998 (South Africa) s 3(a).

[8] See Chapter 36 in this volume.

[9] Walter Kälin and Nina Schrepfer, 'Protecting People Crossing Borders in the Context of Climate Change Normative Gaps and Possible Approaches' (2012) UNHCR Legal and Protection Policy Research Series.

[10] See Section 2.a. See also Chapter 37 in this volume.

[11] See generally UNHCR, '"The Refugee Convention at 60: Still Fit for Its Purpose?" Statement by Erica Feller to Workshop on Refugees and the Refugee Convention—60 Years On: Protection and Identity' (2011).

[12] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted (recast) [2011] OJ L337/9.

and application in practice.[13] In Latin America, States have sometimes used more discretion-based temporary, or humanitarian, protection regimes as *de facto* replacements for refugee protection, effectively circumventing their core obligations under the Refugee Convention.[14]

Irrespective of ongoing developments in the scope of international protection, the term 'refugee' continues to demarcate a category of persons with specific, enforceable rights under international, regional, and domestic law. Against this background, this chapter provides a closer look at the three main refugee definitions in operation today: the universal refugee definition in the Refugee Convention, the African refugee definition in the OAU Convention, and the Latin American definition in the Cartagena Declaration. This chapter provides an overview of the core criteria for refugee status set out in each of these three definitions. It then considers the definitions in comparative perspective, comparing and contrasting their scope and application to specific displacement scenarios. This chapter focuses on the 'inclusion' criteria set out in each definition. The definitions' respective 'exclusion' or 'cessation' clauses and criteria, which may prevent an individual who otherwise meets the criteria for refugee status from obtaining the benefits of its protection, are addressed elsewhere in this volume.[15]

2. Defining Refugees

a. Universal Refugee Definition

The universal refugee definition in article 1A(2) of the Refugee Convention defines a refugee as:

> any person who . . . owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.[16]

An additional paragraph of article 1A(2) stipulates that refugees with multiple nationalities must establish a well-founded fear with respect to each country of

[13] Jane McAdam, *Complementary Protection in International Refugee Law* (OUP 2007) 59, citing Anja Klug, 'Harmonization of Asylum in the European Union—Emergence of an EU Refugee System?' (2004) 47 German Yearbook of International Law 594, 626.

[14] See eg Amnesty International, 'Urgent Measures: Venezuelans Need International Protection' (3 September 2018).

[15] See Chapters 39 and 57 in this volume.

[16] Refugee Convention, art 1A(2).

nationality before qualifying for refugee protection elsewhere. A temporal limitation in the original definition, which applied only to events occurring before 1 January 1951, was effectively removed in 1967 with the adoption of the 1967 Protocol.[17]

When a person applies for refugee status under the universal refugee definition, their claim is commonly assessed according to several distinct, though related, components of the definition's criteria. Goodwin-Gill and McAdam articulate these components as follows:

> (1) They are outside their country of origin; (2) they are unable or unwilling to seek or take advantage of the protection of that country, or to return there; (3) such inability or unwillingness is attributable to a well-founded fear of being persecuted; and (4) the persecution feared is based on reasons of race, religion, nationality, membership of a particular social group, or political opinion.[18]

In practice, components (1) and (2) can usually be dealt with quickly within refugee status determination procedures. Being outside one's country of origin is generally a precondition for accessing refugee status determination procedures in the first place. It is not usually practicable, for example, to claim the benefits of refugee protection from within one's own country.[19] A refugee's inability or unwillingness to avail themselves of the protection of their country of origin is also usually self-evident in the very act of making a claim for refugee status. In practice, the question of what protection is available to the applicant in his or her home country arises more often in the assessment of whether he or she has a 'well-founded fear of being persecuted'.[20]

Component (3)—'a well-founded fear of being persecuted'—is at the heart of refugee status determination under the universal refugee definition. Establishing a well-founded fear of being persecuted involves a forward-looking assessment of the risk of harm to the applicant if returned. In essence, it requires that a refugee face a real chance (well-founded fear) of experiencing serious harm (being persecuted) if returned to their country of origin (or any other place where they face a relevant risk).[21] A 'real chance' of persecution is one that is significant, involves a reasonable degree of likelihood, or is more than a remote possibility.[22] Importantly, a real chance may be less than 50 per

[17] Only Madagascar and Saint Kitts and Nevis remain parties to the 1951 Convention only, making the temporal limitation now largely irrelevant. Article 1B(1) of the Refugee Convention originally gave Contracting States the option to adopt a geographical limitation on the universal refugee definition, limiting it to refugees fleeing events occurring 'in Europe' within the specified timeframe. With the exception of Madagascar, this has also been effectively removed.

[18] Goodwin-Gill and McAdam (n 2) 37.

[19] Gregor Noll, 'Seeking Asylum at Embassies: A Right to Entry under International Law?' (2005) 17 IJRL 542. cf Kate Ogg, 'Protection Closer to Home? A Legal Case for Claiming Asylum at Embassies and Consulates' (2014) 33 RSQ 81. See generally Chapter 17 in this volume.

[20] See Hathaway and Foster (n 5) ch 4.

[21] ibid chs 2 and 3.

[22] University of Michigan Law School, 'The Michigan Guidelines on Well-Founded Fear' (2004) <https://www.refworld.org/docid/467fa3fb22.html> accessed 15 May 2020; UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/1P/4/ENG/REV.4 (1979, reissued 2019) (UNHCR Handbook) paras 37–65.

cent—it does need to be more likely than not.[23] The notion of serious harm—'being persecuted'—is generally understood by reference to international human rights law, such that a 'sustained or systemic violation of basic human rights demonstrative of a failure of State protection' will constitute persecution.[24] This may include 'threats to life or freedom' as per the 1951 Convention's *non-refoulement* provision,[25] as well as other 'serious violations of human rights'.[26]

Not every person facing a real risk of serious harm is a refugee under the universal refugee definition. Component (4) of the definition requires that the risk of harm arise 'for reasons of' one of the five Convention grounds—race, religion, nationality, membership of a particular social group, or political opinion. This component of the definition is sometimes described as the 'nexus' requirement, as refugees must not only have (or be perceived to have) one of the relevant attributes; there must also be a 'nexus' between that attribute and the risk of harm.

The universal refugee definition has sometimes been criticized for its 'Eurocentric' focus, and for being 'out of date' and unable to respond to current displacement drivers, such as climate change and social inequality. Despite such criticisms, the definition's meaning and application have actually evolved considerably since 1951. This is the result of changes in the nature and causes of displacement worldwide, advances in the scrutiny and analysis provided by decision-makers and others, and the evolution of international law as a whole. For example, the protection of 'particular social groups' under the universal refugee definition has evolved to reflect changes in societies over time and across the world. This has allowed the definition to incorporate 'new' persecuted groups not envisaged at the time of the definition's drafting, such as women, homosexuals, conscientious objectors, and people with particular occupations.[27] Understandings of the definition's nexus requirement ('for reasons of') have also developed, so that it is now better understood that the discriminatory element of persecution is not always overt, but may be hidden, or implicit, in apparently generalized conditions and/or social structures. This has been important in the application of the universal refugee definition to situations involving conflict, generalized violence, and even disasters.[28]

An increasing appreciation of the interrelationship between refugee law and the broader body of international human rights law has also informed developments in the meaning and application of the universal refugee definition—in particular, in the kinds of harms that constitute 'persecution'.[29] For example, many courts and decision-makers have now recognized that persecution is not limited to violations of civil and political

[23] Andreas Zimmerman and Claudia Mahler, 'Art. 1 A para. 2' in Andreas Zimmerman (ed), *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: A Commentary* (OUP 2011) 342 (including citations).

[24] James C Hathaway, *The Law of Refugee Status* (Butterworths 1991) 112.

[25] Refugee Convention, art 33.

[26] UNHCR Handbook, para 51.

[27] UNHCR, 'Guidelines on International Protection No. 2: "Membership of a Particular Social Group" Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees', HCR/GIP/02/02 (2002) para 1. See further Chapter 3 in this volume.

[28] See Section 3.b.

[29] See Chapter 11 in this volume.

rights, such as the prohibitions on torture, arbitrary detention, or arbitrary deprivation of life, but may also include serious or systemic violations of socio-economic rights.[30] In addition, where courts have sometimes held that a potential refugee could avoid being persecuted by changing their behaviour or concealing certain aspects of their identity—for example, their sexuality or religious beliefs—it is now more widely accepted that being forced to conceal ones identity in this way might *itself* amount to a form of persecution and give rise to a refugee claim.[31]

Despite considerable developments in the scope and application of the universal refugee definition, it remains the case that not all persons forced to flee their home will fall within its criteria. For those who do not, alternative refugee definitions, such as those that exist under region-specific agreements for refugee protection, may provide another source of refugee protection.

b. African Refugee Definition

In Africa, the OAU Convention provides Africa's 'regional complement' to the 1951 Convention,[32] dealing with 'specific aspects of refugee problems in Africa' not dealt with in the 1951 Convention.[33] Chief amongst these specific aspects at the time of the Convention's drafting were concerns about colonial domination in Africa and the desire that 'freedom fighters'—those engaged in the struggle for African independence—be able to make a legitimate claim for protection as refugees.[34] Article I(1) of the OAU Convention incorporates the Refugee Convention's universal refugee definition, while article I(2) extends the term further, providing:

> The term 'refugee' shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.[35]

This Africa-specific refugee definition has been widely praised for providing 'a valuable addition specifically designed to meet the requirements of African reality'[36] and for

[30] See Michelle Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (CUP 2007). For a critique of the human rights-based approach to interpreting the universal refugee definition see David James Cantor, 'Defining Refugees: Persecution, Surrogacy and the Human Rights Paradigm' in Bruce Burson and David J Cantor (eds), *Human Rights and the Refugee Definition: Comparative Legal Practice and Theory* (Brill 2016).

[31] See Chapter 42 in this volume.

[32] OAU Convention, art 8(2). On the OAU Convention see Chapter 15 in this volume.

[33] See the full title of the OAU Convention—Convention Governing the Specific Aspects of Refugee Problems in Africa.

[34] See Chapter 15 in this volume.

[35] OAU Convention, art 1(2).

[36] Emmanual K Dadzie, Goran Melander, and Peter Nobel, 'Report of the Seminar: Legal Aspects on the African Refugee Problem' in Goran Melander and Peter Nobel (eds), *African Refugees and the Law* (Almqvist & Wiksell International 1978) 77.

'translat[ing] the core meaning of refugee status to the reality of the developing world'.[37] The definition has been widely incorporated into the domestic legislation of African States.[38] Despite this, it is difficult to establish the scope and meaning of the definition's criteria for refugee status with the same level of precision or certainty as there is for the universal refugee definition. This is due to the historical lack of attention or close scrutiny that the African refugee definition (like other regional refugee protection regimes) has received. Indeed, there is a pressing need for the regional definitions, such as the African refugee definition, to be interpreted and applied in a more principled fashion than they have been to date.[39] Nevertheless, drawing on more recent engagement and commentary on this definition by refugee status decision-makers, legal scholars, and international and regional organizations, the following comments about its criteria for refugee status can be made.

The African refugee definition includes two core components. These are: (1) one (or more) of the four enumerated refugee-producing events—external aggression, occupation, foreign domination, or events seriously disturbing public order—exists in the country of origin; and (2) the refugee is 'compelled to leave' as a result of the relevant enumerated event. While attention to the African refugee definition has historically focused solely on component (1)—the enumerated events—the 'compelled to leave' requirement in component (2) is now more widely recognized as a core part of the definition's criteria.[40] In fact, this additional component of the African definition is a key factor in maintaining the integrity of the definition's protection, which could otherwise be broad enough to capture situations that pose little or no risk of harm to the affected population (for example, a peaceful 'occupation').

Under component (1) of the African refugee definition, the refugee must establish the existence of one of the definition's four enumerated refugee-producing events.[41] Only one of the events needs to be established for a refugee to qualify for protection, and all are potentially relevant to refugee claims in Africa today. While the first three events—external aggression, occupation, and foreign domination—evidently reflect the concerns of the definition's drafters to protect those fleeing colonial and minority rule at the time of the OAU Convention's adoption, they might equally apply to situations arising within, or between, independent African States. Kenya's 2012 incursion into Somalia, border disputes between North and South Sudan, and Morocco's occupation in Western Sahara all provide potential examples of these events.

Of the four enumerated refugee-producing events in the African refugee definition, the fourth—events seriously disturbing public order—has been most commonly

[37] Hathaway (n 25) 17.

[38] David J Cantor and Farai Chikwanha, 'Reconsidering African Refugee Law' (2019) 31 IJRL 182.

[39] Tamara Wood 'Who is a Refugee in Africa? A Principled Framework for Interpreting and Applying Africa's Expanded Refugee Definition' (2019) 31 IJRL 290. See also Chapter 15 in this volume.

[40] See eg *Radjabu v Chairperson of the Standing Committee for Refugee Affairs and Others* [2015] 1 All SA 100 (WCC) para 6.

[41] It is generally the responsibility of the applicant to establish the facts that give rise to his or her claim, though there is also a corresponding duty on the decision-maker to ensure full consideration of all the relevant circumstances. UNHCR Handbook, para 196.

recognized and applied within African States' refugee status determination procedures in practice.[42] Both in practice and within scholarship, 'events seriously disturbing public order' is usually associated with situations of war, conflict, and violence. Important questions remain largely unresolved, however, including how public order should be assessed, or what threshold of fighting and violence is required to constitute a serious disturbance.[43] This fourth ernumerated event has been applied by African States to refugees fleeing civil wars and conflict in Angola, Côte d'Ivoire, Central African Republic, DRC, and Somalia, as well as to the genocide in Rwanda and post-election violence in Côte d'Ivoire.[44] More recently, UNHCR and others have begun to consider the potential application of events seriously disturbing public order to situations involving natural hazards, disasters, and the negative effects of climate change.[45] Here, the practice of African States is more ambiguous. Some States, such as Kenya and Ethiopia, have been willing to apply the phrase to such situations—for example, the 2011 Horn of Africa drought—while others, such as South Africa, have not.[46]

Component (2) of the African refugee definition—'compelled to leave'—fulfils a similar function to the 'well-founded fear' component of the universal refugee definition. It requires a forward-looking assessment of the risk to the refugee if returned to one of the enumerated refugee-producing events.[47] While the use of the past tense—'compelled'—has led to suggestions that this component of the African definition involves a retrospective (or 'backwards' looking) assessment of the refugee's reasons for flight,[48] such a reading should be rejected. Not only would it undermine the very purpose of refugee protection under the OAU Convention, which is the prevention of future harm to refugees,[49] but it also risks creating a protection gap for those whose refugee claims arise *sur place*.[50]

Two further features of the 'compelled to leave' requirement are important to note. The first is that the refugee must be compelled to leave his or her 'place of habitual

[42] Marina Sharpe, 'The 1969 OAU Refugee Convention and the Protection of People fleeing Armed Conflict and Other Situations of Violence in the Context of Individual Refugee Status Determination', UNHCR Legal and Protection Policy Research Series, PPLA/2013/01 (2013).

[43] See Tamara Wood, 'The African War Refugee: Using IHL to Interpret the 1969 African Refugee Convention's Expanded Refugee Definition' in David J Cantor and Jean-François Durieux (eds), *Refuge from Inhumanity? Refugee Protection and the Laws of War* (Martinus Nijhoff 2014).

[44] Sharpe (n 43).

[45] UNHCR, 'Legal considerations regarding claims for international protection made in the context of the adverse effects of climate change and disasters' (1 October 2020) paras 13ff. See also Sanjula Weerasinghe, 'In Harm's Way: International Protection in the Context of Nexus Dynamics Between Conflict or Violence and Disaster or Climate Change', UNHCR Legal and Protection Policy Research Series PPLA/2018/05 (2018).

[46] Wood (n 40) 307.

[47] See also Marina Sharpe, *The Regional Law of Refugee Protection in Africa* (OUP, 2018) 59.

[48] Micah Bond Rankin, 'Extending the Limits or Narrowing the Scope: Deconstructing the OAU Refugee Definition Thirty Years On' (2005) 21 South African Journal on Human Rights 406, 431.

[49] The OAU Convention's article II(3) *non-refoulement* provision prohibits return of a refugee to territory 'where his [or her] life, physical integrity or liberty *would be* threatened' (emphasis added).

[50] Sharpe (n 43) 18.

residence'. This means that only those who habitually reside in an area impacted by one of the definition's enumerated events will be entitled to the definition's protection. The second is that the refugee must be compelled to leave 'in order to seek refuge in another place outside his country of origin or nationality'. This aspect of the compelled to leave requirement has generally been overlooked. However, it suggests that those who could obtain effective protection within their own country are not entitled to refugee protection elsewhere for, although they may be compelled to *leave*, they may not be compelled to *seek refuge elsewhere*. In effect, this reading of the definition would allow for the application under the African refugee definition of the so-called 'internal flight alternative', something which has so far generally been rejected.[51]

Finally, exactly how to determine whether a refugee is 'compelled to leave' under the African refugee definition remains subject to debate. For the most part, a 'subjective' view of this requirement, which focuses on whether the refugee *feels* compelled to leave, has been rejected in favour of an approach that looks to the 'causal connection' between the event and the refugee's flight and whether the event is 'sufficiently serious that it is objectively reasonable for a person to leave her or his place of habitual residence and seek refuge in another country'.[52]

c. Latin American Refugee Definition

In Latin America, the regional refugee protection framework is provided by the 1984 Cartagena Declaration. While Latin America is a region with a long history of providing diplomatic asylum to individuals persecuted for their political beliefs,[53] during the 1970s and 1980s, increasing political instability and violence in the region led to larger numbers of displaced people and strained an asylum system better suited to individuals or small groups of similarly situated people.[54] In 1981, a Colloquium on Asylum and International Protection of Refugees in Latin America noted the inadequacies of the existing refugee regime to address the Central American crisis and recommended that a new, more encompassing refugee definition be adopted for all Latin American

[51] See UNHCR, 'Guidelines on International Protection No. 4: "Internal Flight or Relocation Alternative" within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees', HCR/GIP/03/04 (2003) para 5; University of Michigan Law School, 'The Michigan Guidelines on the Internal Protection Alternative' (1999) <https://www.refworld.org/docid/3dca73274.html> accessed 15 May 2020 para 6.

[52] Alice Edwards, 'Refugee Status Determination in Africa' (2006) 14 African Journal of International Comparative Law 204, 230.

[53] On the distinction and differences between Latin America's political asylee (*asilado político*) and refugee (*refugiado*) regimes, see Chapter 17 in this volume.

[54] Michael Reed-Hurtado, 'The Cartagena Declaration on Refugees and the Protection of People Fleeing Armed Conflict and Other Situations of Violence in Latin America', UNHCR Legal and Protection Policy Research Series, PPLA/2013/03 (2013); Eduardo Arboleda, 'Refugee Definition in Africa and Latin America: The Lessons of Pragmatism' (1991) 3(2) IJRL 185.

countries.[55] In 1984, the Colloquium on the International Protection of Refugees in Central America, Mexico, and Panama adopted the Cartagena Declaration.

The Cartagena Declaration calls on Latin American States to adopt the universal refugee definition in the Refugee Convention, and to 'consider enlarging the concept of a refugee' further. Citing the precedent of article I(2) of the OAU Convention, it calls on States to include amongst refugees:

> persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.[56]

As a declaration (and not a treaty), the Cartagena Declaration is not binding under international law, and according to Fischel de Andrade, it was 'never intended to create binding law'.[57] Nevertheless, the Cartagena Declaration and its expanded refugee definition carry strong normative influence in Latin America, providing the basis for refugee policy and status determination across the region.[58] Of the 20 States in total in Latin America,[59] at least 13 have incorporated some version of the Cartagena refugee definition within their domestic legislation.[60] Claims that the Cartagena Declaration's 'legal relevance has become obsolete'[61] therefore risk overlooking the critical role that domestic law plays in refugee protection in practice.[62]

To date, there has been marginally more detailed analysis of the Latin American refugee definition than the African refugee definition. Expert groups convened by the International Conference on Central American Refugees (CIREFCA) and UNHCR have considered and advised on the scope of the definition's enumerated events, including the meaning of 'generalized violence' and 'massive human rights violations'.[63] The CIREFCA Guidelines are sometimes cited as an authoritative source of guidance for the definition's interpretation, however they have also been criticized for their 'overly

[55] Stefania Barichello, 'The Evolving System of Refugees' Protection in Latin America' in Jean-Pierre Gauci, Mariagiulia Giuffré, and Evangelia (Lilian) Tsourdi (eds), *Exploring the Boundaries of Refugee Law: Current Protetion Challenges* (Martinus Nijhoff 2015).

[56] Cartagena Declaration, conclusion III(3).

[57] See Chapter 17 in this volume.

[58] See Barichello (n 56) 157.

[59] On the geographical scope of 'Latin America' see Chapter 17 in this volume.

[60] Only Costa Rica, Panama and Venezuela have not incorporated the definition at the domestic level. Reed-Hurtado (n 55) 16; Jean-François Durieux, 'Capturing the Central American Refugee Phenomenon: Refugee Law-Making in Mexico and Belize' (1992) 4 IJRL 301.

[61] See Chapter 17 in this volume.

[62] On the role of national law in regional refugee protection see generally Cantor and Chikwanha (n 39).

[63] Hector Gros Espiell, Sonia Picado, and Leo Valladares Lanza, 'Principles and Criteria for the Protection of and Assistance to Central American Refugees, Returnees and Displaced Persons in Latin America' (1990) 2 IJRL 83 (CIREFCA Guidelines); UNHCR, 'Summary Conclusions on the Interpretation of the Extended Refugee Definition in the 1984 Cartagena Declaration' (2013) (UNHCR Summary Conclusions).

legalistic' approach and near exclusive reliance on international humanitarian law (IHL) in interpreting the enumerated events.[64]

Like the African refugee definition, there are two core components of the Latin American refugee definition's criteria for refugee status. Component (1) requires the establishment of one of the definition's enumerated list of refugee-producing events—generalized violence, foreign aggression, internal conflicts, massive violation of human rights, or other circumstances which have seriously disturbed public order. Component (2) requires that refugees' 'lives, safety or freedom have been threatened' by one of the relevant events.

Also like the African refugee definition, the enumerated events in the Latin American refugee definition should be interpreted 'in an evolutionary way so that they remain relevant to situations not foreseeable when the Cartagena Declaration was drafted'.[65] The most significant additions to the enumerated events in the Latin American definition, when compared with the African definition, are 'generalized violence' and 'massive violations of human rights'. According to the International Conference on Central American Refugees (ICCAR), massive human rights violations occur 'when large-scale violations take place that affect the human rights and fundamental freedoms enshrined in the Declaration of Human Rights and other relevant instruments' and include 'severe and systematic denial of civil, political, economic, social and cultural rights'.[66] A group of experts convened by UNHCR expanded upon what is required to meet the threshold of a serious violation, suggesting that this would be met in situations where the extent of the violations make it difficult to identify the victims, or where violations impact not only on the real or direct victims but also affect other segments of the population or even society as a whole.[67] The same group held in relation to 'generalized violence' that 'it is not always the intensity of the violence that would render it generalized, but rather its geographic spread and density'.[68]

On one view, the enumerated events in the Latin American definition are 'even broader' than those in the African definition,[69] and indeed may encompass even 'the *indirect* effects of the five … events—including poverty, economic decline, inflation, violence, disease, food insecurity and malnourishment and displacement'.[70] Evidence elsewhere, however, suggests that this broad view is not universally shared. For example, while in Africa, a number of States have been willing to apply the African regional refugee definition in situations involving natural hazards and disasters,[71] the 'official' guidance on the interpretation of the Latin American definition explicitly opposes such

[64] UNHCR Summary Conclusions, fn 5; Reed-Hurtado (n 55) 15.

[65] UNHCR, 'Guidelines on International Protection No. 12: Claims for Refugee Status related to Situations of Armed Conflict and Violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees and the Regional Refugee Definitions', HCR/GIP/16/12 (2016) (UNHCR Armed Conflict Guidelines) para 70.

[66] Cited Amnesty International, 'Welcome Venezuela: People Fleeing Massive Human Rights Violations in Venezuela' (2019) 15.

[67] UNHCR Summary Conclusions, para 21.

[68] UNHCR Summary Conclusions, para 16.

[69] Barichello (n 56) 156; Arboleda (n 55) 203.

[70] UNHCR Summary Conclusions, para 9.

[71] See Section 2.b.

an approach.[72] Moreover, the widespread failure of decision-makers to apply the Latin American definition within States' refugee status determination procedures means that the breadth of its scope may not be realised in practice.[73] This was evident in the region's response to the Venezuelan crisis in 2019–2020, when Latin American States (with the exception of Mexico) largely failed to confer refugee status on displaced Venezuelans, preferring instead to use other temporary stay visas and permits to regularize their status within host States.[74]

Component (2) of the Latin American refugee definition's criteria for refugee status requires that refugees' 'lives, safety or freedom have been threatened' by a relevant event. This requirement closely mirrors the language of the Refugee Convention's article 33 *non-refoulement* provision,[75] and like the African definition's 'compelled to leave' requirement, involves an assessment of the risk of harm to the refugee if returned to face one of the enumerated events. According to UNHCR, the threat to life, safety, or freedom under the Latin American definition 'connotes the *possibility* of harm being inflicted on a person, a group or a whole population; it does not imply that the harm has actually materialized'.[76] Assessing the requisite threat involves an assessment of 'the objective situation in the country of origin and the particular situation of the individual or group of persons who seek protection'.[77]

3. The Definitions Compared and Contrasted

Within international refugee law scholarship, analyses of the regional refugee definitions have tended to focus on their distinguishing features and differences when compared with their universal counterpart. The key question is: to what extent do the African and Latin American refugee definitions *expand upon* the protection provided by the universal refugee definition? Some of the most commonly cited differences between the respective definitions include: first, the regional refugee definitions are more 'objective' in nature than the universal refugee definition, focusing on the conditions or events in the country of origin rather the refugee's individual, 'subjective' fear of

[72] CIREFCA Guidelines, para 33.

[73] See Chapter 17 in this volume; Reed-Hurtado (n 55) 20 ff.

[74] Andrew Selee, Jessica Bolter, Betilde Muñoz-Pogossian, and Miryam Hazán, 'Creativity amid Crisis: Legal Pathways for Venezuelan Migrants in Latin America' (*Migration Policy Institute*, 2019) 10–11 <https://www.migrationpolicy.org/research/legal-pathways-venezuelan-migrants-latin-america> accessed 15 May 2020.

[75] Article 33 of the Refugee Convention prohibits the return of a refugee to a place where 'his [or her] life or freedom would be threatened'.

[76] UNHCR Armed Conflict Guidelines, para 81 (emphasis added).

[77] CIREFCA Guidelines, para 26.

being persecuted.[78] Second, the absence of a discriminatory component in the regional refugee definitions means they are better suited to protecting people fleeing generalized and indiscriminate forms of harm, such as war, conflict, disasters, and the negative effects of climate change.[79] Third, and related to the first two claims, the regional refugee definitions are said to be better suited to dealing with situations involving large-scale displacement or mass influx, and to being applied within group-based or *prima facie* refugee status determination procedures.[80]

Not everyone agrees with these broad claims. As noted above, some commentators on the regional refugee definitions have drawn attention to their limited application within refugee status determination procedures in practice and emphasized the need for more principled analysis of their criteria for refugee status, suggesting that they are 'not necessarily quite as inclusive or broad as most commentators suggest'.[81] Moreover, the differences cited above may fail to appreciate the extent to which the universal refugee definition has evolved since 1951, and how it now applies in situations involving widespread and generalized harm or large-scale displacement, including those that occur in the context of war, conflict, disasters, and climate change.

The extent to which the regional refugee definitions expand upon the protection provided by the universal refugee definition depends on the interpretation and application of the respective definitions across places and over time. Definitions are not static. International law principles of treaty interpretation require that they be interpreted in an 'evolutionary' manner, taking into account changes in the broader context and body of international law of which they are a part.[82] Changes in the nature and drivers of displacement over time also affect the application of the respective definitions—the growing impacts of climate change, for example, may reveal new forms of persecution and new kinds of disturbances to public order. Compounding the difficulties in comparing the scope of the respective refugee definitions is the fact that, while the universal refugee definition has been subject to regular and robust interrogation by courts, scholars, and institutions such as UNHCR, the regional definitions have received comparatively little detailed scrutiny or attention.

[78] 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) RSQ 79, 112; Jacob van Garderen and Julie Ebenstein, 'Regional Developments: Africa' in Andreas Zimmerman (ed), *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: A Commentary* (OUP 2011) 190; Medard Rwelamira, 'Two Decades of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa' (1989) 1 IJRL 557; Reed-Hurtado (n 55) 12; UNHCR Summary Conclusions, para 29.

[79] Rankin (n 49) 413; Reed-Hurtado (n 55) 28; UNHCR Summary Conclusions, paras 2, 4; UNHCR Armed Conflict Guidelines, para 61.

[80] This claim is more common in relation to the African refugee definition. Arboleda (n 55) 189; Ivor Jackson, *The Refugee Concept in Group Situations* (Martinus Nijhoff 1999) 193; Anais Tuepker, 'On the Threshold of Africa: OAU and UN Definitions in South African Asylum Practice' (2002) 15 JRS 409, 411; Edwards (n 53) 211. See also Reed-Hurtado (n 55) 11–12.

[81] Marina Sharpe, 'The 1969 African Refugee Convention: Innovations, Misconceptions, and Omission' (2012) 58(1) McGill Law Journal 95, 112.

[82] See eg Wood (n 40) 311 ff.

With these limitations in mind, this chapter now turns to consider in turn the common distinctions between the universal and refugee definitions set out above. While the analysis below does not provide a definitive answer to the question—to what extent do the African and Latin American refugee definitions expand upon the protection provided by the 1951 Convention's universal refugee definition?—it nevertheless highlights some of the key considerations that must be taken into account in understanding and comparing the scope of the respective definitions.

a. 'Subjective' versus 'Objective' Refugee Definitions

Because the enumerated refugee-producing events in the regional refugee definitions focus on conditions in the country of origin, rather than the predicament of the individual refugee, the regional definitions are often described as more 'objective' in nature, in contrast with the more 'subjective' universal refugee definition. Of the African refugee definition, Edwards states that '[i]t has been taken for granted by most commentators that the [OAU] Convention is an objective test, rather than a subjective one'.[83] In Latin America, Reed-Hurtado describes 'a shift in focus from the subjective and individualised element—fear of persecution of the 1951 Convention—to the objective elements leading to flight'.[84]

This distinction between the 'subjective' universal refugee definition and the 'objective' regional refugee definitions is potentially flawed, however. In particular, it risks obscuring the fact that establishing one of the enumerated refugee-producing events alone is not sufficient to establish refugee status under either of the two regional refugee definitions, which also require a connection between the relevant event and the refugee's flight. Under the African definition, this is the requirement that the refugee is 'compelled to leave', while in Latin America, it is the threat to the refugee's 'life, safety or freedom'. Thus, while the enumerated events in the regional refugee definitions may be concerned only with the objective conditions in the country of origin, the definitions' full criteria also include consideration of the circumstances of the individual refugee.

In fact, in light of the increasing awareness of the individual component of the regional refugee definitions, some commentators have argued that they are not objective at all, but mandate 'a *subjective* test of refugee status, because [of] the requirement of a nexus between the disruptive situation and flight'.[85] However, it does not follow from the inclusion of individual criteria for refugee status that the regional definitions are 'subjective', at least in the sense in which the term has usually been used in international refugee law. Under the universal refugee definition, the term 'subjective' generally refers, not only to the individual refugee, but more specifically to his or her subjective beliefs or state of mind, such that the 'fear' component of a 'well-founded fear' has been said to

[83] Edwards (n 53) 228. [84] Reed-Hurtado (n 55) 12.
[85] Sharpe (n 42) 12 (emphasis added); see also Edwards (n 53) 228–9.

denote the refugee's 'state of mind and…subjective condition'.[86] Using the term 'subjective' to refer simply to the individualized aspects of the regional refugee definitions' criteria for refugee status risks creating confusion. It also risks inadvertently incorporating into the regional refugee definitions an inquiry into the state of mind of the refugee—something that, even under the universal refugee definition, has been criticized for its inherent difficulties and potential to deny protection to persons genuinely at risk.[87]

b. Generalized and Indiscriminate Harms

The regional refugee definitions' enumerated refugee-producing events have led to common claims that they are better suited than their universal counterpart to protecting people fleeing situations of widespread, generalized, and indiscriminate forms of harm. While the universal refugee definition has 'tended to favour the asylum seeker who can show how she has been singled out for persecution',[88] the regional refugee definitions encompass 'situations where the qualities of deliberateness and discrimination need not be present'.[89] Thus, the regional refugee definitions may be better able to address some of the common causes of displacement today, including: displacement from war, conflict, and generalized violence, and displacement in the context of natural hazards, disasters, and climate change.[90]

It is true that the Refugee Convention's universal refugee definition has posed barriers to protection for persons at risk of harms that are perceived as generalized or indiscriminate, such as war, generalized violence, or the negative impacts of climate change. This is due largely to the universal definition's 'nexus' requirement, which stipulates that the risk of persecution to the refugee must arise 'owing to' their (actual or perceived) personal characteristics—namely, race, religion, nationality, membership of a particular social group, or political opinion. In addition, the notion of 'persecution' under the universal refugee definition is frequently linked to the deliberate actions (or wilful complicity) of the State. In contrast, the generalized nature of the regional definitions' enumerated events—including aggression, occupation, massive human rights violations, and serious disturbances to public order—and the absence of any discriminatory component in their criteria for refugee status, mean that the source of harm may be indeterminate and 'need not be the actions of a State or its agents'.[91]

These important distinctions between the universal and regional refugee definitions should not be overstated, however. In particular, they must not obscure the potential application of the universal refugee definition in situations involving widespread and

[86] UNHCR Handbook, paras 37–8. [87] Hathaway and Foster (n 5) 95.
[88] Tuepker (n 81) 410. [89] Arboleda (n 55) 195.
[90] Reed-Hurtado suggests that this was the 'main purpose' of the Latin American refugee definition. See Reed-Hurtado (n 55) 28.
[91] Okoth-Obbo (n 79) 112.

apparently generalized forms of harm. Despite the element of deliberateness inherent in the notion of persecution, the universal refugee definition does not require that the refugee be 'singled out' for persecution, nor more at risk than any other person sharing the same characteristic or facing a similar situation. It is possible, for example, that an entire racial or religious group in a particular country may have a well-founded fear of persecution for reasons relating to their particular race or religion. Secondly, understandings of the nature of persecution and the application of the universal refugee definition have evolved to recognize that seemingly 'indiscriminate' forms of harm are often underpinned by implicit or structural forms of discrimination, so that even conflict, disasters, and the negative effects of climate change may be shaped by political, ethnic, or religious divides.[92]

Evolving understandings of implicit discrimination and the differential impacts that generalized situations and events can have has been especially significant in recognizing the applicability of the universal refugee definition to people fleeing situations of war, conflict, and generalized violence. While the UNHCR Handbook, first published in 1979, advises that '[p]ersons compelled to leave their country of origin as a result of international or national armed conflicts are not normally considered refugees',[93] UNHCR's updated guidance on this issue, published in 2016, recognizes that:

> Rarely are modern-day situations of armed conflict and violence characterised by violence that is not in one way or another aimed at particular populations, or which does not have a disproportionate effect on a particular population, establishing a causal link with one or more of the Convention grounds.[94]

Similar reasoning is also relevant to understanding the role that the universal refugee definition could play in protecting people displaced in the context of natural hazards, disasters, and climate change. For while the drafters of the 1951 Convention may have felt that 'it was difficult to imagine that fires, flood, earthquakes or volcanic eruptions . . . differentiated between their victims',[95] it is becoming increasingly evident that even so-called 'natural' disasters have differential impacts on the populations that they affect.[96]

Ultimately, while the enumerated refugee-producing events and absence of a discriminatory component in the regional refugee definitions makes them well-suited to protecting people fleeing apparently generalized and indiscriminate forms of harm, claims under the universal refugee definition must be closely examined before concluding that an individual's well-founded fear of being persecuted is not connected to his or her personal characteristics such that it arises 'owing to' one of the Refugee Convention's five grounds of discrimination.

[92] See Matthew Scott, *Climate Change, Disasters, and the Refugee Convention* (CUP 2020) especially ch 2.

[93] UNHCR Handbook, para 164.

[94] UNHCR Armed Conflict Guidelines, para 33. See Chapter 45 in this volume.

[95] Statement of the representative of Israel during the Refugee Convention's drafting, cited Hathaway and Foster (n 5) 362.

[96] Scott (n 93).

c. Large-scale Movement, Mass Influx and *Prima Facie* Refugee Status Determination

Commentary on the expanded refugee definition has often emphasized its particular suitability to providing protection in situations of large-scale displacement and mass influx, and its application within group-based, or *prima facie*, refugee status determination procedures.[97] This suitability derives largely from the two previous characterizations of the regional refugee definitions. Because of the emphasis on events or conditions in the country of origin, and the absence of a discriminatory component in the regional refugee definitions, the regional definitions offer a 'more explicit recognition of the mass persecution behind many asylum claims'[98] and a 'valuable mechanism for dealing with large-scale influx situations'.[99] It also reflects historical approaches to refugee status determination in both Africa and Latin America, where States have frequently adopted group-based and *prima facie* refugee status determination procedures.[100]

Moreover, the very nature of the enumerated refugee-producing events in the regional refugee definitions—including aggression, generalized violence, massive violations of human rights, and serious disturbances of public order—means that, when they occur, they are likely to produce displacement on a large scale.[101] When this happens, refugee status may be readily conferred on entire populations of displaced people without requiring each individual to establish his or her own claim. The 'proximity of the circumstance to the person would suffice to create a threat forcing the person to flee the country'[102] and satisfaction of component (2) of the respective regional definitions may be presumed. Particularly in situations where the relevant event affects a country as a whole, 'any other approach would belabour the obvious and, particularly in large-scale influxes, risks overwhelming already strained [refugee status determination] processes'.[103]

The suitability of group-based, or *prima facie*, refugee status determination procedures under the regional refugee definitions should not detract, however, from the potential application of both definitions within individual refugee status determination procedures as well. In some cases, the differential impact of one of the enumerated refugee-producing events may mean that not every person exposed faces a relevant risk as a result. As the High Court of South Africa noted in 2014, 'it is conceivable that the existence of the same set of given circumstances might sustain a conclusion that they compelled A to leave, but not B'.[104] This is important, as the automatic conflation of the

[97] On refugee status determination generally, see Chapter 31 in this volume.
[98] Tuepker (n 81) 410.
[99] Jackson (n 81) 193; see also Arboleda (n 55) 195.
[100] UNHCR Summary Conclusions, para 35; Jean-François Durieux, 'The Many Faces of "Prima Facie": Group-Based Evidence in Refugee Status Determination' (2008) 25(2) Refuge 151.
[101] Rankin (n 49) 416; CIREFCA Guidelines, 110.
[102] UNHCR Armed Conflict Guidelines, para 81; see also UNHCR Summary Conclusions, para 28.
[103] Sharpe (n 43) 13.
[104] *Radjabu* (n 41) para 6.

regional refugee definitions with situations of mass influx and *prima facie* refugee status determination can negatively affect the willingness and capacity of governments and decision-makers to apply it in practice, for fear that any invocation of the definition is tantamount to declaring all persons from a particular country or region to be refugees.[105] Moreover, even the more 'individualized' universal refugee definition may also be applied on a *prima facie* basis, extending protection to large groups of refugees and in situations of mass influx.[106] As UNHCR has explained, 'entire groups have been displaced under circumstances indicating that members of the group could be considered individually as refugees [under the universal refugee definition]'.[107]

4. Conclusion

While there are significant differences between the universal and regional refugee definitions, an oversimplification of these differences risks obscuring important features of each of the respective definitions. It risks creating the impression that the universal refugee definition is suited only to isolated cases of individual, targeted persecution, when in fact the interpretation and application of the universal refugee definition has evolved considerably to recognize that a well-founded fear of persecution can be widespread and can arise in situations which seem to be generalized and indiscriminate but are in fact underpinned by discriminatory structures, motivations, and impacts. In addition, overstating the breadth of the regional refugee definitions risks ignoring the more specific and individualized components of their criteria for refugee status and may undermine their application in practice.

Definitions are not static. The precise differences in scope between the universal and regional refugee definitions depend on the interpretation and application of each across places and time. Further engagement with the regional refugee definitions by decision-makers, scholars, and organizations such as UNHCR will provide a more solid and principled basis for assessing the common distinctions between the various definitions discussed in this chapter. In the meantime, it must be remembered that, while the Refugee Convention's universal refugee definition continues to provide the core of the refugee protection regime, it is not the end of the story. Regional refugee definitions provide equally important, and potentially better suited, sources of protection for a large number of the world's displaced people. A full appreciation of their criteria for refugee status is essential to ensuring that all those who are entitled to international protection are able to access it in practice.

[105] Tamara Wood, 'Expanding Protection in Africa? Case Studies of the Implementation of the 1969 African Refugee Convention's Expanded Refugee Definition' (2014) 26 IJRL 555, 568 ff; Reed-Hurtado (n 55) 28.

[106] See UNHCR, 'Guidelines on International Protection No. 11: Prima Facie Recognition of Refugee Status', HCR/GIP/15/11 (2015).

[107] UNHCR Handbook, para 44.

CHAPTER 35

UNRWA AND PALESTINE REFUGEES

SUSAN M AKRAM

1. Introduction and Background to Palestinian Displacement and the UN Response

Palestine, situated between the Mediterranean Sea and the Jordan River, had an indigenous majority Arab population from the seventh century through successive invaders until the British occupation and Mandate from 1917–47. Under the terms of the Lausanne Treaty that terminated the First World War, Ottomans residing in the area who were Turkish subjects became Palestinian nationals when the treaty entered into force on 6 August 1924.[1] Britain codified the nationality provisions of the treaty through the Palestine Citizenship Order of 1925, conferring citizenship on persons acquiring nationality through parentage and birth in Palestine.[2] By 1924, just under one million people, overwhelmingly Arab, were nationals of Palestine, connected to a recognized territory with borders fixed by the Lausanne Treaty.

In the midst of the post-Second World War effort to establish a new global order, the Palestine–Israel conflict unfolded. The massive Palestinian refugee crisis that ensued—with 750,000–800,000 people forced from their lands and homes in the newly created State of Israel—featured prominently in the drafting discussions of foundational

[1] Treaty of Lausanne (adopted 24 July 1923, entered into force 6 August 1924) 28 LNTS 11.

[2] Palestine Citizenship Order 1925 (adopted 24 July 1925, entered into force 1 August 1925). The 847,000 persons who met the Citizenship Order criteria included foreign residents entering Palestine between 1920 and 1922 who did not meet the Lausanne Treaty requirements, while excluding thousands of Palestinians who did meet the treaty's criteria.

instruments of the UN, including the Refugee Convention and the 1954 Convention on the Status of Stateless Persons.[3]

The UN passed a series of resolutions to provide for the refugees' immediate relief, as well as for longer-term solutions to their plight. The General Assembly appointed a UN Mediator for Palestine, whose report was adopted into the core resolution on the rights of Palestinian refugees (resolution 194).[4] The General Assembly also established the first short-term agency to provide immediate relief, the UN Relief for Palestine Refugees (UNRPR),[5] and an agency intended to secure and implement legal protection and durable solutions for the refugees, the United Nations Conciliation Commission on Palestine (UNCCP).[6]

UNCCP was to 'take steps to assist the governments and authorities concerned to achieve a final settlement of all questions outstanding between them'.[7] Its mandate included protecting and implementing the rights of refugees enumerated in resolution 194. For the purposes of UNCCP's mandate, Palestine refugees were defined as all habitual residents and citizens covered by the Palestine nationality law under the Lausanne Treaty who left, or were forced to leave, that territory from 6 August 1924 through to the 1947–49 conflict.[8] Under resolution 194, UNCCP was required to 'facilitate the repatriation, resettlement and economic and social rehabilitation of the refugees and the payment of compensation', commonly understood as the 'right to return'.[9] Its role in protecting 'the rights, property and interests of the refugees' has been reaffirmed each year by the General Assembly.[10]

The General Assembly acknowledged that until the terms of resolution 194 could be fulfilled, the UN had to continue providing assistance to Palestinian refugees to prevent further 'starvation and distress'.[11] As an interim measure, it established a second agency, the UN Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) to

[3] Convention relating to the Status of Stateless Persons (adopted 28 September 1954, entered into force 6 June 1960) 360 UNTS 117, art 1 (1954 Statelessness Convention).

[4] See UNGA res 186 (S-2) (14 May 1948); Folke Bernadotte (UN Mediator for Palestine), 'Progress Report of the United Nations Mediator on Palestine Submitted to the Secretary-General for Transmission to the Members of the United Nations' (16 September 1948) UN doc A/648. See also UNGA res 194 (III) (11 December 1948). In this chapter, 'Palestine refugees' is used to refer to the first generation (1948) refugees, while 'Palestinian refugees' is used as a generic term to cover all generations and categories of Palestinian displaced populations. See further UNRWA, 'Consolidated Eligibility and Registration Instructions (CERI)' (2009). <https://www.unrwa.org/sites/default/files/2010011995652.pdf> accessed 20 October 2019.

[5] UNGA res 212 (III) (19 November 1948).

[6] UNGA res 194 (n 4). [7] ibid para 6.

[8] See UN Conciliation Commission for Palestine (UNCCP), 'Analysis of paragraph 11 of the General Assembly's Resolution of 11 December 1948' (15 May 1950) UN doc A/AC.25/W/45; UNCCP, 'Definition of a "Refugee" under paragraph 11 of the General Assembly Resolution of 11 December 1948' (9 April 1951) A/AC.25/W/61; UNCCP, 'Addendum to Definition of a "Refugee" under paragraph 11 of the General Assembly Resolution of 11 December 1948' (29 May 1951) A/AC.25/W/61/Add.1.

[9] UNGA res 194 (n 4) para 11 ('the refugees wishing to return to their homes . . . should be permitted to do so at the earliest practicable date').

[10] See eg UNGA res 394 (V) (14 December 1950) para 2(c).

[11] UNGA res 302 (IV) (8 December 1949), paras 1, 5.

take over the relief work begun by the UNRPR.[12] UNRWA's founding resolution explicitly linked its mandate to UNCCP's obligation to fulfil the terms of resolution 194.[13] UNRWA's role was to provide humanitarian 'relief' and to provide economic opportunities—'works'—for refugees in the areas of major displacement: the West Bank, Gaza, Syria, Jordan, and Lebanon. Initially, the definition of Palestine refugee for UNRWA's purposes was a sub-category of the UNCCP definition for purposes of relief provision, but also 'grandfathered' persons included in the UNRPR rolls. It later included Palestinians displaced from subsequent conflicts.[14] The Consolidated Eligibility and Registration Instructions (CERI), setting out entitlement for registration by UNRWA and receipt of its services, define Palestine refugees as:

> Persons whose normal place of residence was Palestine during the period 1 June 1946 to 15 May 1948, and who lost both home and means of livelihood as a result of the 1948 conflict. Palestine Refugees, and descendants of Palestine refugee males, including legally adopted children, are eligible to register for UNRWA services.[15]

Following the 1967 Arab–Israeli conflict, Israel occupied the West Bank, Gaza, East Jerusalem, the Egyptian Sinai, and Syrian Golan, forcing another 350,000–400,000 Palestinians to flee their homes, some for the second time. In response, UNRWA included the 1967 Palestinian 'displaced persons' and other categories of Palestinians eligible for its services into its eligibility criteria.[16] The 'other claimants' grandfathered from the UNRPR rolls were maintained, but no new applicants were registered.[17]

The third agency established for the protection and assistance of refugees and other displaced persons was UNHCR,[18] with an explicit mandate to provide international protection to all defined refugees and to provide durable solutions for them. For Palestinian refugees, paragraph 7(c) of UNHCR's Statute and article 1D of the Refugee Convention are of primary importance. Paragraph 7(c) of the Statute provides that 'the competence of the High Commissioner . . . shall not extend to a person . . . (who) continues to receive from other organs or agencies of the United Nations protection or assistance'.[19] Similar, although not identical, language appears in article 1D of the Refugee Convention. The drafting history of these instruments shows that the UN delegates felt that Palestine refugees should be excluded from them since the UN had

[12] ibid para 7. [13] ibid paras 5, 20.

[14] See UNRWA, 'Annual Report of the Director of the United Nations Relief and Works Agency for Palestine Refugees in the Near East' (30 June 1961) A/4861, para 42.

[15] CERI (n 4).

[16] Lance Bartholomeusz, 'The Mandate of UNRWA at Sixty' (2009) 28(2–3) RSQ 452, 457–60. UNRWA's CERI (n 4) lists categories of beneficiaries, not just those defined as 'Palestine refugees' under res 194. The refugee definition applies to subsequent generations of refugees in the recognized categories, but only through the male line.

[17] These included 'Jerusalem Poor', 'Gaza Poor', 'Frontier Villagers', and 'Compromise Cases': Bartholomeusz (n 16) 458.

[18] UNGA res 319 (IV) (3 December 1949).

[19] ibid para 7(c). Note also 1954 Statelessness Convention, art 1(2).

already extended protection and relief through UNCCP and UNRWA.[20] Accordingly, delegates from a number of Arab States proposed an amendment that the '[m]andate of the High Commissioner should not extend to refugees currently under the mandates of other UN organs'.[21] It was clear to all delegates that the only 'refugees' to whom this exclusion applied were Palestine refugees.

The Arab delegates' reasons for excluding Palestinians from UNHCR's mandate included, first, that Palestine refugees were the only population that had become refugees through an act of the UN itself—namely, the passage of resolution 181—recommending partition of their homeland. Secondly, because the UN had incorporated a specific durable solution for them in resolution 194, focused on their right to return to their homes, Palestinian refugees should not be 'submerged' with other refugees in a new resettlement-focused treaty.[22] Thirdly, there was a general consensus that overlapping competencies amongst UN agencies should be avoided.[23]

The language that became paragraph 7(c) of the UNHCR Statute was further debated at the Conference of Plenipotentiaries that adopted the Refugee Convention.[24] When it became apparent that Palestine refugees might be excluded from the Convention,[25] the Arab States proposed an amendment to ensure the continuity of their protection in case the 'special regime' of UNCCP and UNRWA should cease to function.[26] Their amendment became article 1D in the final text.[27]

A related provision was included as article 1(2)(i) of the 1954 Statelessness Convention, which, like paragraph 7(c) of the UNHCR Statute, replicates only the first sentence of article 1D.[28] Following the passage of the Convention on the

[20] See discussions in GAOR 5th Session 3rd Committee 326th Meeting (24 November 1950) UN doc A/C.3/SR.326.

[21] The amendment was submitted by Egypt, Lebanon, and Saudi Arabia: UNHCR 'Egypt, Lebanon, Saudi Arabia Amendments to Draft Statute' (27 November 1950) UN doc A/C.3/L.128; GAOR 5th Session 3rd Committee 328th Meeting (27 November 1950) UN doc A/C.3/SR.328, para 37.

[22] See 328th Meeting (n 21): statements by Lebanon, para 47; Saudi Arabia, paras 49–52.

[23] See statements by Turkey, para 11 and US, para 37: GAOR 5th Session 3rd Committee 329th Meeting (29 November 1950) UN doc A/C.3/SR.329.

[24] See 'Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons' (25 July 1951) UN doc A/CONF.2/108/Rev.1, 138.

[25] See Statement by Mostafa Bey, 'Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Twenty-Ninth Meeting', UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons (28 November 1951) UN doc A/CONF.2/SR.29.

[26] UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 'Draft Convention relating to the Status of Refugees. Egypt: Amendment to Article 1' (3 July 1951) UN doc A/CONF.2/13.

[27] See 'Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons' (n 24). The inconsistent language between the first and second sentences was pointed out after the text was adopted, but it was too late to correct the ambiguity: see Commission of the Churches on International Affairs 'Observations Concerning Article I of the Draft Convention relating to the Status of Refugees' (6 July 1951) UN doc A/CONF.2/NGO/10. Since the UNHCR Statute had already been adopted, the second sentence of art 1D does not appear in para 7(c).

[28] 1954 Statelessness Convention, art 1(2).

Reduction of Statelessness,[29] the General Assembly authorized UNHCR to include stateless persons within its mandate.[30] The Arab host States do not recognize Palestinians as falling under the international legal definitions of 'refugees' or 'stateless persons', however, and have refused to accept any UNHCR involvement vis-à-vis Palestinians in the UNRWA areas. The effect of these provisions is that Palestinians are excluded from UNHCR's protection mandate in UNRWA areas, and since UNRWA has no durable solutions mandate, Palestinians have no access to durable solutions either as refugees or as stateless persons in UNRWA fields.

2. UNRWA and Ongoing UN Engagement with Palestine Refugees

The international community's ambiguity towards the scope of UNRWA's work is reflected in changes to the agency's role and mandate over time. The General Assembly has vacillated between emphasizing its 'relief' and 'works' roles, and, more recently, its role in providing 'international protection'.[31] Following aborted efforts to integrate refugees 'into the economic life of the Near East' through work projects, UNRWA reoriented its focus to relief in the form of human resources development.[32] This became the foundation for its permanent service delivery programme for the Palestinian refugee population. Its provision of education, social services, and healthcare—though basic and, in many cases, wholly inadequate for their needs—has ensured the refugees' survival and afforded opportunities for employment both inside and outside the region. Due to continued funding pressures, UNRWA has significantly reduced its basic relief and has concentrated aid delivery on smaller numbers of hardship cases.[33] However, the need for relief has waxed and waned with the multiple crises affecting Palestinian refugees as a result of ongoing Israeli occupation and expulsion policies and conflicts in Lebanon, Kuwait, Iraq, Gaza, and most recently, Syria.

Beginning in the 1980s, General Assembly resolutions increasingly referenced UNRWA's obligations to guarantee 'the legal and human rights' of Palestinian refu-

[29] Convention on the Reduction of Statelessness (adopted 30 August 1961, entered into force 13 December 1975) 989 UNTS 175.

[30] See also UNGA 'Question of the Establishment, in accordance with the Convention on the Reduction of Statelessness, of a Body to Which Persons Claiming the Benefit of the Convention May Apply' (10 December 1974) UN doc A/RES3274(XXIX).

[31] See eg UNGA res 393 (V) (2 December 1950) para 4.

[32] The reintegration aspect, as determined by UNGA res 393 (V), was terminated by 1960, and dropped from UNGA Resolutions concerning UNRWA. See Bartholomeusz (n 16) 452, 471 n 84.

[33] Lex Takkenberg, 'UNRWA and the Palestinian Refugees After Sixty Years: Some Reflections' (2009) 28(2–3) RSQ 253, 256.

gees.[34] During the first Palestinian uprising (*intifada*), the General Assembly approved UNRWA's establishment of 'protection officers' under the Refugee Affairs Officer (RAO) programme,[35] which monitored, intervened, and raised complaints about Israel's mistreatment of Palestinian refugees (including deaths and injuries during the uprising).[36] Subsequently, UNRWA established the Operations Support Officer (OSO) Programme in the second *intifada* in 2000;[37] a Senior Protection Policy Advisor post in 2007; and a Protection Division in its headquarters in 2016.[38] Based on more explicit General Assembly resolutions referring to its 'protection role',[39] UNRWA incorporated 'protection' into all its work, and set 'protection standards' in its programming.[40] At the same time, UNHCR has sought and facilitated durable solutions for Palestinians in specific crises, including the First Gulf War in 1991 when Palestinians were forcibly displaced from Kuwait; the exodus of Palestinians from Libya in 1995–96; the mass displacement of Palestinians during the Second Gulf War into camps in Syria and Jordan; and the recent flight of Palestinians from Syria to Turkey and other countries.[41]

As a subsidiary organ, UNRWA reports directly to the General Assembly which renews its mandate every few years.[42] Because UNRWA's continued operations depend on the voluntary commitments of States, which never meet its full budgetary requirements, it is in permanent budget deficit. Aside from its core budget needs, UNRWA has faced constant shortages across its fields of operation and must perpetually fundraise for 'emergency appeals'. In 2018, the Trump Administration announced that it would cease funding the agency—a loss of more than US$300 million per annum. As a result, UNRWA cut staff and services, and closed schools across its fields.

[34] See eg. UNGA res 37/120 (16 December 1982); UNGA res 38/83 (15 December 1983); UNGA res 43/57 (6 December 1988).

[35] UNRWA, 'Report of the Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (1 July 1987–30 June 1988)' (16 September 1988) UN doc A/43/13, para 55. UNGA res 43/57 (6 December 1988).

[36] See the UNSC 'Report Submitted to the Security Council by the Secretary-General in accordance with Resolution 605 (1987)' (21 January 1988) UN doc S/19443 (Goulding Report) (defining protection as including physical protection, legal protection, and protection by publicity; and defining general assistance as intervening with the occupying authorities to resist violations of Palestinian rights and to help with the problems faced by Palestinians including land confiscation, security restrictions, curfews, etc).

[37] Damian Lilly, 'UNRWA's Protection Mandate: Closing the "Protection Gap"' (2019) 30 IJRL 444, 458.

[38] See UNGA 'Report of the Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (1 January–31 December 2015)' UN GAOR 71st Session Supp No 13, UN doc A/71/13.

[39] See eg UNGA res 71/93 (6 December 2016).

[40] See Nicholas Morris, 'Consultant's Report: What Protection Means for UNRWA in Concept and Practice' (2008) <https://www.unrwa.org/userfiles/20100118155412.pdf> accessed 26 October 2019.

[41] Brenda Goddard, 'UNHCR and the International Protection of Palestinian Refugees' (2009) 28(2–3) RSQ 475, 500–4.

[42] Charter of the United Nations (adopted 17 December 1963, entered into force 24 October 1945) 1 UNTS XVI, arts 7(2), 22.

3. UNRWA, UNCCP, and UNHCR: The Debate over Protection

Shortly after its establishment, it became clear that UNCCP would be unable to fulfil its functions due to the impasse in finding political solutions to the conflict and to Israel's resistance to the refugees' return and recognition of their rights. The General Assembly took a series of steps that reduced UNCCP's funding, effectively ending the agency's capacity to protect and implement durable solutions for the refugees. By the early 1960s, UNCCP began to focus its efforts on gathering documentation and recording Palestinian refugees' property interests, creating a database that it maintains today.[43] Other than recording property rights, UNCCP's main protection role came to an end. At the same time, the interpretation of the various legal provisions relevant to Palestinian refugees (in the UNHCR Statute, Refugee Convention, and 1954 Statelessness Convention) engendered significant debate amongst academics, the agencies involved, and Palestinians themselves, including in litigation before international and domestic courts.[44] Today, it remains contested whether the interrelated provisions created a 'protection gap' for Palestinian refugees.[45] The key concerns about the consequences of the way these provisions are currently interpreted by States and adjudicators are whether UNRWA's protection activities are equivalent to what UNHCR provides for all other refugees; whether Palestinian refugees have meaningful access to durable solutions; and the consequences for Palestinians both within and outside the five UNRWA fields of operation.

The primary issues raised by article 1D of the Refugee Convention (which not all States invoke) are: (a) which refugees fall within the provision's scope; (b) when are such refugees considered to no longer be receiving protection or assistance (and from which agency); and (c) what is meant by the *ipso facto* clause (in the second sentence of article 1D). Some of these issues have been addressed by the Court of Justice of the European Union (CJEU), summarized below. Currently, the debate centres on the meaning of 'protection or assistance', and whether what UNRWA provides is equivalent to what UNCCP was intended to provide. UNHCR maintains that Palestinian refugees who are in UNRWA areas are not within its competence and are excluded from the benefits of

[43] See Michael R Fischbach, *Records of Dispossession: Palestinian Refugee Property and the Arab–Israeli Conflict* (Columbia University Press 2003).

[44] For the range of conflicting views on the interpretation of article 1D and related provisions, see eg Bartholomeusz (n 16); Lilly (n 37); Morris (n 40); Goddard (n 41); Michael Kagan, 'Is There Really a Protection Gap? UNRWA's Role vis-à-vis Palestinian Refugees' (2009) 28(2–3) RSQ 511; Susan M Akram, 'Palestinian Refugees and Their Legal Status: Rights, Politics, and Implications for a Just Solution' (2002) 31 Journal of Palestinian Studies 36; Susan M Akram and Nidal Al-Azza, *Closing Protection Gaps: Handbook on Protection of Palestinian Refugees in States Signatories to the 1951 Refugee Convention* (2nd edn, BADIL Resource Center for Palestinian Residency and Refugee Rights 2015).

[45] See Lilly (n 37) 444.

the Refugee Convention.[46] UNHCR's most recent interpretation is that Palestinian refugees fall into three categories, two of which are covered by article 1D as UNRWA refugees.[47] These two categories of persons could be eligible for the benefits of the Refugee Convention if they are outside UNRWA areas for reasons beyond their control, and should be assessed under article 1D criteria. The third category, Palestinians who do not qualify as 'Palestine refugees' or 'Displaced Persons' under UNRWA regulations, falls under article 1A(2) of the Refugee Convention once they have left the areas where they have been residing, and should be assessed under that definition.[48]

There are widely divergent and often inconsistent interpretations in States' application of article 1D and the refugee definition in article 1A(2) to Palestinian asylum seekers. A survey of the jurisprudence of more than 30 States revealed over a dozen interpretations.[49] The EU Qualification Directive, which incorporates article 1D into EU law, has been interpreted by the CJEU in several recent decisions. In 2010 in *Bolbol v BAH*, the CJEU interpreted the phrase 'receiving . . . protection or assistance' as meaning that 'a person receives protection or assistance from an agency of the United Nations other than UNHCR, when that person has actually availed himself of that protection or assistance'.[50] Two years later, the court held that the language 'when protection or assistance has ceased . . . for any reason' means for any reasons 'beyond [a person's] control and independent of his volition', giving examples of when it will be deemed that protection or assistance has ceased for reasons 'beyond the person's control'.[51] It also held that the *ipso facto* clause means that a 'Member State must recognize [the person] as a refugee . . . and that person must automatically be granted refugee status'.[52] In that case,

[46] This has evolved from the Handbook position that Palestinians covered by art 1D are excluded entirely from the benefits of the Convention and UNHCR's mandate: UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/1P/4/ENG/REV.4 (1979, reissued 2019) paras 140–3.

[47] The first two categories are 'Palestine refugees' from the 1948 conflict registered or eligible for registration and residing in UNRWA areas, and 'Palestinian displaced persons' during the 1967 conflict registered or eligible for registration in the UNRWA areas. UNHCR parallels UNRWA's registration regulations by confirming that descendants of the first two categories would also fall under art 1D. See UNHCR, 'Note on the Applicability of Article 1D of the 1951 Convention relating to the Status of Refugees to Palestinian refugees' (2002) 14 IJRL 450; UNHCR, 'Revised Note on the Applicability of Article 1D of the 1951 Convention relating to the Status of Refugees to Palestinian Refugees' (2009); UNHCR, 'Guidelines on International Protection No. 13: Applicability of Article 1D of the 1951 Convention relating to the Status of Refugees to Palestinian Refugees' (December 2017) HCR/GIP/16/12 (Guidelines on International Protection No 13).

[48] See 'Guidelines on International Protection No 13' (n 47).

[49] Akram and Al-Azza (n 44).

[50] C-31/09, *Nawras Bolbol v Bevándorlási és Állampolgársági Hivatal* [2010] ECR I-05539, para 53.

[51] C-364/11, *Mostafa Abed El Karem El Kott and Others v Bevándorlási és Állampolgársági Hivatal* [2012] (CJ 19 December 2012) para 82. A Palestinian could be considered to have lost protection or assistance against his or her volition when, for example, his or her personal safety was at serious risk and it was impossible for the agency to guarantee that living conditions would be commensurate with its mission: paras 63, 65. See also UNHCR, 'Note on UNHCR's Interpretation of Article 1D of the 1951 Convention relating to the Status of Refugees and Article 12(1)(a) of the EU Qualification Directive in the context of Palestinian Refugees Seeking International Protection' (2013).

[52] *El Kott* (n 51) para 82.

the court found that, because UNRWA was unable to provide effective protection to Palestinian refugees in Lebanon, Hungary was required to grant them refugee status.

However, the CJEU's interpretations are questionable in light of the plain language and drafting history of article 1D, as well as the object and purpose of the Refugee Convention. First, the cases conflate 'protection' with 'assistance' and fail to make the critical distinction between the mandates of the various agencies established for Palestinian refugees. The cases acknowledge the establishment of UNCCP, but fail to recognize that it was the only UN agency given a protection mandate for Palestinians and that UNRWA does not, and never did, have a mandate with regard to the most critical component of protection—namely, to implement the required durable solution for Palestinian refugees of return to their homes, restitution, and compensation.[53] Despite efforts to expand UNRWA's protection activities, it is clear that it does not have a mandate to seek and implement durable solutions for Palestinian refugees.[54] The CJEU Advocate-General herself noted the limits of UNRWA's protection role in her opinion to the court in *El Kott*.[55] By contrast, the CJEU wrongly focused on whether UNRWA's assistance had ceased, failing to take into account the cessation of UNCCP's protection to Palestinian refugees as the condition for re-including Palestinians in the 'benefits of the Convention'. Moreover, the transformation of the phrase 'when protection or assistance has ceased for any reason' into 'when protection or assistance has ceased for a reason beyond his control and independent of his volition' has no support whatsoever either in the text or drafting history.[56]

Most important are the consequences of the protection gap, which remain unexplained in the jurisprudence. First, despite the efforts noted above with respect to ongoing cooperation between UNRWA and UNHCR in certain emergencies, Palestinian refugees as a whole have no agency that promotes and implements durable solutions for them in the Arab host States in which the majority reside (other

[53] See Lilly (n 37) 468. See also UNRWA 'Outline of Protection Initiatives' <https://www.unrwa.org/sites/default/files/outline%20of%20protection%20initiatives.pdf> accessed 20 October 2019; UNRWA, 'Syria: UNRWA—Progress Highlights January—June 2019' <https://www.unrwa.org/resources/reports/syria-unrwa-progress-highlights-january-june-2019> accessed 31 October 2019.

[54] Bartholomeusz (n 16) 469–71.

[55] *El Kott* (n 51) Opinion of AG Sharpston, para 66.

[56] ibid paras 61–5. See also UK Home Office, 'Asylum Policy Instruction: Article 1D of the Refugee Convention: Palestinian Refugees Assisted by the United Nations Relief and Works Agency (UNRWA)' (9 May 2016) 10, according to which, cessation of UNRWA protection or assistance is in practice likely to occur only 'in one of the following circumstances: threats to life, physical integrity or security or freedom, or other serious protection related reasons, including: situations such as armed conflict or other situations of serious violence, unrest and insecurity . . . individualised threats or protection risks such as sexual and/or gender-based violence, human trafficking and exploitation, torture, inhuman or degrading treatment or punishment, severe discrimination, or arbitrary arrest or detention, or practical, legal and/or safety barriers, including: being unable to access UNRWA assistance because of long-term border closures, road blocks or closed transport routes, absence of documentation to travel or where the authorities in the receiving country refuse their re-admission or the renewal of their travel documents, serious dangers such as minefields, factional fighting, shifting war fronts, banditry or a real risk of other forms of violence or exploitation'. This shows how national adjudicators are further distorting the meaning of art 1D and further restricting those who should be entitled to its benefits.

than in exceptional cases). Secondly, the debate about the scope of UNRWA's protection activities remains academic, for the most part, as the agency struggles to provide even core services to all Palestinians who need them. Thirdly, as described at the outset, the definition of Palestine refugee in resolution 194 is a nationality, not a refugee, definition, which applies to approximately 12 million Palestinians worldwide, while UNRWA-registered Palestinian refugees total only 5.5 million persons.[57] The durable solution incorporated in resolution 194 is guaranteed to all Palestinians meeting the nationality definition, not just those registered with UNRWA. The CJEU, UNHCR, and UNRWA interpretations of the scope of the inter-related Palestinian refugee provisions fail to take into account the full significance of their meaning and purpose.

4. Palestinian Refugees and the Politics of the Palestine Liberation Organization (PLO) and the Arab Host States

Ever since the Palestinian refugee crisis unfolded on the newly independent Arab States, their position has been that the UN is primarily responsible for the refugees' plight (along with Israel), and that it is up to the international community to care for the refugees and facilitate their return. This position reflects the demands of the refugees themselves and the League of Arab States (LAS).[58] However, this position has been manipulated for the benefit of Arab host States, depending on the politics of the moment, often at significant cost to the refugees themselves. It has further been complicated by the Arab States' fluctuating relationship with the PLO over time.

The establishment of the PLO in 1964 was a mixed blessing for Palestinian refugee communities in the main host States. The PLO's presence as a political force in Jordan ended in the violent conflict between the Jordanian army and the PLO of 1970–71, known as Black September. The PLO's establishment in Lebanon through the Cairo Agreement of 1969 led to improvement of living conditions and rights of Palestinian refugees in Lebanon, which lasted until the Israeli invasion of 1982. The PLO's base of operations in Lebanon ended with the siege of Beirut and the US-brokered deal to allow it to depart Lebanon for Tunisia. The PLO maintained its base of operations in Tunis

[57] UNRWA, 'Palestine Refugees' <https://www.unrwa.org/palestine-refugees> accessed 8 January 2020.

[58] See eg Mohammed K Al-Az'ar, 'Arab Protection for Palestinian Refugees, Analysis and Prospects for Development' (English trans.) in Terry Rempel (ed), *Rights in Principle—Rights in Practice: Revisiting the Role of International Law in Crafting Durable Solutions for Palestine Refugees* (BADIL Resource Center for Palestinian Residency and Refugee Rights 2009) 214.

until the first uprising of 1987–90, which ended with the Oslo negotiations and, ultimately, the establishment of the Palestinian Authority (PA) in Ramallah, with Yasser Arafat returning as its first president.

The Arab States have insisted that Palestinian refugees should have the right to return to their homes (including in present-day Israel) and should not be integrated into the citizenry of the host States (*tawtin*). They have therefore implemented a form of temporary protection that allows Palestinian refugees to remain in their territories and have cooperated with UNRWA to provide relief and services. This temporary protection regime rests on a series of LAS resolutions and agreements, and domestic laws and policies.[59] The most important instrument is the Casablanca Protocol, adopted by the main Arab host States in 1965 to regularize the status of Palestinians in their territories,[60] which supplements earlier LAS resolutions on rights to be provided to Palestinian refugees (including family unity and freedom of movement).[61] The Casablanca Protocol requires States to provide the same treatment to Palestinians as their nationals concerning residence and employment; to issue and renew travel documents and visas to Palestinians; and to grant Palestinians the right to leave (and return to) the country. Such rights were generally respected through the 1980s; in 1991, the LAS passed resolution 5093 recommending that the Casablanca Protocol be applied according to the national laws of each State party.[62] Arab host States have interpreted this resolution as allowing them to suspend the Casablanca Protocol's guarantees.[63]

The irony has not been lost on the Arab host States that, although they are not parties to the international refugee and statelessness treaties, they have been the hosts to millions of Palestinian refugees for over seven decades. Taking the position that they have borne the burden of the refugee problem, they have resisted attempts to cut UNRWA's funding or to substitute UNRWA services for greater support from their own governments.[64] At the same time, they have entered into agreements with UNRWA that govern the scope of UNRWA's work and activities in their territories.[65] LAS Council resolutions have called on Arab States to develop a unified approach to UNRWA in

[59] Susan M Akram and Terry Rempel, 'Temporary Protection as an Instrument for Implementing the Right of Return for Palestinian Refugees' (2004) 22 Boston University International Law Journal 1; see Chapter 18 in this volume.

[60] League of Arab States (LAS) 'Protocol for the Treatment of Palestinians in Arab States (Casablanca Protocol)' (11 September 1965); Al-Az'ar (n 58) 226.

[61] See LASC res 424 (14 September 1952); LASC res 714 (27 January 1954); Special Resolution on the Treatment of Palestinians in the Arab Countries, LASCAMI res 8 (15 December 1982), cited in Abbas Shiblak, *The League of Arab States and Palestinian Residency Rights* (The Palestinian Diaspora and Refugee Centre (SHAML) 1998) 16.

[62] LAS res 5093 (12 September 1991).

[63] This interpretation is incorrect as a matter of law, because the Casablanca Protocol is a treaty and cannot be terminated or suspended by subsequent resolutions: Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 133 (VCLT) arts 54, 56–9, 65.

[64] Al-Az'ar (n 58) 214–15.

[65] See ibid 215.

the treatment of refugees across the host States.[66] The Arab League has facilitated cooperation with UNRWA on a wide range of issues, including providing land and services for refugees and assisting with family reunification.[67]

i. Jordan

Over two million Palestinian refugees are registered with UNRWA in Jordan, which hosts the largest Palestinian refugee population.[68] Jordan granted citizenship to the first wave of 1948 Palestinian refugees, including those in the West Bank and East Jerusalem, affording them permanent passports with national identity numbers. When Israel occupied the West Bank, Gaza, and East Jerusalem in 1967, it conducted a census and recorded Palestinians in the occupied areas on its Population Registry, classifying them as 'non-citizens and foreign residents', while maintaining military law over Palestinians (but not Jews) in the occupied territories (Opt). Palestinians not recorded on the Registry became 'illegal' and were ineligible to return to or reside in their homes in the Opt. Following the 1967 conflict, West Bank Palestinians at first received Jordanian temporary passports for two years—later extended to five years—but needed border-crossing cards to enter Jordan. Palestinians with Jordanian passports residing in the West Bank without Jordanian national identity numbers were not Jordanian citizens. In 1988, when Jordan relinquished all claims over the West Bank, it began to issue five-year passports, and later two-year passports; since these do not include national identity numbers, they are essentially travel documents and not proof of citizenship. Between 2004 and 2008, Jordan stripped thousands of Palestinians of Jordanian citizenship (most were 1967 Palestinian refugees or later arrivals).

Other categories of Palestinians registered with UNRWA in Jordan include approximately 80,000 Palestinians who fled Gaza in 1967; 'ex-Gazans' have Egyptian travel documents but do not have residency or citizenship in Jordan. Today there are approximately 130,000 of these stateless refugees with two-year temporary passports, but few benefits in Jordan. Since 2011, nearly 10,000 Palestine refugees from Syria (PRS) have entered Jordan and are relying on UNRWA assistance. Due to political and economic considerations, UNRWA instituted a policy of 'recording' them as 'Palestine refugees-Syria' rather than registering them in Jordan (or Lebanon).

ii. Lebanon

Like Jordan, Lebanon is not a party to the refugee or stateless persons treaties. Lebanon's Law Regulating the Entry, Stay, and Exit of Foreigners regulates the status of refugees,

[66] See LASC res 325 (12 June 1950); LASC res 2252 (12 June 1966); Al-Az'ar (n 58) 215.

[67] Al-Az'ar (n 58) 216, citing LASC Resolutions.

[68] UNRWA, 'Where We Work: Jordan' <www.unrwa.org/where-we-work/jordan> accessed 26 October 2019.

including Palestinians, and all other foreigners.[69] UNRWA has 463,000 Palestinian refugees registered in Lebanon.[70] For a short period in 1994, Lebanon allowed some Palestinians to apply for citizenship, but this was not well advertised and few benefited. Lebanon, like most Arab States, discriminates in nationality law such that only men can pass nationality to their children, and few Palestinians have acquired citizenship. Lebanese law grants rights on a reciprocal basis to foreigners, so Palestinians cannot benefit from the rights granted other foreigners whose States give reciprocal rights to Lebanese. Thus, Palestinians are denied many basic rights, including the right to work in dozens of professions. In 2013, Lebanon lifted restrictions on some of the previously closed professions but few Palestinians benefited.[71] Palestinians who are registered with UNRWA or the League of Red Crescent Societies can obtain travel documents valid for a year that are renewable up to three times. Palestinians not registered with either agency can obtain a travel document valid for three months.[72]

Lebanon's Memorandum of Understanding with UNHCR prevents that agency from extending protection or assistance to Palestinians as stateless persons or as refugees, including Palestinians from Syria.[73] As of December 2016, the population of Palestinian refugees from Syria recorded by UNRWA in Lebanon had dropped dramatically due to the closure of the border (in 2014).[74] Since Lebanon prohibits the construction of new camps, PRS have been forced to live in already overcrowded camps or in temporary shelters that have sprung up mostly on private land. UNRWA notes that almost 90 per cent of the PRS in Lebanon live below the poverty line. Due to the complicated process of civil registration in Lebanon, many PRS, as well as Palestinian refugees in Lebanon, do not (or cannot) register their children's birth, compounding the problem of statelessness for this population.[75]

iii. Syria

Syria was once the only country where Palestinian refugees enjoyed rights almost on a par with citizens—other than the right to vote, own more than one home, or purchase

[69] Law Regulating the Entry and Stay of Foreigners in Lebanon and their Exit from the Country (entered into force 10 July 1962) Bulletin de Législation Libanaise (Official Gazette) No 28–1962.

[70] UNRWA, 'Lebanese Minister Tours Refugee Camp, Discusses Cooperation with UNRWA' (24 January 2012) <www.unrwa.org/newsroom/press-releases/lebanese-minister-tours-refugee-camp-discusses-cooperation-unrwa> accessed 26 October 2016; UNRWA, 'Where We Work: Lebanon' <www.unrwa.org/where-we-work/lebanon> accessed 26 October 2019.

[71] Jaber Suleiman, 'Marginalized Community: The Case of Palestine Refugees in Lebanon' (2006) 16 <https://assets.publishing.service.gov.uk/media/57a08c4be5274a31e0001112/JaberEdited.pdf> accessed 26 October 2019.

[72] ibid 14–15.

[73] UNHCR, 'UNHCR Regional Office Beirut, Lebanon Country Operations Plan (1 January–31 December 2005)' <www.refworld.org/pdfid/4159634c4.pdf> accessed 26 October 2019.

[74] See Susan M Akram and others, 'Protecting Syrian Refugees: Laws, Policies and Global Responsibility Sharing' (2014) Boston University School of Law 37 <http://www.bu.edu/law/central/jd/programs/clinics/international-human-rights/> accessed 26 October 2019.

[75] UNRWA, 'Palestine Refugees from Syria in Lebanon' <www.unrwa.org/palestine-refugees-syria-lebanon> accessed 26 October 2019.

arable land.[76] Before the start of the conflict in 2011, 552,000 Palestine refugees were registered with UNRWA in Syria.[77] The Syrian war has had devastating consequences for the population and Palestinian refugees have been severely affected; about 120,000 Palestine refugees have fled the country since the start of the conflict.[78] UNRWA is currently providing those remaining with basic food assistance, as well as attempting to continue ongoing service delivery of healthcare and schooling. About 60 per cent of Palestinian refugees in Syria have been displaced. UNRWA currently has access to 10 of the 12 camps in the country; all UNRWA facilities have suffered damage or become inaccessible to the agency. As a result of the war, 40 per cent of UNRWA classrooms have been destroyed and 25 per cent of its health centres have been rendered unusable. A number of UNRWA staff members have also been killed or injured.[79]

iv. West Bank

There are 775,000 Palestinian refugees registered with UNRWA in the West Bank: 25 per cent live in the 19 UNRWA camps while the rest live in towns and villages. Since 1967, Palestinians in the West Bank and Gaza have been under Israeli military occupation. As such, they do not hold Israeli citizenship but, rather, various forms of residency status under a highly arbitrary permit system. Israel has revoked the residency of over a quarter of a million Palestinians in Jerusalem and the Opt since 1967, leaving them stateless.[80] Under Israeli law, the Opt are governed by military law, while Jewish settlers benefit from full civil rights as Israeli citizens.[81] The Oslo 'process' installed the Palestinian Authority in 1994 as an interim government with limited authority over parts of the Opt.[82] The West Bank was divided under Oslo into three administrative areas, with the PA having full control over only 18 per cent. However, today, Israel

[76] See Law 260 of 1956.

[77] UNRWA, 'Where We Work: Syria' <www.unrwa.org/where-we-work/syria> accessed 26 October 2019. See also Canada: Immigration and Refugee Board of Canada, 'Syria (2009–November 2013)' (2013) <https://www.refworld.org/docid/532024234.html> accessed 26 October 2019.

[78] UNRWA, 'Palestine Refugees in Syria: A Tale of Devastation and Courage' (14 March 2019) <https://www.unrwa.org/newsroom/features/palestine-refugees-syria-tale-devastation-and-courage> accessed 8 January 2020.

[79] UNRWA, 'Where We Work: Syria' (n 77).

[80] Nidal al-Azza and Lubnah Shomali (eds), *Survey of Palestinian Refugees and Internally Displaced Persons 2016–2018 Volume IX* (BADIL Resource Center) <www.badil.org/phocadownloadpap/badil-new/publications/survay/survey2016-2018-eng.pdf> accessed 26 October 2019.

[81] Association for Civil Rights in Israel, 'One Rule, Two Legal Systems: Israel's Regime of Laws in the West Bank' (2014) <https://law.acri.org.il/en/2014/11/24/twosysreport/> accessed 26 October 2019; see also B'Tselem, 'Dual System of Law' (2011) <www.btselem.org/settler_violence/dual_legal_system> accessed 26 October 2019.

[82] The Oslo Accords resulted in a single general agreement, the Declaration of Principles on Interim Self-Government Arrangements (DOP) (13 September 1993) <www.nad.ps/en/publication-resources/agreements/declaration-principles-interim-self-government-arrangements> accessed 26 October 2019.

maintains *de facto* control over all of the West Bank through a regime of permits, checkpoints, and the wall that extends throughout the West Bank. This regime has subdivided the West Bank into over 100 fragmented areas that prevent Palestinians from moving easily, if at all, from one side of the Opt to the other.[83] Palestinian refugees face daily threats of injury, death, house demolition, eviction, displacement, and severe restrictions on their freedom of movement at the hands of the Israeli authorities. Despite ongoing international attention to the fact that Israel, as the occupying power, has obligations under international humanitarian and human rights law to respect and protect Palestinians, Palestinian human rights have continued to deteriorate.[84] The Special Rapporteur on the Occupied Palestinian Territories concluded in his recent report to the General Assembly that in its administration of the Opt, Israel was in systemic violation of these obligations, and was no longer merely an 'occupier', but has *de facto* annexed a significant part of the West Bank.[85]

v. Gaza

Of the 1.9 million people living in Gaza, 1.4 million are Palestine refugees registered with UNRWA, living in eight refugee camps. Gaza has endured three massive invasions by Israel since its 'disengagement' of settlers in 2004. Israel remains the sole controlling authority over entry and egress by air, sea, and land; Hamas has civilian control over the Gazan population, but has no *de facto* control over the territory. Because Israel controls the movement of all Palestinians into and out of the Gaza Strip, and the entry and exit of all goods and services, as the occupying power it continues to bear the obligations to protect the population.[86]

UNRWA declared a humanitarian emergency in July 2014 after Israel's 50-day bombardment of Gaza.[87] The Israeli-imposed blockade, imposed in 2007 after Hamas won the elections, has devastated the lives and livelihoods of Gazans and destroyed the local Gaza economy, leaving 80 per cent of the population dependent on humanitarian

[83] Under the DOP, the PA was afforded civil and security control over Area A (18 per cent of the WB); the PA was afforded civil control but Israel retained security control over Area B (22 per cent of the WB); and Israel maintains full control over Area C (60 per cent of the WB). See Nidal al-Azza and Lubnah Shomali (n 80) 13. <www.badil.org/phocadownloadpap/badil-new/publications/survay/survey2016-2018-eng.pdf> accessed 26 October 2019.

[84] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136.

[85] UNGA 'Situation of Human Rights in the Palestinian Territories Occupied Since 1967' (22 October 2018) UN doc A/73/447.

[86] Under Israeli policies, Gaza is completely separated from the West Bank. It is a violation of the Occupying Power's authority to separate the integrity of occupied territory. See Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (GCIV).

[87] UNRWA, 'Where We Work: Gaza' <https://www.unrwa.org/where-we-work/gaza-strip> accessed 26 October 2019.

assistance. Unemployment exceeds 50 per cent, one million Palestinian refugees rely on UNRWA for food aid, and 95 per cent of Gazans do not have access to clean water.[88]

5. UNRWA's Current Challenges and Prospects for the Future

States outside the region have severely criticized the Arab League and States for not integrating Palestinian refugees into their citizenry. However, the Arab League and Arab States' position that they are not legally obliged to integrate the refugees is arguably consistent both with international law and the Palestinian demand to implement their right of return. States' core obligation with respect to refugees is to respect the principle of *non-refoulement* and grant temporary protection over time, while 'making every effort to facilitate the naturalization of refugees'.[89] The Arab host States have offered a form of temporary protection to Palestinian refugees for more than 70 years under regional instruments, in sharp contrast to the failure of the international community to implement durable solutions for this population. The standards of rights offered to Palestinian refugees in the Arab States vary substantially, and in many instances fall below the human rights norms to which the States have committed themselves. In particular, the systemic discrimination and targeting of Palestinians in many, if not all, of the host States violates their obligations under both international and regional human rights instruments.[90] At the same time, it must be acknowledged that the host States have provided them with safe haven, often at great cost to themselves. Moreover, it is clear from State and UNHCR practice that of the three durable solutions, only voluntary return is an absolute obligation on any State;[91] no State is required to accept a refugee or national of any other State or to grant him or her permanent status.

On the other hand, Israel's obligations towards Palestinians, as the occupying power in the West Bank and Gaza, include protection of civilians, the prohibition against settler implantation and transfer of populations, protection of natural resources for the benefit of the occupied population (not the occupier), and preservation of the local laws in place prior to occupation.[92] What is clear is that the main obligation to implement the core durable solution of Palestinian right of return rests on Israel. The territorial settlement that has thus far been discussed during negotiations has ignored the fact that refugees moving to the West Bank or Gaza, whose original

[88] ibid. [89] Refugee Convention, preamble. See Akram and Rempel (n 59) 1.

[90] All the Arab host States are parties to the ICCPR, the CAT, the CRC, the Arab Charter on Human Rights (adopted 22 May 2004, entered into force 15 March 2008), the Casablanca Protocol (n 60), and the Organization of the Islamic Conference (OIC), Covenant on the Rights of the Child in Islam (June 2005) OIC/9-IGGE/HRI/2004/Rep.Final.

[91] Kathleen Lawand, 'The Right to Return of Palestinians in International Law' (1996) 8 IJRL 532.

[92] GCIV (n 86). See also *Legal Consequences of the Construction of a Wall* (n 84).

homes were not in those areas, would be exercising an option of resettlement, not return.[93] Regardless of the ultimate territorial outcome of peace negotiations, individual Palestinian refugees remain legally entitled to return 'to their homes' of origin, as stated in resolution 194, and UNRWA is required to continue assistance and service delivery until this is achieved.

The UN has repeatedly referred to resolution 194 as incorporating the 'just solution' for Palestinian refugees, which in turn rests on fundamental international human rights law principles.[94] Any steps taken by a UN agency in the context of a peace agreement must be consistent with international refugee law, incorporating the core principles of voluntary return, restitution of refugee property, and compensation for losses. UNCCP, UNHCR, and UNRWA each has an important role to play in any post-conflict settlement. UNCCP's expertise and documentation of Palestinian refugee property will be essential to restitution and compensation. UNHCR's experience in implementing comprehensive plans of action and durable solutions for refugees will be essential to the multi-State, multilevel (and region-wide) plan that will be necessary for a resolution of the issues.[95]

UNRWA's accomplishments in service delivery to date are significant: there are approximately half a million children registered in the 700+ schools it operates; over 1.5 million children have graduated from its primary schools; over 7,700 students are enrolled in technical and vocational training programmes; and two-thirds of registered refugees have benefited from health services delivered by 143 healthcare centres.[96] UNRWA's camp and infrastructure improvement projects have included water and sanitation, hospital construction, and innovative camp re-design.[97] Despite its limitations and deficiencies, UNRWA has been the main provider for Palestinian refugees for seven decades. The most serious challenge faced by UNRWA to date is the termination of US funding in 2018, which was its largest single source (30 per cent).[98] The Trump Administration shares Israel's view that a condition of any peace agreement should be the elimination of the agency. While defunding UNRWA does not formally

93 Susan M Akram, 'The Legal Trajectory of the Palestinian Refugee Issue: From Exclusion to Ambiguity' in Rochelle Davis and Mimi Kirk (eds), *Palestine and the Palestinians in the 21st Century* (Indiana University Press 2013).

94 See UNGA res 194 (n 4) para 11.

95 Akram and Rempel (n 59) 106. The New York Declaration for Refugees and Migrants, UNGA res 71/1 (3 October 2016) (adopted 19 September 2016), Annex I sets out in detail the key components of comprehensive refugee response frameworks, specifically referring to UNRWA and the Palestinian refugee host States.

96 UNRWA, 'What We Do' <https://www.unrwa.org/what-we-do> accessed 25 December 2019.

97 See Takkenberg (n 33) 257. See also Nell Gabiam, *The Politics of Suffering: Syria's Palestinian Refugee Camps* (Indiana University Press 2016).

98 Edward Wong, 'Trump Administration's Move to Cut Aid to Palestinian Refugees is Denounced', *The New York Times* (31 August 2018) <https://www.nytimes.com/2018/08/31/world/middleeast/trump-administration-aid-palestinian-refugees-.html> accessed 26 October 2019. See Geneva Initiative, 'The Geneva Initiative—Draft Permanent Status Agreement' (12 October 2003) art 7 para 13.

change its mandate or functions, which are solely matters for the General Assembly,[99] it does make service delivery extremely difficult. The drastic budget cut seriously threatens the ability of UNRWA to maintain the long-term investment in human development it has made for the welfare of generations of Palestinian refugees.[100] Meanwhile, UNRWA has proved to be particularly innovative in the face of multiple challenges over the years. As long as the UN continues to renew its mandate, UNRWA will adapt to the latest challenge and provide for the needs of Palestinians until they can achieve the durable solution first established for them when their long displacement began.

[99] The General Assembly has continually renewed UNRWA's mandate: see eg the latest resolution, UNGA res 74/85 (13 December 2019).

[100] Leila Hilal, 'Peace Prospects and Implications for UNRWA's Future: An International Law Perspective' (2009) 28(2–3) RSQ 607, 610.

CHAPTER 36

COMPLEMENTARY PROTECTION

JANE McADAM

1. Introduction

In addition to refugees, there are other forced migrants in need of international protection. The principle of *non-refoulement* extends beyond article 33 of the Refugee Convention to preclude (at a minimum) the removal of people who face a real risk of being arbitrarily deprived of their life, or subjected to the death penalty, torture, or cruel, inhuman, or degrading treatment or punishment. These obligations derive from international human rights law, although it is only in the past few decades that States have come to accept such protection as a matter of international legal obligation, rather than goodwill. Some scholars have identified an even broader principle of refuge in customary international law,[1] which Goodwin-Gill describes as an 'overarching principle of protection, sufficient to accommodate all those instances where States are obliged to act or refrain from action in order that individuals or groups are not exposed to the risk of certain harms'.[2]

The present chapter focuses on the principle of *non-refoulement* in human rights law, which provides a clear, definitive basis for non-removal that is recognized in the law and practice of many States and which also encompasses the provision of a legal status. Although not a term of art, this is known generally as 'complementary protection'. The 'complementary' element describes protection derived from sources *complementary to*

[1] On this, see Chapters 13 and 37 in this volume.

[2] Guy S Goodwin-Gill, '*Non-Refoulement*, Temporary Refuge, and the "New" Asylum Seekers' in David J Cantor and Jean-François Durieux (eds), *Refuge from Inhumanity? War Refugees and International Humanitarian Law* (Brill 2014) 458. See also Walter Kälin and Nina Schrepfer, 'Protecting People Crossing Borders in the Context of Climate Change Normative Gaps and Possible Approaches', UNHCR Legal and Protection Policy Research Series, PPLA/2012/01 (2012) 65. See further Chapter 13 in this volume.

the Refugee Convention—such as human rights treaties (or more general humanitarian principles, such as assisting those fleeing generalized violence)—while the 'protection' element implies a status that confers more than the benefit of *non-refoulement* alone.[3] According to the Inter-American Court of Human Rights, 'complementary protection constitutes a normative development that is consistent with the principle of non-*refoulement*, by means of which States safeguard the rights of those who do not qualify as refugee[s] . . . but who cannot be returned'.[4] In State practice, it consists of 'a number of administrative or legislative mechanisms . . . in place for regularizing, on a variety of grounds, the stay of persons, including those who may not be eligible for refugee protection but who may be in need of international protection'.[5]

Complementary protection should be distinguished from protection granted solely on compassionate grounds or for practical reasons (such as the inability to obtain travel documents).[6] It is also distinct from the expanded protection provided by the African and Latin American refugee instruments, which extend Convention refugee status to a wider class of beneficiaries (who are also described as 'refugees').[7]

As a concept, then, 'complementary protection' refers to a status in domestic law that is granted to individuals who have been determined not to be refugees under the Refugee Convention, but who nonetheless have an international protection need based on the principle of *non-refoulement*. Standards of treatment vary between States, but according to UNHCR's Executive Committee of States, they should, at the very least, 'provide for the highest degree of stability and certainty by ensuring the human rights and fundamental freedoms of [beneficiaries] without discrimination, taking into account the relevant international instruments and giving due regard to the best interest of the child and family unity principles'.[8]

Many States now have domestic complementary protection regimes in place, including in Albania,[9] Australia,[10] Bosnia,[11] Canada,[12] Costa Rica,[13] the European Union

[3] UNHCR Executive Committee (ExCom) Conclusion No 103 (LVI), 'The Provision of International Protection including through Complementary Forms of Protection' (2005) paras (n), (s).

[4] *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection* (Advisory-Opinion OC-21/14), Inter-American Court of Human Rights Series A No 21 (19 August 2014) para 240.

[5] ExCom (n 3) preamble.

[6] Standing Committee of the Executive Committee of the High Commissioner's Programme, 'Complementary Forms of Protection: Their Nature and Relationship to the International Refugee Protection Regime', EC/50/SC/CRP.18 (9 June 2000) paras 4–5; ExCom (n 3) para (j).

[7] OAU Convention, art I(2); Cartagena Declaration, conclusion III(3). See also Chapters 15, 17, and 34 in this volume.

[8] ExCom (n 3) para (n).

[9] Law on Asylum in the Republic of Albania, No 121/2014, art 78. This example, along with Bosnia, Macedonia, Montenegro, Norway, Serbia, South Korea, Turkey, and Ukraine, are cited in Bill Frelick, 'What's Wrong with Temporary Protected Status and How to Fix It: Exploring a Complementary Protection Regime' (2020) 8 Journal on Migration and Human Security 42. He also cites South Africa's Refugees Act 1998, s 3, but this definition is based solely on the expanded definition in the OAU Convention.

[10] Migration Act 1958 (Cth), s 36(2A)–(2C) (Migration Act).

[11] Bosnia and Herzegovina, Law on Asylum, No 11/2016, art 22.

[12] Immigration and Refugee Protection Act SC 2001, c 27, s 97.

[13] Ley General de Migración y Extranjería No 8764 (10 September 2009) arts 6(6), 94(12).

(EU),[14] Hong Kong,[15] New Zealand,[16] Macedonia,[17] Mexico,[18] Montenegro,[19] Nicaragua,[20] Norway,[21] Serbia,[22] South Korea,[23] Switzerland,[24] Turkey,[25] Ukraine,[26] the United Kingdom (UK),[27] the United States (US),[28] and parts of Africa.[29] Complementary protection is typically granted in situations where a person: (a) has a well-founded fear of being persecuted that is not linked to one of the five Refugee Convention grounds; (b) is precluded from being granted refugee status owing to a domestic carve-out; or (c) is at risk of harm that does not reach the level of severity of 'persecution' under the Refugee Convention.[30]

2. Scope and Content

States' *non-refoulement* obligations under international human rights law may be express or implied. Why such an obligation has been implied in some contexts, and

[14] EU Qualification Directive (original), arts 2(e), 15; EU Qualification Directive (recast), arts 2(f), 15.

[15] Immigration Ordinance, Cap 115, Laws of Hong Kong, part VIIC.

[16] Immigration Act 2009, ss 130, 131.

[17] Law on Asylum and Temporary Protection, L No 07–3664/1 (2003), arts 2, 5.

[18] Ley sobre Refugiados Protección Complementaria y Asilo Político, arts 28–32.

[19] Law on International and Temporary Protection of Foreigners (29 December 2016) arts 4, 25.

[20] Ley No 761—Ley General de Migración y Extranjería (7 July 2011) art 220.

[21] Act of 15 May 2008 on the Entry of Foreign Nationals into the Kingdom of Norway and Their Stay in the Realm (Immigration Act), s 28.

[22] Law on Asylum (2007), arts 2, 4.

[23] Refugee Act, Law No 11298 of 2012, art 2(3).

[24] Federal Act on Foreign Nationals and Integration of 16 December 2005, art 83(3)–(4).

[25] Law No 6458 of 2013 on Foreigners and International Protection (as amended 29 October 2016), arts 46, 48, 55, 63. Of note is that, in addition to EU-like subsidiary protection grounds (in art 63), a humanitarian permit may be granted *inter alia* 'where the best interest of the child is of concern', 'where, notwithstanding a removal decision or ban on entering Turkey, foreigners cannot be removed from Turkey or their departure from Turkey is not reasonable or possible', or 'in extraordinary circumstances'.

[26] Law of Ukraine on Refugees and Persons in Need of Complementary or Temporary Protection in Ukraine 2011, No 3671-VI, art 1(4), (13).

[27] Immigration Rules (as updated 2 May 2017), part 11, paras 339C–339CA. The UK is not bound by the recast EU Qualification Directive.

[28] Immigration and Nationality Act 8 CFR §§ 208.16, 208.17 (protection from return to torture pursuant to CAT).

[29] David J Cantor and Farai Chikwanha, 'Reconsidering African Refugee Law' (2019) 31 IJRL 182 explain that Angolan law prevents the removal of individuals to a country where they will be subjected to torture or cruel or degrading treatment: Lei No 10/15, art 54(3). In Sierra Leone and the Central African Republic, people must not be expelled to a risk of torture: Refugees Act, s 16 and Loi No 07.019, art 22, respectively. Burundian law provides that asylum may be granted to any non-national 'whose life or liberty are threatened in their country or who is exposed to inhuman or degrading treatment when such threats or risks emanate from persons or groups other than the public authorities of their country', and beneficiaries are granted the same rights as refugees: Loi No 1/32, art 5.

[30] See Jane McAdam and Fiona Chong, 'Complementary Protection in Australia Two Years On: A Developing Human Rights Jurisprudence' (2014) 42 Federal Law Review 441. In New Zealand, 'persecution' encompasses inhuman or degrading treatment and the latter thus does not involve a lower level of harm: *AC (Syria)* [2011] NZIPT 800035, paras 70–80.

not others (including with respect to one 'absolute' right),[31] begs further analysis. Article 3 of the CAT expressly prohibits States from removing an individual in any manner whatsoever where there are substantial grounds for believing that doing so would expose him or her to a danger of being subjected to torture.[32] By contrast, the prohibition on torture and cruel, inhuman, or degrading treatment or punishment contained in article 7 of the ICCPR[33] (with parallels in other international and regional instruments)[34] has been interpreted as preventing the removal of individuals who face a real risk of being exposed to those forms of harm[35]—as have article 6 of the ICCPR and article 2 of the ECHR with respect to the right to life.[36] Article I of the American Declaration of the Rights and Duties of Man, which protects everyone's 'right to life, liberty and the security of his person',[37] has been interpreted broadly, arguably precluding removal to a wider range of harms than comparable provisions elsewhere.[38]

[31] Article 4 of the ECHR prohibits slavery, servitude, and forced or compulsory labour. Article 4 was considered in *Ould Barar v Sweden* (1999) 28 EHRR CD 213 but there was no risk of a violation. See also *MO v Switzerland*, App No 41282/16 (ECtHR, 20 June 2017); *J v Austria*, App No 58216/12 (ECtHR, 17 January 2017), Concurring Opinion of Judge Pinto de Albuquerque, joined by Judge Tsotsoria, para 40.

[32] CAT, art 3.

[33] ICCPR, art 7, which is reflected in all domestic complementary protection regimes mentioned in this chapter except the US, which only safeguards against return to persecution or torture. In Costa Rica and Nicaragua, the obligation is expressed more broadly—non-return to places where individuals' lives are at risk, and non-return to places where people would suffer violations of their human rights: respectively, Ley General de Migración y Extranjería (n 13) art 6(6); Ley No 761 (n 20) art 220.

[34] CRC, art 37(a); ECHR, art 3; EU Charter of Fundamental Rights, art 19(2); African Charter on Human and Peoples' Rights (adopted 17 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58, art 5; Arab Charter on Human Rights (adopted 22 May 2004, entered into force 15 March 2008), art 8.

[35] See eg UN Human Rights Committee, 'General Comment No 20: Replaces General Comment 7 concerning Torture or Cruel, Inhuman or Degrading Treatment or Punishment (Art 7)' (10 March 1992) para 9; UN Human Rights Committee, 'General Comment No 31: Nature of the General Legal Obligation on States Parties to the Covenant', UN doc CCPR/C/21/Rev1/Add.13 (26 May 2004) para 12; *Soering v United Kingdom* (1989) 11 EHRR 439. There are procedural and evidentiary merits/drawbacks of the various adjudicatory bodies: Jane McAdam *Complementary Protection in International Refugee Law* (OUP 2007) 138–40.

[36] See eg UN Human Rights Committee 2004 (n 35) para 12; UN Human Rights Committee, 'General Comment No 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life', UN doc CCPR/C/GC/36 (30 October 2018) paras 30–1; *Bader and Kanbor v Sweden*, App No 13284/04 (ECtHR, 8 November 2005); *AL (XW) v Russia*, App No 44095/14 (ECtHR, 29 October 2015).

[37] American Declaration of the Rights and Duties of Man (adopted at the 9th International Conference of American States, Bogota, 2 May 1948).

[38] David J Cantor and Stefania E Barichello, 'The Inter-American Human Rights System: A New Model for Integrating Refugee and Complementary Protection?' (2013) 17 International Journal of Human Rights 689, 693. The Commission has also precluded removal in the context of article XXVI 'not to receive cruel, infamous or unusual punishment': *Mortlock v United States*, Inter-American Commission on Human Rights Report No 63/08, Case No 12.534 (25 July 2008).

Human rights law also precludes removal to situations where individuals face a real risk of being subjected to the death penalty[39] or an enforced disappearance.[40] In each case, these rights are absolute. No exceptions to,[41] derogations from, or reservations to the prohibition on removal are permitted.[42]

The majority of complementary protection claims are made on the basis that the feared harm constitutes cruel, inhuman, or degrading treatment. As noted below, even though it is widely accepted that most other human rights could independently found a *non-refoulement* claim, the absolute nature of non-return to cruel, inhuman, or degrading treatment, its reflection in international, regional, and domestic law, and the extensive jurisprudence that has developed as to its meaning, make it the 'go to' complementary protection ground. Arguably, this has stultified the development of other grounds for protection since violations of other rights are recharacterized as examples of cruel, inhuman, or degrading treatment.

Decision-makers often do not clearly distinguish between treatment that is 'cruel', 'inhuman', or 'degrading',[43] instead viewing them either as a sliding scale of ill-treatment (with torture the most severe form[44]), or collectively as the 'compendious expression of a norm' that 'proscrib[es] any treatment that is incompatible with humanity'.[45] In some domestic schemes, such as the Australian Migration Act, decision-makers must identify precisely which form of ill-treatment the applicant fears;[46] by contrast, it is rare for the

[39] Second Optional Protocol to the International Covenant on Civil and Political Rights on the Abolition of the Death Penalty (adopted 15 December 1989, entered into force 11 July 1991) 999 UNTS 414; *GT v Australia*, UN doc CCPR/C/61/D/706/1996 (4 December 1997) para 8.5; *Judge v Canada*, UN doc CCPR/C/78/D/829/1998 (13 August 2003) para 10.4; CRC, art 37(a); EU Charter of Fundamental Rights, art 19(2); Protocol No 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the Abolition of the Death Penalty in All Circumstances (adopted 3 May 2002, entered into force 1 July 2003) ETS 187; *Wong Ho Wing v Peru*, Inter-American Court of Human Rights Series C No 297 (30 June 2015) para 134.

[40] This derives from the International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3, art 16. This is reflected in Japanese law, which protects people from being removed where there are substantial grounds for believing that they would be in danger of being subjected to an enforced disappearance: Immigration Control and Refugee Recognition Act (Cabinet Order No 319 of 4 October 1951), art 53(3)(iii).

[41] *Tapia Paez v Sweden*, UN doc CAT/C/18/D/39/1996 (28 April 1997) para 14.5; *Aemei v Switzerland*, UN doc CAT/C/18/D/34/1995 (9 May 1997) para 9.8. The Supreme Court's approach in *Suresh v Canada*, 2002 SCC 1, [2002] 1 SCR 3 is contrary to international law and has been criticized by the UN Human Rights Committee, 'Consideration of Reports: Concluding Observations on Canada', UN doc CCPR/C/79/Add.105 (7 April 1999) para 13.

[42] This also means that there is no scope for balancing a person's conduct (however abhorrent) against the risk of harm if he or she is returned (see eg *Chahal v United Kingdom* (1996) 23 EHRR 413, paras 79–80).

[43] UN Human Rights Committee 1992 (n 35) para 4 has explained that any distinctions 'depend on the nature, purpose and severity of the treatment applied'.

[44] eg *Ireland v United Kingdom* (1979–80) 2 EHRR 25, para 167.

[45] *Taunoa v Attorney-General* [2007] NZSC 70, para 82 (Elias CJ), referring to *Miller v R*, 1976 CarswellBC 321, [1977] 2 SCR 680, 690 (Laskin CJ).

[46] Migration Act (n 10) ss 5, 36(2A).

Human Rights Committee to explain which element of article 7 of the ICCPR has been violated (which explains the limited jurisprudence from that body about the nature of each type of harm). The case law of the European Court of Human Rights falls somewhere in between, although it has come to consider the various types of ill-treatment as a whole, and has observed that, as a '"living instrument which must be interpreted in the light of present-day conditions"[,] . . . certain acts which were classified in the past as "inhuman and degrading treatment" as opposed to "torture" could be classified differently in future'.[47]

In practical terms, it is not hard to see why complementary protection has developed in this way. It is much harder to successfully mount a case for *non-refoulement* with respect to a 'qualified' right, which can be derogated from in certain circumstances, be subject to reservations, or balanced against competing considerations. For example, while the preservation of family unity may in some cases mandate against removal, this will be balanced against what is 'necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'.[48] As noted above, in such cases, it is common for applicants to seek to characterize the harm (eg family separation) as 'inhuman or degrading treatment'.[49] This provides a more straightforward basis for the protection claim, and involves a less stringent threshold than the 'flagrant denial of a right' test, discussed below. Further, as the European Court of Human Rights noted in *Z and T*, 'it would be difficult to visualise a case in which a sufficiently flagrant violation of Article 9 [freedom of thought, conscience, and religion] would not also involve treatment in violation of Article 3 of the Convention'.[50]

The Human Rights Committee,[51] the Committee on the Rights of the Child,[52] the European Court of Human Rights,[53] the Committee on the Elimination of Racial

[47] See *Selmouni v France*, App No 25803/94 (ECtHR, Grand Chamber, 28 July 1999) para 101. The Committee against Torture has detailed a long, non-exhaustive list of situations that may indicate a risk of torture: Committee against Torture, 'General Comment No 4 (2017) on the Implementation of Article 3 of the Convention in the context of Article 22' (2017), UN doc CAT/C/GC/4. Significantly, such acts (with a lesser degree of severity) could constitute cruel, inhuman, or degrading treatment or punishment.

[48] ECHR, art 8(2).

[49] *Z and T v United Kingdom*, App No 27034/05 (ECtHR, 28 February 2006); *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323. In the Inter-American Court of Human Rights, see *Wong Ho Wing* (n 39) para 136.

[50] *Z and T* (n 49) 7.

[51] UN Human Rights Committee, 'General Comment No 15: The Position of Aliens under the Covenant' (11 April 1986) para 5. To date, however, all violations have been regarded as being encompassed by article 6 or 7: see eg *BL v Australia*, UN doc CCPR/C/112/D/2053/2011 (7 January 2015) para 6.5.

[52] Committee on the Rights of the Child, 'General Comment No 6 (2005): Treatment of Unaccompanied and Separated Children outside Their Country of Origin', UN doc CRC/GC/2005/6 (1 September 2005) para 27.

[53] eg *Soering* (n 35) para 113.

Discrimination,[54] the Inter-American Court of Human Rights,[55] the House of Lords,[56] and States themselves in the 2018 Global Migration Compact[57] have all acknowledged that the principle of *non-refoulement* may extend to other rights,[58] which is why it is problematic that different thresholds have emerged in some contexts, depending on the nature of the right concerned.

Of all the international and regional bodies, the European Court of Human Rights has engaged in the most detailed analysis of the scope of other human rights (beyond the right to life,[59] and the prohibition on torture and cruel, inhuman, or degrading treatment or punishment) to entail a *non-refoulement* obligation.[60] It has expressly recognized this with respect to articles 4 (prohibition of slavery and forced labour),[61] 5 (right to liberty and security),[62] 6 (right to a fair trial),[63] 8 (right to respect for private and family life),[64] and 9 (right to freedom of thought, conscience, and religion).[65] However, in that jurisdiction, a very high standard is required in such cases—a 'flagrant denial' of a right—which has rarely been met.[66] It requires a breach 'so fundamental as to amount to a nullification, or destruction of the very essence, of the right

[54] Committee on the Elimination of Racial Discrimination, 'Consideration of Reports Submitted by States Parties under Article 9 of the Convention: Concluding Observations of the Committee on the Elimination of Racial Discrimination: Japan', UN doc CERD/C/JPN/CO/3–6 (16 March 2010) para 23.

[55] Advisory-Opinion OC-21/14 (n 4) para 231.

[56] *Ullah* (n 49); *R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27, [2004] 2 AC 368.

[57] Global Compact for Migration, objective 21, para 37.

[58] EU Qualification Directive, art 15(b).

[59] Even these cases are generally recharacterized as inhuman treatment.

[60] *Soering* (n 35) para 113. For a detailed discussion of case law on other provisions, see Maarten den Heijer, *Europe and Extraterritorial Asylum* (Hart Publishing 2012) 280–5; Cathryn Costello, 'The Search for the Outer Edges of *Non-Refoulement* in Europe: Exceptionality and Flagrant Breaches' in Bruce Burson and David J Cantor (eds), *Human Rights and the Refugee Definition: Comparative Legal Practice and Theory* (Brill 2016) 181–2. For an overview of ICCPR rights, see Ben Saul, 'Affidavit of 18 August 2014' (evidence file, folio 6980), *Wong Ho Wing* (n 39).

[61] *Ould Barar* (n 31).

[62] See eg *El-Masri v Macedonia* (2013) 57 EHRR 25; *Abu Zubaydah v Lithuania*, App No 46454/11 (ECtHR, 31 May 2018) paras 657–8; *Al Nashiri v Romania*, App No 33234/12 (ECtHR, 31 May 2018) paras 691–2.

[63] eg *Soering* (n 35); *Drozd and Janousek v France and Spain* (1992) 14 EHRR 745; *Tomic v United Kingdom*, App No 17837/03 (ECtHR, 14 October 2003); *Mamatkulov v Turkey* (2005) 41 EHRR 494 (Grand Chamber); *Othman (Abu Qatada) v United Kingdom*, App No 8139/09 (ECtHR, 9 May 2012); *Yefimova v Russia*, App No 39786/09 (ECtHR, 19 February 2013) para 218.

[64] eg *F v United Kingdom*, App No 17341/03 (EctHR, 22 June 2004); *Üner v The Netherlands*, App No 46410/99 (ECtHR, Grand Chamber, 5 July 2005); *Al Nashiri* (n 62) paras 698–9; *Abu Zubaydah* (n 62) para 665.

[65] eg *Z and T* (n 49); see also *Ullah* (n 49).

[66] It was first met in *Othman* (n 63); see also *El-Masri* (n 62); *Al Nashiri v Poland*, App No 28761/11 (ECtHR, 24 July 2014); *Husayn (Abu Zubaydah) v Poland*, App No 7511/13 (ECtHR, 24 July 2014). For a detailed overview of cases, see Costello (n 60) 197–205.

guaranteed'.[67] An individual must demonstrate an added 'measure of persecution, prosecution, deprivation of liberty or ill treatment' beyond a 'mere' violation of the right.[68] This is because the State may have a 'legitimate aim' in restricting a qualified right, such that

> it is only in such a case—where the right will be completely denied or nullified in the destination country—that it can be said that removal will breach the treaty obligations of the signatory state however those obligations might be interpreted or whatever might be said by or on behalf of the destination state.[69]

This seems to be premised on the idea that the ECHR's Contracting States are not the 'indirect guarantors of [rights] for the rest of the world',[70] and on 'a purely pragmatic basis, it cannot be required that an expelling Contracting State only return an alien to a country where the conditions are in full and effective accord with each of the safeguards of the rights and freedoms set out in the Convention'.[71] As Foster rightly observes, this 'certainly raises a question as to the universality of human rights'.[72] Costello argues that the flagrant breach standard 'hamper[s] the progressive development of the law'[73] because it is 'unduly uncertain and excessively stringent'.[74]

By contrast, the Human Rights Committee and the Committee on the Rights of the Child have stated that individuals must not be removed to any country where they face a real risk of 'irreparable harm'. That term is not defined, but both committees cite arbitrary deprivation of life, torture, and cruel, inhuman, or degrading treatment or punishment as examples of such harm.[75] In the context of interim measures, the Human Rights Committee has stated that the 'essential criterion' of irreparable harm is 'the irreversibility of the consequences'.[76] While Noll has argued that this is 'ambig-

[67] *Mamatkulov* (n 63) 537, para O-III14 (joint partly dissenting opinion of Judges Bratza, Bonello, and Hedigan), adopted by the court in *Othman* (n 63) para 260.

[68] *Z and T* (n 49) 7.

[69] *Ullah* (n 49) para 24 citing *Devaseelan v Secretary of State for the Home Department* [2002] UKAIT 00702, [2003] Imm AR 1, para 111.

[70] *Z and T* (n 49) 7. [71] ibid 6.

[72] Michelle Foster, '*Non-Refoulement* on the Basis of Socio-Economic Deprivation: The Scope of Complementary Protection in International Human Rights Law' [2009] 2 New Zealand Law Review 257, 276 (fn omitted); Thomas Spijkerboer, 'Gender, Sexuality, Asylum and European Human Rights' (2018) 29 Law Critique 221, 225, 228; Chapter 46 in this volume. For analysis of the court's various rationales as to when and why a *non-refoulement* obligation pertains, see Foster 268–72; Costello (n 60) 206. Costello argues that the 'flagrant breach' test 'is symptomatic of the lack of a single coherent normative rationale for the *non-refoulement* case law' (184).

[73] Costello (n 60) 184 (fn omitted). [74] ibid 205.

[75] UN Human Rights Committee 2004 (n 35) para 12; Committee on the Rights of the Child (n 52) para 27.

[76] See also *Stewart v Canada*, UN doc CCPR/C/58/D/538/1993 (1 November 1996) para 7.7. For a critique of irreparable harm, see Foster (n 72) 273–4; Gregor Noll, *Negotiating Asylum: The EU Acquis, Extraterritorial Protection and the Common Market of Deflection* (Martinus Nijhoff 2000) 464–7.

uous' and 'opens up a new arena for indeterminacy',[77] in practice it has not been used as an independent standard.

The distinctions between absolute and qualified rights are problematic, especially when contrasted with refugee law's more holistic assessment of the conditions amounting to persecution. There is a paucity of cogent reasoning by decision-makers as to when a *non-refoulement* duty attaches and why—especially when it comes to the nature of the right concerned (absolute/qualified), and the requisite degree of involvement by the State (in cases relating to inadequate resources or medical care, where there are 'fault-lines in the case law around the source of the harm').[78] Much of the reasoning seems to be based on policy concerns rather than anything more normative,[79] with Costello suggesting that the European Court of Human Rights seems to be deferring more to States' migration control prerogatives than to anything more principled.[80]

When it comes to domestic complementary protection regimes, most prohibit removal to the 'clear-cut' cases of arbitrary deprivation of life, the death penalty, torture, and cruel, inhuman, or degrading treatment or punishment. Indeed, the Human Rights Committee has stated that States parties to the ICCPR '*must* allow all asylum seekers claiming a real risk of a violation of their right to life in the State of origin access to refugee or other individualized or group status determination procedures that could offer them protection against *refoulement*'.[81] In some jurisdictions, the legislation refers directly to the relevant treaty provision as the source of the *non-refoulement* obligation,[82] whereas in others, the legislation itself defines the scope of the obligation.[83] The EU Qualification Directive additionally precludes a civilian's removal to a real risk of a 'serious and individual threat to . . . life or person by reason of indiscriminate violence in situations of international or internal armed conflict',[84] while Nicaraguan law prohibits the return of people suffering violations of their human rights.[85] Harm may result both from positive acts (eg the actual infliction of harm) as well as from deprivation (eg resources being withheld).[86] Furthermore, the individual circumstances of each case will influence whether or not the particular ill-treatment feared attains the minimum level of severity required.

[77] Noll (n 76) 466. [78] Costello (n 60) 184; see further Chapter 46 in this volume.

[79] Foster (n 72) 276; Costello (n 60) 193, citing *SHH v United Kingdom* (2013) 57 EHRR 18.

[80] Costello (n 60) 201.

[81] *Teitiota v New Zealand*, UN doc CCPR/C/127/D/2728/2016 (24 October 2019) para 9.3, referring to UN Human Rights Committee (n 36) para 31. See further Jane McAdam, 'Protecting People Displaced by the Impacts of Climate Change: The UN Human Rights Committee and the Principle of *Non-Refoulement*' (2020) 114 AJIL 708.

[82] New Zealand's Immigration Act (n 16) ss 130, 131 refer respectively to the CAT and ICCPR.

[83] For example, Australia's Migration Act (n 10) s 5(1) requires 'intent' to cause harm—namely, 'an actual, subjective, intention on the part of a person to bring about suffering by his or her conduct'; *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, para 8 (Kiefel CJ, Nettle, and Gordon JJ); para 114 (Edelman J).

[84] EU Qualification Directive, art 15(c). [85] Ley No 761 (n 20) art 220.

[86] On the latter, see Chapter 46 in this volume.

3. Particular Issues

a. The Impact of Subsidiary Protection on Refugee Law and Protection

A long-standing concern is whether complementary protection regimes might result in the atrophy of refugee law. Many domestic regimes require asylum seekers' claims to be assessed in accordance with the Refugee Convention first, and only subsequently assessed against the complementary protection grounds if they are found not to be a refugee.[87] However, there remains a risk that if it is simpler for a decision-maker to identify a particular form of harm as 'inhuman treatment', rather than analysing in detail whether it constitutes persecution on account of membership of a particular social group, for instance, then refugee law jurisprudence may suffer.[88] Durieux contends that the long history of human rights-based protection in Europe 'reveals a worrying trend of using the *non-refoulement* potential of article 3 ECHR not as subsidiary or complementary to, but rather as a substitute for, refugee status'.[89] As such, Costello cautions that human rights law has the capacity to undermine refugee law 'as cases are siphoned into human rights claims'.[90] Highly divergent recognition rates throughout the EU Member States suggest that decision-makers are applying different tests and interpretations, developing refugee jurisprudence in some jurisdictions but not in others.[91]

A related—and very real—problem is that if complementary protection results in beneficiaries receiving a lesser status, there may be policy pressures to grant that, rather than refugee status. This seems to be borne out in practice. Whereas Australia, Canada, and New Zealand grant identical rights to refugees and beneficiaries of complementary protection,[92] the EU permits differential treatment. Even though the recast EU Qualification Directive has moved towards a greater convergence of rights for refugees

[87] This is the case in the EU, Canada, Australia, and New Zealand, for instance.

[88] See eg *F v United Kingdom* (n 64) and critique by Costello (n 60) 199; Spijkerboer (n 72) 224–8. On complementary protection being used for honour killings, see McAdam and Chong (n 30) 467–71. On concerns about stifling refugee law, see Jean-François Durieux, 'The Vanishing Refugee: How EU Asylum Law Blurs the Specificity of Refugee Protection' in Hélène Lambert, Jane McAdam, and Maryellen Fullerton (eds), *The Global Reach of European Refugee Law* (CUP 2013) 254.

[89] Durieux (n 88) 250. This trend continues: Council of Europe Commissioner for Human Rights, 'Realising the Right to Family Reunification of Refugees in Europe' (Issue Paper prepared by Cathryn Costello, Kees Groenendijk, and Louise Halleskov Storgaard, June 2017) 14.

[90] Costello (n 60) 207.

[91] See Minos Mouzourakis, *Refugee Rights Subsiding? Europe's Two-Tier Protection Regime and Its Effect on the Rights of Beneficiaries* (AIDA and ECRE 2016) 13.

[92] See Migration Act (n 10) s 36; Immigration and Refugee Protection Act (n 12) ss 95–7; Immigration New Zealand, *Operational Manual: Refugees and Protection* (8 May 2017) ch 5 pt 15.1. The regional African and Latin American refugee treaties envisage the extension of Convention refugee status to the broader categories of people they protect: OAU Convention, art VIII(2). Nothing in the Cartagena Declaration suggests a different status should be accorded to its wider category of 'refugees', referring to the OAU Convention as a precedent: Cartagena Declaration, conclusions III(3), III(8); see also Advisory-Opinion OC-21/14 (n 4) para 239.

and beneficiaries of subsidiary protection,[93] several EU Member States have since reduced the latter's entitlements to the minimum allowed by EU law.[94] Furthermore, the European Commission's proposal for a Qualification Regulation, which would replace the Directive and directly bind Member States, seeks to entrench inequalities in treatment in three areas: duration of protection, social benefits, and exclusion.[95]

The evidence suggests that differential statuses mean people are being denied protection as refugees.[96] Following the arrival of 890,000 Syrian asylum seekers in Germany in 2015, a policy change reducing the entitlements of beneficiaries of subsidiary protection (including no family reunion) saw a surge in grants of that status, and a sharp decline in grants of refugee status. As a result, thousands of people appealed their subsidiary protection determination to try to 'upgrade' to refugee status—with over 75 per cent succeeding in 2016.[97] Such practices raise valid legal concerns about discrimination, given that any differences in treatment between the holders of different forms of migration status must be objectively and reasonably justified.[98]

b. Risk of Generalized Violence or Armed Conflict

Beyond protection based on specific provisions of human rights treaties, there has been a consistent, albeit varied, trend in State practice to provide some form of protection to

[93] Differences remain with respect to the length of residence permits granted (article 24), social assistance (which can be limited to core benefits for beneficiaries of subsidiary protection (article 29)), and access to employment, social welfare, healthcare, and integration facilities may be made contingent on the prior issue of a residence permit (recital 40).

[94] Mouzourakis (n 91) 15–23.

[95] European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on Standards for the Qualification of Third Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection and for the Content of the Protection Granted and Amending Council Directive 2003/109/EC of 25 November 2003 Concerning the Status of Third-Country Nationals Who Are Long-Term Residents' COM (2016) 466 final.

[96] Some States tend to grant subsidiary protection instead of refugee status (eg Malta, Cyprus, Portugal, and Romania): European Council for Refugees and Exiles, 'Asylum Decisions in the First Half of 2019: Unlocking Statistics' (10 September 2019) <https://www.asylumineurope.org/news/10-09-2019/asylum-decisions-first-half-2019-unlocking-statistics> accessed 16 December 2020.

[97] Whereas 95.8 per cent of Syrians had been granted refugee status in Germany in 2015, this decreased to 56.4 per cent in 2016 and only 35 per cent in 2017, while the rate of Syrians granted subsidiary protection rose exponentially from 0.1 per cent in 2015 to 41.2 per cent in 2016 and 56 per cent in 2017. A legislative amendment in March 2016 temporarily suspended family reunification for beneficiaries of subsidiary protection. See Mouzourakis (n 91) 8; Asylum Information Database, 'Differential Treatment of Specific Nationalities in the Procedure: Germany' <http://www.asylumineurope.org/reports/country/germany/asylum-procedure/treatment-specific-nationalities> accessed 24 May 2019; Asylum Information Database, 'Criteria and Conditions: Germany' <http://www.asylumineurope.org/reports/country/germany/content-international-protection/family-reunification/criteria-and> accessed 24 May 2019. Arguably, had the Temporary Protection Directive been triggered (providing an interim status), Germany would not have used subsidiary protection in this way.

[98] *Hode and Abdi v United Kingdom*, App No 22341/09 (ECtHR, 6 November 2012); European Commission (n 95) 23–6. In the context of internal displacement, see *Mapiripán Massacre v Colombia*, Inter American Court of Human Rights Series C No 134 (15 September 2005) paras 177–9.

'persons whose life or freedom would be at risk as a result of armed conflict or generalized violence if they were returned involuntarily to their countries of origin'.[99] As noted above, the EU Qualification Directive expressly prohibits the removal of civilians who are individually at risk during conflict,[100] with the caveat that '[r]isks to which a population of a country or a section of the population is generally exposed do normally not create in themselves an individual threat which would qualify as serious harm'.[101]

In such cases, considerable attention has focused on the extent to which the individual must be personally targeted.[102] The Court of Justice of the EU has clarified that a person does not have to 'adduce evidence that he is specifically targeted by reason of factors particular to his personal circumstances',[103] but, rather, show that the harm 'is so serious that it cannot fail to represent a likely and serious threat to that person'.[104] The more a person is individually affected, 'the less it will be necessary to show that he faces indiscriminate violence in his country or a part of the territory which is so serious that there is a serious risk that he will be a victim of it himself'.[105] Canada's Federal Court has similarly held that demonstrating a personal and objectively identifiable risk 'does not mean that the risk or risks feared are not shared by other persons who are similarly situated'.[106]

c. Children's Protection Needs

In addition to the general grounds for complementary protection outlined above, children may require special protection. Article 3 of the CRC requires that a child's best interests are a primary consideration in any decision concerning him or her. They may only be outweighed if another consideration (individual or cumulative) is inherently more significant,[107] and cannot be overridden by non-rights-based arguments (such as migration control).[108]

[99] UNHCR, 'Note on International Protection', A/AC.96/830 (7 September 1994) para 39; ELENA, 'Complementary/Subsidiary Forms of Protection in the EU States: An Overview' (April 1999); Council of Europe Committee Member, 'Recommendation Rec (2001) 18 of the Committee of Ministers to Member States on Subsidiary Protection' (27 November 2001).

[100] EU Qualification Directive, art 15(c).

[101] See EU Qualification Directive (original) recital 26; EU Qualification Directive (recast) recital 35.

[102] There is a large literature on this; see generally Cantor and Durieux (eds) (n 2) and Chapter 45 in this volume.

[103] Case C-465/07 *Elgafaji v Staatssecretaris van Justitie* [2009] ECR I–921, para 45.

[104] ibid para 42. [105] ibid para 37.

[106] *Surajnarain v Canada (Minister of Citizenship and Immigration)* 2008 FC 1165, [2008] FCJ 1451, para 11.

[107] *ZH (Tanzania) (FC) v Secretary of State for the Home Department* [2011] UKSC 4, [2011] 2 AC 166, paras 26, 33; *EM (Lebanon) v Secretary of State for the Home Department* [2008] UKHL 64, [2009] 1 AC 1198, para 49; *Wan v Minister for Immigration and Multicultural Affairs* (2001) 107 FCR 133. For factors that have been considered to outweigh the child's best interests, see Jason M Pobjoy, *The Child in International Refugee Law* (CUP 2017) 236–7.

[108] Committee on the Rights of the Child (n 52) para 85. See also *Tarakhel v Switzerland*, App No 29217/12 (ECtHR, Grand Chamber, 4 November 2014) para 99; *Mubilanzila Mayeka and Kaniki Mitunga v Belgium*, App No 13178/03 (ECtHR, 12 October 2006) para 55; *Popov v France*, App Nos 39472/07 and 39474/07 (ECtHR, 19 January 2012) para 91.

This is a 'fundamental, interpretative legal principle'[109] and 'substantive right',[110] not merely a procedural rule.[111] Indeed, an age-sensitive approach to a child's protection needs[112] is central to the question whether removal is in the child's best interests or not. Protection may be triggered by 'degrees of risk falling short of a well-founded fear or serious reasons of anticipated harm', as well as by '*types* of risk not generally or directly relevant to refugee or complementary protection, such as deprivation, destitution, denial, exploitation, or absence of care'.[113] The Committee on the Rights of the Child has stated that a child should not be removed if there is 'a "reasonable risk" that such return would result in the violation of fundamental human rights ... and in particular, if the principle of *non-refoulement* applies'.[114]

d. Domestic Carve-outs

Some domestic regimes contain carve-outs to preclude complementary protection from being granted. For example, Australia, Canada, and the EU deny protection if the risk is faced by the population generally and not by the individual in particular.[115] Canada and New Zealand refuse protection if the risk stems from a State's inability to provide adequate health or medical care.[116] Australia, Canada, and New Zealand deny protection if the risk is inherent or incident to lawful sanctions (that are not inconsistent with international standards).[117] Neither Australia nor the EU grants protection if an internal flight alternative is available.[118]

[109] Committee on the Rights of the Child, 'General Comment No 14 on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art 3, Para 1)', UN doc CRC/C/GC/14 (29 May 2013) para 6; see also Pobjoy (n 107) 6–7, 28–30, chs 3–5.

[110] Committee on the Rights of the Child (n 109) para 6; Pobjoy (n 107) 7, 30–1, ch 6.

[111] Committee on the Rights of the Child (n 109); Pobjoy (n 107) 6, 27–8, ch 2.

[112] See eg Committee on the Rights of the Child (n 52) para 27.

[113] Guy S Goodwin-Gill, 'Expert Roundtable Discussion on "The United Nations Convention on the Rights of the Child and Its Application to Child Refugee Status Determination and Asylum Processes": Introduction' (2012) 26 Journal of Immigration, Asylum and Nationality Law 226, 230.

[114] Committee on the Rights of the Child (n 52) para 84. The use of 'in particular' indicates that the principle of *non-refoulement* is not the only relevant consideration in the case of a child. This approach has been echoed by Advisory-Opinion OC-21/14 (n 4) para 231.

[115] Migration Act (n 10) s 36(2B)(c); Immigration and Refugee Protection Act (n 12) s 97(1)(b)(ii); EU Qualification Directive (original) recital 26; EU Qualification Directive (recast) recital 35.

[116] Immigration and Refugee Protection Act (n 12) s 97(1)(b)(iv); Immigration Act (n 16) s 131(5)(b). See discussion in Chapter 46 in this volume.

[117] Migration Act (n 10) s 5; Immigration and Refugee Protection Act (n 12) s 97(1)(b)(iii); Immigration Act (n 16) s 131(5)(a). For discussion, see Jane McAdam, 'Australian Complementary Protection: A Step-by-Step Approach' (2011) 33 Sydney Law Review 687, 701–2.

[118] Migration Act (n 10) s 36(2B)(a); EU Qualification Directive (original) art 8; EU Qualification Directive (recast) art 8. See also Jessica Schultz, *The Internal Protection Alternative in Refugee Law* (Brill 2019) 298–302.

4. Threshold or 'Standard of Proof'

In general, the relevant standard is that there are 'substantial grounds' for believing that a person would face a 'real risk' of harm if removed. It derives from article 3 of the CAT and has been adopted by the Human Rights Committee and the European Court of Human Rights, as well as incorporated into the legislation of some States.[119] In terms of best practice, the 'real risk' threshold should be interpreted as equivalent to the 'well-founded fear' test in refugee law (as in Australia, New Zealand, and the UK, for example).[120] The UK Asylum and Immigration Tribunal has noted that it would be strange if a different standard were to apply:

> Apart from the undesirable result of such a difference of approach when the effect on the individual who resists return is the same and may involve inhuman treatment or torture or even death, an adjudicator and the tribunal would need to indulge in mental gymnastics. Their task is difficult enough without such refinements.[121]

A different approach has been taken in the US and Canada, however, where the test is 'more likely than not'.[122] This imposes a higher standard for complementary protection than for refugee claims, where the 'well-founded fear' test is interpreted as a 'reasonable possibility' of persecution (in the US)[123] or a 'reasonable chance' or 'serious possibility' of persecution (in Canada).[124] The Committee against Torture has criticized the US for using a standard that is inconsistent with international law and at odds with the

[119] EU Qualification Directive (original) art 2(e); EU Qualification Directive (recast) art 2(f); Migration Act (n 10) s 36(2)(aa); Immigration Act (n 16) ss 130(1), 131(1). Others refer to a 'danger': Mexico, Canada, Costa Rica. For detailed analysis of the jurisprudence on the meaning of these terms, see McAdam (n 117) 716–25.

[120] See *Minister for Immigration and Citizenship v SZQRB* (2013) 210 FCR 505, paras 246–8 (Lander and Gordon JJ), 297 (Besanko and Jagot JJ), 342 (Flick J); *AK (South Africa)* [2012] NZIPT 800174 (16 April 2012) para 79. The Court of Justice of the EU has not ruled directly on the standard but would appear to regard 'well-founded fear' and 'real risk' as the same: International Association of Refugee Law Judges (IARLJ) European Chapter, *Qualification for International Protection (Directive 2011/95/EU): A Judicial Analysis* (European Asylum Support Office 2016) 114–15, referring to C-71/11 and C-99/11 *Germany v Y and Z* [2013] All ER (EC) 1144, ECJ, paras 75, 79, 80.

[121] *Kacaj v Secretary of State for the Home Department* [2001] UKAIT 00018, [2001] INLR 354, para 10, see also para 12; *Bagdanavicius v Secretary of State for the Home Department* [2005] UKHL 38, [2005] 2 AC 668, para 30.

[122] See 8 CFR (n 28) §208.16(c)(2); *Li v Canada (Minister for Citizenship and Immigration)* 2005 FCA 1, [2005] 3 FCR 239, paras 27–9; cf Immigration and Refugee Board of Canada, *Consolidated Grounds in the* Immigration and Refugee Protection Act: *Persons in Need of Protection: Risk to Life or Risk of Cruel and Unusual Treatment or Punishment* (15 May 2002) 39.

[123] Compare 8 CFR (n 28) §208.16(c)(2) and §208.13(b)(2).

[124] *Adjei v Canada (Minister of Employment and Immigration)* 1989 CarswellNat 40, [1989] 2 FC 680.

Committee's jurisprudence.[125] Similarly, the Human Rights Committee has criticized Canada for relying on outdated international jurisprudence to justify a higher test for complementary protection claims.[126] As noted above, for qualified rights, the European Court of Human Rights requires a 'flagrant breach' or a 'flagrant denial' of a right.

5. Exclusion from Complementary Protection

Although the prohibition on removal to certain types of serious harm is absolute, many States' complementary protection regimes contain exclusion clauses that are based on articles 1F and 33(2) of the Refugee Convention.[127] This does not mean that States can remove people contrary to international law, however.[128] Instead, people are typically denied the legal status granted to other beneficiaries of complementary protection, often resulting in legal limbo and even indefinite detention.[129] Although State practice varies considerably and is marked by unsystematic, *ad hoc* approaches, it seems to be underpinned by the (misplaced) assumption that the need to remain will necessarily be temporary; thus, cases are regularly reviewed to determine whether

[125] Committee against Torture, Summary Record of the First Part (Public) of the 424th Meeting (10 May 2000), UN doc CAT/C/SR.424, para 17.

[126] Individual opinion (concurring) by Committee members Ms Helen Keller, Ms Iulia Antoanella Motoc, Mr Gerald L Neuman, Mr Michael O'Flaherty, and Sir Nigel Rodley in *Pillai v Canada*, UN doc CCPR/C/101/D/1763/2008 (9 May 2011) 22.

[127] See eg EU Qualification Directive, art 17; Immigration and Refugee Protection Act (n 12) s 98; Immigration Act (n 16) ss 137(2), 139; Migration Act (n 10) s 5H(2). US law also excludes certain 'undesirable' people from 'withholding of removal' but gives them 'deferral of removal' status (amounting to little more than toleration of their presence).

[128] It will rarely be possible for States to extradite or prosecute people for the alleged crimes that have resulted in their exclusion from refugee or complementary protection status: Maarten P Bolhuis, Louis P Middelkoop, and Joris van Wijk, 'Refugee Exclusion and Extradition in the Netherlands: Rwanda as Precedent?' (2014) 12 Journal of International Criminal Justice 1115; Geoff Gilbert and Anna Magdalena Rüsch, 'Jurisdictional Competence through Protection: To What Extent Can States Prosecute the Prior Crimes of Those to Whom They Have Extended Refuge?' (2014) 12 Journal of International Criminal Justice 1093.

[129] In New Zealand, the status of such people is left to executive discretion. This enables the greatest flexibility in individual cases but provides no certainty for the individuals concerned. Under the EU Qualification Directive (art 14(6)), 'refugees' denied refugee status (on the grounds of criminal activity or national security) are nevertheless entitled to the rights set out in articles 3, 4, 16, 22, 31, 32, and 33 of the Refugee Convention. No equivalent entitlement exists for those denied subsidiary protection (see EU Qualification Directive, art 19). See further Joined Cases C-391/16, C-77/17, and C-78/17 *M v Ministerstvo vnitra, X and Y v Commissaire général aux réfugiés et aux apatrides* [2019] OJ C255/2, paras 105, 109. For an overview of practices in a number of jurisdictions, see Refugee Law Initiative, *Undesirable and Unreturnable? Policy Challenges around Excluded Asylum Seekers and Other Migrants Suspected of Serious Criminality Who Cannot Be Removed* (Conference report, 2016) <https://cicj.org/wp-content/uploads/2016/09/Undesirable-and-Unreturnable-Full-report.pdf> accessed 27 November 2019.

removal is possible.[130] This considerable protection gap has been described as a 'fundamental system error'.[131]

6. Conclusion

While on one reading, complementary protection has expanded the bases on which people cannot be removed to serious harm, on another it has diluted refugee protection and risked reducing international protection to *non-refoulement* alone.[132] As Durieux reminds us, human rights instruments like the ECHR do 'not actually deal with asylum, if that concept is construed to mean the sum total of protection afforded by a State to refugees on its territory or under its jurisdiction'.[133] He argues that whereas refugee law is framed 'positively', affording a legal status to aliens we want to protect, human rights law is framed 'negatively', simply limiting who can be removed.[134] As such, EU law 'induces the phenomenon of a "vanishing refugee"', who is 'blurred, marginalized or ignored'.[135]

There is clearly a need for greater, principled articulation of the relationship between refugee law and human rights law when it comes to the principle of *non-refoulement* and—importantly—the legal status granted to those who cannot be removed. The dissonance between the protection afforded by article 3 of the ECHR and subsidiary protection under the EU Qualification Directive is illustrative of a systemic disjointed approach that results in protection gaps—gaps that can rarely be explained by principled reasoning.

[130] For example, Norway grants a temporary residence permit with very limited rights, reviewed every six months. In the UK, excluded individuals may be granted restricted leave for up to six months. See Mi Christiansen and Terje Einarsen, 'The Situation in Norway' (Preliminary Workshop, Undesirable and Unreturnable? Policy Challenges around Excluded Asylum-Seekers and Other Migrants Suspected of Serious Criminality but Who Cannot Be Removed, Vrije University Amsterdam, 27 March 2015) 2; Home Office, 'Restricted Leave (version 3.0)' (25 May 2018) 14; Sarah Singer, '"Undesirable and Unreturnable" in the United Kingdom' (2017) 36(1) RSQ 9, 30.

[131] Joke Reijven and Joris van Wijk, 'Caught in Limbo: How Alleged Perpetrators of International Crimes Who Applied for Asylum in the Netherlands are Affected by a Fundamental System Error in International Law' (2014) 26 IJRL 248, 249.

[132] Durieux (n 88) 251; cf Chetail who argues that 'human rights law has become the ultimate benchmark for determining who is a refugee': Vincent Chetail, 'Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law' in Ruth Rubio-Marín (ed), *Human Rights and Immigration* (OUP 2014); see also Chapter 11 in this volume.

[133] Durieux (n 88) 247.

[134] ibid 252; see also Jean-François Durieux, 'Three Asylum Paradigms' (2013) 20 International Journal on Minority and Group Rights 147, 168–9. Kälin provides more nuance, distinguishing the approach of the Human Rights Committee—which regards States as having 'a duty to actively protect individuals against infringements of their rights'—from that of the Committee against Torture and the European Court of Human Rights—which preclude return 'based on a duty to abstain from treating individuals in an inhuman manner': Walter Kälin, 'Limits to Expulsion under the International Covenant on Civil and Political Rights' in Francesco Salerno (ed), *Diritti dell'uomo, estradizione ed espulsione* (CEDAM 2003) 159.

[135] Durieux (n 88) 228.

Finally, just as the meaning of the 'refugee' definition in the Refugee Convention has evolved over time through robust judicial, institutional, and legislative engagement,[136] so, too, must the interpretation of complementary protection remain alive to developments in international human rights law. Among other things, this means giving considered attention to the role of *non-refoulement* with respect to rights other than the right to life and the prohibition on torture and other cruel, inhuman, or degrading treatment or punishment.

136 UNHCR, 'Persons in Need of International Protection' (June 2017) 2–3.

CHAPTER 37

TEMPORARY PROTECTION AND TEMPORARY REFUGE

JEAN-FRANÇOIS DURIEUX

1. Introduction

Though they are often discussed together, 'complementary protection' and 'temporary protection' occupy substantially different spaces within the international legal regime of refugee protection. 'Complementary' is readily understood to mean 'additional' to the protection provided to refugees in accordance with the Refugee Convention. In contrast, the import of the adjective 'temporary' is far from obvious, since Convention refugee status itself is, in essence, temporary.[1] The choice of adjective by governments, UNHCR, and scholars is, however, far from haphazard or casual. Unlike 'complementary protection', the concepts of 'temporary refuge' and 'temporary protection' (both of which will be discussed in this chapter) were introduced either as challenges to the Refugee Convention, or in order to remedy flaws deemed to be inherent in it. One specific concern is directly related to the temporal dimension of protection: it is based on a reading of the Refugee Convention, according to which the treaty requires that Contracting States provide refugees on their territories with permanent or at least durable residence. At its core, then, the debate over 'temporary' forms of protection exposes a tension within the Refugee Convention-based regime, which can be summarized as follows: while premature return to an ongoing situation of persecution or other relevant harm is clearly prohibited by the *non-refoulement* principle, changes in a refugee's country

[1] UNHCR observed in 1994 that '[t]emporary protection, like refugee status, should last as long as there remains a need for international protection (or until conversion to a more permanent status)': UNHCR, 'Note on International Protection', UN doc A/AC.96/830 (7 September 1994) 24. See also Chapter 57 in this volume.

of origin are usually slow to come about, and take much longer to stabilize; meanwhile, the refugee's lawful presence gradually turns into near-irreversible integration, through the combined effect of the Convention's provisions and of other human rights standards.[2]

This (real or perceived) flaw in the Refugee Convention tends to come to light mainly—perhaps exclusively—within the context of large-scale influxes of refugees. Such flows raise complex issues that are not easy to disaggregate. It comes as no surprise, therefore, that the concepts of 'temporary refuge' and/or 'temporary protection' have impregnated some policy and scholarly debates that do not address the above-mentioned 'clash of times' in the Refugee Convention, or address it only implicitly. These include: the status and scope of the *non-refoulement* principle where mass influxes of refugees threaten the security and/or overwhelm the resources of receiving States;[3] the legal condition of the people involved in such flows, the causes of which may be within, as well as outside, the ambit of the accepted definition of a Convention 'refugee'; and the status and scope of a 'principle of international solidarity'[4] of the international community at large towards States admitting and/or hosting large numbers of refugees.[5]

Neither 'mass influx' nor 'large-scale influx' is a term of art in international refugee law. It is generally acknowledged, however, that the terms denote more than sheer numbers: amongst the characteristics of 'mass influx situations', UNHCR's Executive Committee has listed: '(i) considerable numbers of people arriving over an international border; (ii) a rapid rate of arrival; (iii) inadequate absorption or response capacity in host States, particularly during the emergency; and (iv) individual asylum procedures, where they exist, which are unable to deal with the assessment of such large numbers'.[6] This mix of quantitative and qualitative criteria finds an echo in the 2016 New York Declaration on Refugees and Migrants.[7]

[2] I have referred to a 'clash of times', as the Refugee Convention represents time as both attachment and deadline: Jean-François Durieux, 'Temporary Protection: Hovering at the Edges of Refugee Law' [2014] Netherlands Yearbook of International Law 221, 230–2.

[3] On *non-refoulement*, the starting point is that the prohibition of returning refugees to danger applies in all circumstances, regardless of the size of the influx. This is notwithstanding the (widely contested) clause in the 1967 declaration of the UNGA, 'Declaration on Territorial Asylum', UNGA res 2312 (XXII) (14 December 1967) art 3(2), according to which '[e]xception may be made to the foregoing principle only for overriding reasons of national security or in order to safeguard the population, as in the case of a mass influx of persons'. See also Chapter 50 in this volume.

[4] UNHCR ExCom Conclusion No 52 (XXXIX), 'International Solidarity and Refugee Protection' (1988) para 4. See also Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, OUP 2007) 416: 'the duty to accord *non-refoulement* through time cannot be separated in practice from that other complex duty which recognizes the responsibility of the community of States in finding durable solutions.'

[5] In an 'extra-large' version of the concept, Fitzpatrick wrote that 'temporary protection can be presented as an adaptation to the contemporary realities of forced displacement': Joan Fitzpatrick, 'Temporary Protection of Refugees: Elements of a Formalized Regime' (2000) 94 AJIL 279, 287.

[6] ExCom Conclusion No 100 (LV), 'International Cooperation and Burden and Responsibility Sharing in Mass Influx Situations' (2004) para (a).

[7] New York Declaration for Refugees and Migrants, para 6.

Large-scale movements of refugees have been 'an enduring and global issue throughout the twentieth century'.[8] Until the 1980s, however, little attention was paid in doctrine to the legal implications of the 'massification' of flows. In the inter-war period and in the immediate aftermath of the Second World War, population movements involving refugees, amongst others, occurred on a huge scale without raising many legal questions.[9] Through the following decades, the general feeling was that large-scale refugee movements in Africa were adequately addressed by the OAU Convention, while those happening in Asia had to be dealt with on an *ad hoc* basis, since the Refugee Convention had not penetrated that continent. What changed the deal was the phenomenon of the 'new asylum seekers'[10]—in other words, the globalization of refugee flows 'in an age when asylum-seekers are no longer only border crossers, but arrive by sea and by air in increasingly large numbers in countries far away from their homelands'.[11] Together with this new phenomenon came the realization that large-scale flows of refugees exposed gaps and points of tension within the international refugee law regime. Durieux and Hurwitz identify these at three levels: qualification, standards of treatment, and termination and solutions.[12]

a. Qualification

The proponents of temporary forms of protection have argued that the Refugee Convention is ill-suited to deal with large-scale influxes of refugees, owing to its refugee definition's focus on individualized persecution.[13] While this reading of the definition is

[8] Claudena Skran, *Refugees in Inter-War Europe: The Emergence of a Regime* (Clarendon Press 1995) 4. See also Ivor C Jackson, *The Refugee Concept in Group Situations* (Martinus Nijhoff 1999).

[9] Hathaway explains how, between 1938 and the adoption of the Refugee Convention in 1951, the pursuit of resettlement of European refugees to States outside the region 'led to a de-emphasis on the elaboration of standards to govern refugee rights': James C Hathaway, *The Rights of Refugees under International Law* (CUP 2005) 90.

[10] David A Martin (ed), *The New Asylum Seekers: Refugee Law in the 1980s* (Kluwer 1988); Guy S Goodwin-Gill, '*Non-Refoulement* and the New Asylum Seekers' (1986) 26 Virginia Journal of International Law 897.

[11] Statement of UN High Commissioner Poul Hartling from 1984 to the 35th session of ExCom, cited in Martin (n 10) 2.

[12] Jean-François Durieux and Agnès Hurwitz, 'How Many Is Too Many? African and European Legal Responses to Mass Influxes of Refugees' (2004) 47 German Yearbook of International Law 105.

[13] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/1P/4/ENG/REV.4 (1979, reissued 2019) paras 38–41; Goodwin-Gill (n 10) 898; Goodwin-Gill and McAdam (n 4) 529 (but nuanced at 129). This enduring assumption has been challenged by, amongst others, Jean-François Durieux, 'The Many Faces of *Prima Facie*: Group-Based Evidence in Refugee Status Determination' (2008) 25(2) Refuge 151; Francesco Maiani, 'The Concept of "Persecution" in Refugee Law: Indeterminacy, Context-sensitivity, and the Quest for a Principled Approach' (2010) Les Dossiers du Grihl <https://journals.openedition.org/dossiersgrihl/3896> accessed 6 October 2019.

highly debatable,[14] it is a fact that recognition of Convention refugee status often commands a detailed examination of the merits of a claim to refugee status; and it cannot be denied that a massive and sudden influx of asylum seekers puts significant pressures on such a process.[15]

b. Standards of Treatment

The Refugee Convention's overall logic is one of progressive accrual of rights over time: because refugees cannot return to their countries of origin, they must be given a chance to start a new life and become integrated into a new community. While this 'assimilative path'[16] is generally accepted by Contracting States to the Convention, absorption capacity becomes a serious issue when refugees arrive in large numbers: suddenly, the basic standards of the Convention appear terribly expansive and generous. 'More refugees, less asylum' is increasingly presented as an inescapable equation.[17]

c. Termination and Solutions

This is, as explained above, when the adjective 'temporary' reaches its full significance. Faced with both political and practical obstacles in invoking group cessation on account of changed circumstances, States are tempted to make questionable assumptions about the expected duration of the need for international protection and/or to try to circumvent the rather strict requirements of cessation through resort to notions such as 'safe return'.[18]

2. Temporary Refuge: Concept, Practice, Principle?

In the late 1970s, war and regime changes on the Indochinese peninsula drove people to flee in their tens, then hundreds, of thousands, which 'generated debate about "status", and then about admission and treatment and solutions, in a region where few States

[14] UNHCR has observed that, 'in fact, there is nothing inherent in the provisions of the 1951 Convention and 1967 Protocol to preclude it being applied in mass influx situations. The stumbling block has been less the Convention itself and more the individualised processes put in place to implement it, coupled with a perception of the Convention as an instrument of integration': UNHCR, 'Protection of Refugees in Mass Influx Situations: Overall Protection Framework', EC/GC/01/4 (19 February 2001) para 17.

[15] See Chapters 31 and 32 in this volume. It is noteworthy that mass influxes may also put pressure on exclusion procedures which, owing to their exceptional character, can never be 'group-based'.

[16] Hathaway (n 9) 369.

[17] Adam Roberts, 'More Refugees, Less Asylum: A Regime in Transformation' (1998) 11 JRS 375.

[18] Goodwin-Gill and McAdam (n 4) 496–7.

were party to the 1951 Convention ... and the 1967 Protocol'.[19] Potentially exposed to large-scale arrivals of 'boat people', and with little prospect of external support, Australia in 1979 launched an international initiative proposing that the concept and practice of temporary refuge should be studied by the international community. Gervase Coles was the 'brain' behind this initiative, and the author of a seminal paper submitted to an Expert Group on Temporary Refuge in Situations of Large-Scale Influx, which met in Geneva in April 1981.[20]

In that paper, 'temporary refuge' is defined as 'that protection characterized by the principle of *non-refoulement* which is accorded a person and which is temporary pending the obtaining of a durable solution'.[21] The 'proper function' of this concept/practice is 'to facilitate admission and the obtaining of satisfactory durable solutions' in large-scale influx situations. In such situations, Coles wrote, 'it may ... be reasonable and desirable for the country of refuge to state at the time of admission that the solution granted by admission should be regarded as temporary'.[22] This proposition was meant to challenge the generally accepted concept of asylum, which Coles presented as an 'ideal' inherent in the Refugee Convention, whereby the State of first admission also provided a durable solution on its territory. In the same vein, Goodwin-Gill and McAdam observe that, in the case of large-scale movements, 'the presumption or at least ... reasonable expectation that a local durable solution will be forthcoming' can no longer be raised.[23] The concept of 'temporary refuge' reaches, however, beyond this sober finding, as it includes, from the standpoint of a 'State of first admission', an important *external* dimension: 'the qualification of the grant of protection as temporary ... places the international community on notice that the presence of the refugees in the country of refuge should not be construed by itself as a satisfactory durable solution'.[24]

Indeed, the genuine novelty of the concept lies in its articulation between immediate, basic protection and longer-term solutions. As a link between admission and durable solutions, temporary refuge does not absolve the country of refuge from the obligation to find a satisfactory durable solution, but clearly, and from the onset of the crisis,

[19] Guy S Goodwin-Gill, '*Non-Refoulement*, Temporary Refuge and the "New" Asylum-Seekers' in David J Cantor and Jean-François Durieux (eds), *Refuge from Inhumanity? War Refugees and International Humanitarian Law* (Martinus Nijhoff 2014) 432.

[20] Paper submitted by Gervase JL Coles and included in UNHCR, 'Report of the Meeting of the Expert Group on Temporary Refuge in Situations of Large-Scale Influx', EC/SCP/16/Add.1 (17 July 1981).

[21] The paper includes a full section on terminology, explaining why 'refuge' should be preferred to 'asylum': 'protection provided by admission on a temporary basis has sometimes been called by different phrases, such as '"temporary asylum", "provisional asylum", "first asylum" or "temporary residence" ... None of these phrases is satisfactory': ibid 11.

[22] ibid 3.

[23] Goodwin-Gill and McAdam (n 4) 344. They add: 'the concept of temporary refuge ... thus stands paradoxically as both the link and the line between the peremptory, normative aspects of *non-refoulement* and the continuing discretionary aspect of a State's right in the matter of asylum as a permanent or lasting solution.'

[24] Coles (n 20) 18.

distributes this responsibility between the State of refuge and other States in the regime. Seen in this light, temporary refuge is also 'an essential link between the principle of *non-refoulement* and the principle of international solidarity'.[25]

Both principles underpin the most detailed (non-binding) instrument resulting from the Australian initiative, namely Executive Committee (ExCom) Conclusion No 22 on 'The Protection of Asylum-Seekers in Situations of Large-Scale Influx'.[26] The Conclusion stresses that asylum seekers should always be admitted, at least on a temporary basis, in the country in which they first seek refuge; and that (other) States 'shall, within the framework of international solidarity and burden-sharing, take all necessary measures to assist, at their request, States which have admitted asylum seekers in large-scale influx situations'.[27] This Conclusion has been praised for elucidating the minimum standards of treatment owed to refugees arriving in large numbers, including (perhaps especially) in States that are not bound by the Refugee Convention. It is not certain, however, that it represents a normative leap in the articulation of immediate protection—the responsibility of frontline States—with the collective responsibility of the international community at large to provide longer-term solutions: it is definitely possible to read Conclusion 22 as establishing a sequence of distinct obligations, rather than successive manifestations of a single collective duty.[28] To be sure, the 'protection before burden-sharing tradition'[29] endures in the doctrine of ExCom, which insists that 'access to asylum . . . should not be dependent on burden and responsibility sharing arrangements first being in place, particularly because respect for human rights and humanitarian principles is a responsibility for all members of the international community'.[30]

Likewise, Conclusion 22 does not fully clarify the relationship between 'temporary refuge' and the Refugee Convention: while it acknowledges that Convention standards do not cover all aspects of the treatment of asylum seekers in large-scale influx situations, it stops short of providing what the Australian initiative had asked for, namely 'a clearer understanding of the application of the Convention to [such] situations', which 'may help to remove some of the obstacles to the wider ratification of the Convention'.[31]

[25] ibid 21.

[26] ExCom Conclusion No 22 (XXXII), 'Protection of Asylum-Seekers in Situations of Large-Scale Influx' (1981). Paragraph I(3) reads:

> It is . . . imperative to ensure that asylum seekers are fully protected in large-scale influx situations, to reaffirm the basic minimum standards for their treatment pending arrangements for a durable solution, and to establish effective arrangements in the context of international solidarity and burden-sharing for assisting countries which receive large numbers of asylum seekers.

[27] ibid para IV(1).

[28] Jean-François Durieux, 'The Duty to Rescue Refugees' (2016) 28 IJRL 640.

[29] Nils Coleman, '*Non-Refoulement* Revised: Renewed Review of the Status of *Non-Refoulement* as Customary International Law' (2003) 5 EJML 23.

[30] ExCom Conclusion No 100 (LV), 'International Cooperation and Burden and Responsibility Sharing in Mass Influx Situations' (2004) preamble.

[31] Coles (n 20) 13. See also Jean-François Durieux and Jane McAdam, '*Non-Refoulement* through Time: The Case for a Derogation Clause to the Refugee Convention in Mass Influx Emergencies' (2004) 16 IJRL 4.

Apart from Coles[32] and Goodwin-Gill,[33] refugee law scholars did not immediately pursue the line of thought suggested by the 1979 Australian initiative. Academic debate on the international law dimensions of temporary refuge resurfaced in 1986, inspired by the work of Perluss and Hartman.[34] The concept, and behind it the legal principle which these authors described, were, however, quite distinct from the earlier manifestation of 'temporary refuge': in this new version, the 'principle of temporary refuge' addresses an issue related to the causes, rather than the consequences, of displacement; and it imposes a unilateral obligation on States, upon which the search for durable solutions through international solidarity has little, if any, bearing.[35] This principle 'prohibits states to which civilians have fled in search of safety from internal armed conflict from forcibly repatriating them during the pendency of the conflict. It also prohibits rejection at the frontier where such rejection would have the effect of exposing the civilians to the armed conflict.'[36] Through a remarkably comprehensive review, Perluss and Hartman find evidence of this principle at work in the practice of international organizations and regional institutions, as well as States in all regions—the notable exception (and the authors' principal target) being the US policy at the time of forcibly repatriating Salvadoran and Guatemalan asylum seekers.

Their argument resolutely breaks new ground where they assert 'that the norm of temporary refuge exists as a part of customary international law and that its distinctive character is best appreciated by recognizing it as a customary humanitarian norm, rather than as an extension of refugee law or as a gloss upon codified humanitarian law'.[37] The first part of this thesis is backed by an extensive discussion of *opinio juris* in the creation of custom.[38] The second part relies on a pioneering exploration of the refugee protection potential of general principles of law, international humanitarian law,

[32] Relevant writings by Coles include: Gervase JL Coles, 'Temporary Refuge and the Large Scale Influx of Refugees (1983) 8 Australian Year Book of International Law 190; Gervase JL Coles, 'Approaching the Refugee Problem Today' in Gil Loescher and Laila Monahan (eds), *Refugees and International Relations* (OUP 1989).

[33] Guy S Goodwin-Gill, *The Refugee in International Law* (Clarendon Press 1983) 119–21. Having analysed State practice within the Indochinese and Afghan refugee contexts, he concludes that in 'neither case could the condition of temporary refuge be considered a satisfactory durable solution in itself; that was an objective which remains to be pursued'.

[34] Deborah Perluss and Joan F Hartman, 'Temporary Refuge: Emergence of a Customary Norm' (1986) 26 Virginia Journal of International Law 551.

[35] ibid 633. Humanitarian solidarity is, however, mentioned at 619: 'persons seeking temporary refuge must at the least be permitted to accept the benefactions of organizations engaged in charitable efforts to provide humanitarian assistance.'

[36] Joan F Hartman, 'Temporary Refuge and Central American Refugees' (1987) 10 In Defense of the Alien 171, 172. This description of the principle is more comprehensive than the original one in Perluss and Hartman (n 34), notably in its affirmation that both 'repatriation' and 'rejection at the frontier' are prohibited. Hailbronner had criticized, *inter alia*, Perluss and Hartman's weak stress on non-rejection: Kay Hailbronner, '*Non-Refoulement* and "Humanitarian" Refugees: Customary International Law or Wishful Legal Thinking' (1986) 26 Virginia Journal of International Law 857.

[37] Perluss and Hartman (n 34) 554.

[38] ibid 575–8. Contra Hailbronner (n 36), rebutted by Goodwin-Gill (n 19).

and human rights law.[39] It reaches the conclusion that, while the norm of temporary refuge can be traced to the prohibition of *refoulement*, the latter should not be understood in its narrow refugee law meaning.[40] Within the particular context in which the article was written, resort to a 'customary humanitarian norm' represented in part a flight forward, implicitly admitting that the US resistance (notably, to admission as a necessary corollary of *non-refoulement*) could not be overcome with traditional refugee law tools.[41] This particular battle was lost, as US tribunals and courts rejected the argument, finding that 'neither the Fourth Convention nor customary international law provides potential relief from deportation that can be sought by individual aliens in deportation proceedings over and above that which is provided by the Immigration and Nationality Act, as implemented by regulation';[42] and that 'Congress has specifically rejected the norm of temporary refuge' in adopting the Refugee Act of 1980.[43] The 'Temporary Protected Status' which Salvadorans in the US eventually obtained was a discretionary measure, which in any event did 'not operate as an admission program'.[44] More generally, the intended beneficiaries of temporary refuge—namely, civilian victims of internal armed conflict—remain caught in a grey area as regards the source of their international protection, although in Europe at least, complementary protection has come to fill the gap somewhat.[45]

Perluss and Hartman put forward another argument for the recognition of temporary refuge as a customary norm, however, and this one goes some way towards meeting Coles' vision—even though the latter never resorted to customary international law as such: 'if a grant of temporary refuge is no more than a simple voluntary act of charity by the refuge state, there is no particular reason other states should be obligated to come to its assistance with material support. If, however, the state of refuge lacks free choice because it is constrained by an international norm . . . its moral claim to burden-sharing is a powerful one'.[46]

[39] Perluss and Hartman (n 34) 601–23.

[40] On this point, compare Goodwin-Gill (n 19) 439–40 with Goodwin-Gill (n 10).

[41] At the same time, other voices in the US were calling for either an expansion of the 'asylee' definition: Michael G Heyman, 'Redefining Refugee: A Proposal for Relief for Victims of Civil Strife' (1987) 24 San Diego Law Review 449; or, alternatively, for a liberal interpretation of art 1A(2) of the Refugee Convention (which indeed worked in some famous cases): Deborah Anker, '*INS v Cardoza-Fonseca*, One Year Later: Discretion, Credibility and Political Opinion' (1988) 11 In Defense of the Alien 120.

[42] *Matter of Medina*, 19 I&N Dec 734, 747 (BIA 1988).

[43] *American Baptist Churches in the USA v Meese*, 712 F Supp 756, 771 (1989).

[44] Joan Fitzpatrick, 'Flight from Asylum: Trends toward Temporary "Refuge" and Local Responses to Forced Migrations' (1994) 34 Virginia Journal of International Law 442. See 438–43 for a detailed analysis of the evolution of US legislation and practice regarding Temporary Protected Status.

[45] See eg EU Qualification Directive; see also Chapter 36 in this volume. It is worth noting that UNHCR's attempts in the 1990s to secure 'a more predictable and secure legal basis' for the protection of 'refugees from armed conflict and civil strife', including in 'States that are not party to [relevant] international instruments', were unsuccessful: see ExCom, 'The Scope of International Protection in Mass Influx', EC/1995/SCP/CRP.3 (2 June 1995); ExCom Conclusion No 86 (XLIX), 'Decision on Informal Consultations on Protection Issues' (1998).

[46] Perluss and Hartman (n 34) 588.

3. Temporary Protection: From Flexibility to Predictability?

Whereas the concept of 'temporary refuge' emerged in Australasia and was later invoked to address an American conundrum, 'the contemporary international law understanding of "temporary protection" is based predominantly on European practice' and law.[47] The term gained prominence during the 1990s in relation to the crisis in the former Yugoslavia, which produced massive displacement of populations both within and outside the Western Balkans. It was first coined by UNHCR in 1992, within the framework of 'an informal international meeting at the ministerial level, with the objective of launching an initiative, on the one hand to address the immediate humanitarian needs of the victims and receiving States and, on the other, to intensify the action in search of a lasting solution to the plight of the victims of the conflict'.[48] According to UNHCR, the pursuit of this dual objective required 'a comprehensive approach which serves to: (i) enhance respect for human rights and humanitarian law; (ii) strengthen efforts to prevent or contain displacement; (iii) provide temporary refuge and material assistance for those in need of international protection; and (iv) initiate action to create conditions . . . in order to encourage refugees and displaced persons to return home'.[49] Use of the term 'temporary refuge', as well as a reference to Executive Committee Conclusion No 22 in the same document's description of temporary protection,[50] testify to a certain lineage between 'temporary refuge' and 'temporary protection'; and indeed, the Australian initiative of 1979 contained most of the ingredients of the debate surrounding the advent of temporary protection in Europe some 15 years later.

Different contexts command different approaches, however. The concrete problem at hand in 1979 was the 'push-back' of boat people by coastal States in Southeast Asia, most of which were not party to the Refugee Convention, and thus were largely insensitive to any arguments based on a legal duty to refrain from *refoulement* of refugees, let alone a legal duty to grant them asylum. On the other hand, precisely because they were not bound by refugee treaties, States of 'first refuge' had no reason to dismiss the refugee character of the flow.[51] To the contrary, the refugee label proved convenient *because* it

[47] Goodwin-Gill and McAdam (n 4) 340. Note that temporary visa regimes, such as Australia's Temporary Protection Visas, do not fall within the international law concept of temporary protection. The US Temporary Protected Status (see Fitzpatrick (n 44)) also falls outside the scope of this section, for it is a defence against deportation for specified nationalities and not an admission mechanism.

[48] UNHCR, 'A Comprehensive Response to the Humanitarian Crisis in the Former Yugoslavia', HCR/IMFY/1992/2 (24 July 1992) para 3.

[49] ibid.

[50] ibid para 13: 'the concept of temporary protection . . . should include, at a minimum, admission to the country where such protection is being sought, respect for the principle of non-refoulement and basic human rights (the elements of which are further outlined in ExCom Conclusion 22 (XXXII)), and repatriation when conditions so allow in the country of origin.'

[51] The questioning eventually came from (Western) resettlement countries, and led to the adoption of the Comprehensive Plan of Action in 1989. See UNGA, 'Declaration and Comprehensive Plan of Action of the International Conference on Indo-Chinese Refugees. Report of the Secretary-General', UN doc A/44/523 (22 September 1989).

was 'foreign' and, as such, made sure that, through international burden-sharing, refuge in Asia would be a mere way-station. In contrast, when people started fleeing from former Yugoslav republics in the early 1990s, they sought refuge in European States that were all parties not only to the Refugee Convention, but also to the European Convention on Human Rights. Temporary protection had to be crafted, therefore, within the parameters of an agreed framework of refugee rights.[52] Wary of unmanageable numbers of protection-seekers from the former Yugoslavia, European States found that evading their obligations under the Refugee Convention—including time-consuming status determination procedures—was only possible through questioning the refugee character of the flow and, more generally, by avoiding any reference to refugee law standards. 'Flexibility' became the buzzword.[53]

The rationale for recommending a 'flexible system' in the face of obvious humanitarian needs was found in the *emergency* and *temporary* nature of such needs. Both characteristics deserve some scrutiny. There is little doubt that the violent disintegration of Yugoslavia triggered a displacement crisis of a magnitude unseen in Europe since the Second World War. However, a large-scale influx of refugees into several wealthy European States need not create an emergency, so long as responsibilities are shared amongst those States. As Kjaerum observed: 'In Western Europe today . . . the major reason for the introduction of temporary protection is the inability of the European countries to co-ordinate their efforts sufficiently to allow for equal burden-sharing'.[54] Sadly, 'burden-sharing was a dismal failure during the Yugoslav crisis',[55] which allowed those States that were most exposed, such as Germany, to seek the same kind of justification as States in the developing world for a less than welcoming attitude towards new and prospective asylum seekers.[56]

As for the temporary nature of the need for international protection, it is unequivocally linked to 'return home', which UNHCR presented as both a desirable and feasible

[52] See Walter Kälin, 'Temporary Protection in the EC: Refugee Law, Human Rights and the Temptation of Pragmatism' (2001) 44 German Yearbook of International Law 202.

[53] 'I believe that the nature of the current conflict is such that a flexible system of temporary protection would respond adequately to the emergency situation': Sadako Ogata, 'Statement of Mrs Sadako Ogata, United Nations High Commissioner for Refugees, to the International Meeting on Humanitarian Aid for Victims of the Conflict in the Former Yugoslavia, Geneva, 29 July 1992' (UNHCR, 29 July 1992) <https://www.unhcr.org/en-us/admin/hcspeeches/3ae68fac1a/statement-mrs-sadako-ogata-united-nations-high-commissioner-refugees-international.html> accessed 6 October 2019. See Fitzpatrick (n 5) 305: 'formalizing TP could have the effect of shifting refugee protection from the realm of law, with treaty-based norms enforceable by individuals in domestic tribunals, to an uncertain realm of political bargaining and humanitarian assistance.'

[54] Morten Kjaerum, 'Temporary Protection in Europe in the 1990s' (1994) 6 IJRL 447.

[55] Joan Fitzpatrick, 'The End of Protection: Legal Standards for Cessation of Refugee Status and Withdrawal of Temporary Protection' (1999) 13 Georgetown Immigration Law Journal 343, 372 and corresponding note.

[56] Quoting UN figures, the International Crisis Group reported that close to one-half of the pre-war population of Bosnia and Herzegovina were displaced during the 43 months of war. One million of the displaced remained within the country, and over 1.2 million refugees were dispersed throughout 25 host States. By early 1996, Germany was host to 345,000 Bosnians with temporary protection, Austria to 80,000 and Sweden to 61,500, while other EU Member States were hosting only a few thousand. International Crisis Group, 'Refugees and Internally Displaced Persons in B-H' (30 April 1997) <https://www.refworld.org/docid/3ae6a6d20.htm> accessed 6 October 2019.

solution to the displacement crisis. It was deemed desirable on account of the 'horrifying twist' of the conflict in the former Yugoslavia, where '[d]isplacement seems to be the goal, not just the result of the war, with the motive clearly being ethnic relocation'.[57] This characteristic made it morally compelling to reverse ethnic cleansing, which could only be achieved through return to the multi-ethnic *status quo ante*.[58] However, there is also a hint in the High Commissioner's statement that this result can be achieved promptly. In the words of Joly, 'it is semantically logical that temporary protection ought to be used for temporary crises or, in UNHCR's words, "whenever safe return to the country of origin can be envisaged within a reasonable period" '. And she adds:

> Not only must one ask here 'when' and 'who', but also 'how' can one know? . . . such an evaluation cannot be based on hard facts and presumes of events which follow their own course. The conflict in former Yugoslavia is a case in point and calls for greater caution in the future.[59]

In fairness, though, there was more than wishful thinking in UNHCR's insistence on 'temporariness'. The implicit (political) message to States read: if you work harder on solutions (as well as prevention), you may be justified in offering a lesser quality of protection.

Indeed, *quality* and *duration* of protection are intimately interconnected in the conceptualization of temporary protection. In essence, temporary protection was conceived as a return-oriented protection mechanism, within which 'the focus on return as the most appropriate solution' provided the rationale for 'standards of treatment which emphasize the provisional aspect of the refugees' stay . . . and minimize, at least in the initial stages, efforts to promote integration'.[60] Duration of sojourn is 'linked to standards of treatment' where 'social and economic benefits facilitate local integration and deter repatriation'.[61] With the withholding of such benefits, Kjaerum has argued, 'a signal is sent to the refugee that his or her stay in the specific country is only temporary'.[62]

In practice, national temporary protection regimes varied greatly.[63] They were phased out very much in the way they had been introduced, that is, in a cacophony. Come 1997, therefore, interest in the formalization of temporary protection would have waned had it not been for the activism of the European Commission, which under the Maastricht

[57] Ogata (n 53).

[58] ibid: '[r]eturn . . . fundamentally . . . will require the reaffirmation of the basic human right to return home in safety and dignity and for an end to all practices and actions which force people out of their homes and block the prospects of return. I consider this point to be of crucial importance. Otherwise, measures to protect and assist refugees will amount to complicity in the policy of "ethnic cleansing"'.

[59] Danièle Joly, 'Temporary Protection within the Framework of a New European Asylum Regime' (1998) 2(3) International Journal of Human Rights 49. UNHCR's 1994 'Note on International Protection' (n 1) 24 candidly acknowledged that, '[a]s the situation in Bosnia and Herzegovina shows, hopes for an early safe return are not always realized'.

[60] UNHCR (n 1) 24. [61] Fitzpatrick (n 55) 299. [62] Kjaerum (n 54) 450.

[63] See Kjaerum (n 54); Karoline Kerber, 'Temporary Protection in the European Union: A Chronology' (1999) 14 Georgetown Immigration Law Journal 35; Joanne van Selm-Thorburn, *Refugee Protection in Europe: Lessons of the Yugoslav Crisis* (Martinus Nijhoff 1998).

Treaty had assumed a new, albeit still modest, role in the harmonization of migration and asylum policies of EU Member States.[64] One year later, the Amsterdam Treaty elevated the harmonization of those policies to the supranational level,[65] and the Tampere Council of October 1999 laid out the agenda, which included 'step[ping] up . . . efforts to reach agreement on the issue of temporary protection for displaced persons on the basis of solidarity between Member States'.[66] Most significantly, though, it was a fresh conflict in the Balkans that made temporary protection a popular concept again: the 1999 NATO campaign in Serbia and Kosovo entailed an unprecedented movement of Kosovar refugees—around 900,000—across the borders to the Former Yugoslav Republic of Macedonia (FYROM), Albania, and Montenegro. The massive outflow to FYROM, in particular, led the authorities to close the border to would-be refugees, which increased the pressure to undertake evacuations out of the sub-region. The Humanitarian Evacuation Programme to airlift Kosovar refugees to temporary safety in European and more distant States surely 'exemplifie[d] TP's [temporary protection's] appeal and adaptability'.[67] It must be stressed, however, that in the eyes of asylum States, the success of that programme did not reside so much in the evacuation *per se* as it did in its happy ending, whereby the vast majority of the evacuated refugees were both willing and able to return to (the UN-administered) Kosovo within a matter of months. At last, the temporary character of temporary protection had been vindicated.

The European Commission explicitly acknowledged that the experience and confidence gained during the Kosovo crisis had influenced the proposal it put forward in October 2000 for a Council Directive on temporary protection, which was eventually adopted in July 2001.[68] The Temporary Protection Directive attempts to meet two goals, namely solidarity and consistency. The first objective is to ensure that, in future refugee emergencies, Member States will act in concert and in a 'spirit of solidarity'—something that was in very short supply at the outset of the former Yugoslavia crisis. On this front, the outcome of EU negotiations is disappointing. 'Solidarity' is clearly short-changed in the Directive: the only 'measures promoting a balance of efforts between Member States' mentioned in the text are of a procedural character, or rely on a pre-existing common

[64] See EU Commission, 'Proposal to the Council for a Joint Action Based on Art.K3 para.2 lit.b of the Treaty on European Union, concerning Temporary Protection of Displaced Persons' COM (1997) 93 final.

[65] See Treaty of Amsterdam Amending the Treaty on EU, the Treaty Establishing the European Communities and Certain Related Acts (adopted 2 October 1997, entered into force 1 May 1999) (1997) 39 ILM 270, art 2(15).

[66] European Council, 'Tampere European Council 15 and 16 October 1999: Presidency Conclusions', *European Parliament* (1999) para 16 <www.europarl.europa.eu/summits/tam_en.htm> accessed 6 October 2019.

[67] Fitzpatrick (n 55) 279.

[68] Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts between Member States in Receiving such Persons and Bearing the Consequences Thereof [2001] OJ L212/12 (Temporary Protection Directive). For commentaries, see Durieux (n 2); Karoline Kerber, 'The Temporary Protection Directive' (2002) 4 EJML 193; Nuria Arenas, 'The Concept of Mass Influx of Displaced Persons in the European Directive Establishing the Temporary Protection System' (2005) 7 EJML 435.

'pot of gold' in the form of the European Refugee Fund.[69] Furthermore, the potential of the Directive as the driver of a truly collective response is also weakened by the mechanism it provides for the activation of temporary protection Union-wide.[70] While the prescribed procedure is far from odd within the EU context, in view of its complexity it does not seem well suited to emergency situations that require quick action. In view of these two shortcomings, the risk of the Directive remaining a dead letter is real.

The second objective of the Directive, meanwhile, is to harmonize the practice of all Member States faced with the same emergency, as regards the contents and duration of the temporary protection granted to the incoming 'displaced persons' (the Directive carefully avoids calling them 'refugees'). On this front, the Directive is far from disappointing. Indeed, it resolves a fair number—although not all—of the ambiguities that had marred the doctrine, and above all, the practice, of temporary protection in the preceding decade. Welcome clarifications are found in five main areas.

First, temporary protection is affirmed as a '*procedure* of exceptional character' to be applied 'in the event of a mass influx or imminent mass influx'.[71] Emphasis on the procedural character of temporary protection is essential, as it discards the notion that temporary protection might constitute an alternative or additional status. As a procedural tool, temporary protection comes close to—but deliberately stops short of—*prima facie* recognition of the refugee character of all members of a group, which is practised in other parts of the world.

Secondly, the Directive clarifies another key point: the operation of the Refugee Convention cannot be suspended, regardless of the size or suddenness of the influx. The principle that '[p]ersons enjoying temporary protection must be able to lodge an application for asylum at any time'[72] is an important and necessary re-affirmation of the universal right to seek asylum, which implies the right to seek the specific protection of the Refugee Convention in States that are bound by it.[73]

Thirdly, EU law clearly portrays temporary protection as a prelude to the 'normal' operation of the Refugee Convention. This prelude is filled with protection contents that compare well with what the Convention mandates on behalf of refugees. The Directive guarantees the issuance of personal documentation and fairly extensive rights to work, housing, social welfare, education, and family reunification, thus providing beneficiaries of temporary protection with a status that constitutes 'a middle ground between the status of asylum seeker and the rights accorded to refugees'.[74] Adherence to high standards in times of crisis may be difficult to obtain, even in wealthy European States. Still, Member States can hardly object, since their domestic

[69] Temporary Protection Directive (n 68) ch VI.

[70] This involves a proposal by the Commission (which itself may be seized of a request by a Member State) and a Council decision adopted by a qualified majority: ibid art 5.

[71] ibid art 2(a) (emphasis added).

[72] ibid art 17(1).

[73] The 'twist' introduced by the Directive is in its art 17(2): while claims must be registered 'at any time', as long as temporary protection applies, decisions on these claims may be delayed.

[74] Durieux and Hurwitz (n 12) 149. See also Kerber (n 68) for an assessment of temporary protection status against EU law standards regarding refugees.

legislation is, as a rule, well ahead of Convention standards as regards the rights of lawful foreign residents in general.

Fourthly, the 'return orientation' of temporary protection is represented in the Directive through a form of 'group cessation': pursuant to article 6, the Council may at any time decide that temporary protection shall come to an end because the situation in the country of origin is 'such as to permit the safe and durable return of those granted [temporary protection]'. The meaning of 'safe and durable' is briefly explicated by reference, in the article, to 'respect for human rights and fundamental freedoms and Member States' obligations regarding *non-refoulement*'. Of course, given the second point above, the ending of temporary protection by a Council decision does not, in and by itself, cause the 'safe and durable return' to happen.

Finally, whether or not a movement of return is initiated, the exceptional mechanism of temporary protection cannot be maintained for more than two years unless a fresh decision is made by Council, extending the duration of temporary protection by up to one year.[75] These are short deadlines when compared with earlier proposals that regarded a maximum duration of five years as reasonable.

4. Temporary Refuge/Protection Today and Directions for Further Research

The Syrian refugee 'crisis', which started in 2011 and reached dramatic proportions in 2015, should have provided a prime opportunity for EU Member States to activate temporary protection under the 2001 Directive. This did not happen, for reasons which Garlick has tried to elucidate in her award-winning thesis.[76]

The European Commission drove what may be the final nail into the coffin of the Temporary Protection Directive with its 2020 communication on a 'New Pact on Migration and Asylum', in which it recommended that the Directive be repealed.[77] Instead, it proposes a new instrument to address 'crisis situations of such a magnitude that put under significant strain even well prepared and functioning asylum and

[75] Temporary Protection Directive (n 68) art 4.

[76] Madeline Garlick, 'Solidarity under Strain: Solidarity and Fair Sharing of Responsibility in Law and Practice for the International Protection of Refugees in the European Union' (PhD thesis, Nijmegen University 2016) 116–19. She explains that, while at least Germany and Sweden could justifiably have asked the Commission to propose a temporary protection motion in the Council in 2015, 'neither State appeared to be in favour. This suggests that EU Member States are concerned that, rather than spreading the responsibility around among other Member States, temporary protection would simply attract even more desperate Syrian people.'

[77] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum, COM(2020) 609 final (23 September 2020) 11. All quotes in this paragraph from the same page.

migration management systems'.[78] The main features of the proposed new mechanism—'some limited margin to temporarily derogate from the normal procedures and timelines, while ensuring respect for fundamental rights and the principle of *non-refoulement*',[79] and the equivalent of subsidiary protection to be 'immediately granted to a pre-defined group of people, notably to people who face an exceptionally high risk of indiscriminate violence due to armed conflict in their country of origin'[80]—do not seem strikingly different from the Directive itself. Will 'immediate protection' succeed where 'temporary protection' has failed? Nothing is less certain. The justification given for substituting new legislation for something that was never tested—namely 'the development of the concepts and rules of qualification for international protection'[81]—is disingenuous: the true problem is solidarity (better said, lack thereof), and in this respect the proposed new mechanism is likely to meet the same resistance as was displayed in the aftermath of the 2015 crisis.

Meanwhile, since 2014 Syrians in Turkey have formally enjoyed 'temporary protection' under Turkish law.[82] This terminology is inspired by the EU Directive insofar as the law refers to mass influxes and emergency needs. It must also be read, however, within the peculiar context of a State that has maintained a geographical limitation to the Refugee Convention.[83] As a concept of potentially universal application, temporary protection seems to have lost most of its appeal, not only to States, but also to academic experts. UNHCR has tried to rekindle the interest of both constituencies, with limited success. In 2012 and 2013, it convened two Roundtables on the subject at the International Institute of Humanitarian Law in San Remo, Italy, but the gathered experts failed to agree on a 'Global Framework on Temporary Protection'.[84] In its stead, in 2014, UNHCR issued a set of 'Guidelines on Temporary Protection or Stay Arrangements', intended to 'guide and assist Governments in the development of…responses to humanitarian crises and complex or mixed population movements'.[85] On the whole, though, this

[78] Proposal for a Regulation of the European Parliament and of the Council Addressing Situations of Crisis and *force majeure* in the Field of Migration and Asylum, COM(2020) 613 final (23 September 2020) 1. For a critique, see Meltem Ineli-Ciger, 'What a Difference Two Decades Make? The Shift from Temporary to Immediate Protection in the New European Pact on Asylum and Migration', EU Immigration and Asylum Law Blog (11 November 2020) <https://eumigrationlawblog.eu/what-a-difference-two-decades-make-the-shift-from-temporary-to-immediate-protection-in-the-new-european-pact-on-asylum-and-migration/> accessed 19 December 2020.

[79] Communication (n 77) 11 (fn omitted).

[80] ibid.

[81] Proposal for a Regulation (n 78) 18.

[82] Law on Foreigners and International Protection, Law No 6458 Official Gazette (TC Resmi Gazete=RG), 11 April 2013 No 28615, enacted 4 April 2013; Temporary Protection Regulation, RG, 22 October 2014 No 29153.

[83] See Meltem Ineli-Ciger, *Temporary Protection in Law and Practice* (Brill 2018) ch 6; Hélène Lambert, 'Temporary Refuge from War: Customary International Law and the Syrian Conflict' (2017) 66 ICLQ 723, 736–8.

[84] UNHCR, 'Roundtable on Temporary Protection, 19–20 July 2012: Summary Conclusions' <http://www.unhcr.org/refworld/docid/506d908a2.html> accessed 6 October 2019; UNHCR, 'Global Roundtable on Temporary Protection, 15–16 July 2013: Concept Note' <https://www.unhcr.org/5284cf2b9.pdf> accessed 6 October 2019.

[85] UNHCR, 'Guidelines on Temporary Protection or Stay Arrangements' (February 2014) <https://www.unhcr.org/en-us/protection/expert/5304b71c9> accessed 6 October 2019.

rather poor piece of UNHCR doctrine deepens, rather than dispels, confusion about the nature and scope of temporary protection.[86] The question to be asked, therefore, is whether, aside from its established meaning and (untested) capacity in EU law, temporary protection is 'the tool States need in order to resolve contradictions, fill gaps, and correct weaknesses in extant international law'.[87] On the one hand, the very malleability of the temporary protection concept makes it an interesting object of creative research, as well as an attractive policy device for States yearning for 'flexible' approaches to refugee protection. On the other hand, the time may have come to 'unpack' the varied issues which temporary protection came to represent, in order to address them within known legal frameworks. Thus, the status of people fleeing the indiscriminate effects of armed conflict remains a crucial question of international refugee law, which can only be obscured by being put in the temporary protection box: indeed, there is nothing especially 'temporary' about what Fitzpatrick called 'nonpersecutory violence'.[88] Likewise, the criteria for cessation of refugee status on account of changed circumstances deserve to be studied further.[89] The quality of protection in emergency situations is another issue that requires a more robust legal approach, including through a discussion of derogation.[90] Last but not least, the solidarity dimension of international protection, the vexing Achilles' heel of the regime, requires serious attention. Twenty years ago Fitzpatrick thought that 'concretizing long-standing calls for international responsibility sharing may become possible in the context of the broader process of formalizing TP, and would constitute an important inducement to risk-averse states to embrace formalization'.[91] In actual fact, the EU experiment seems to prove the opposite. To be sure, neither the New York Declaration nor the Global Compact on Refugees makes a link between temporary protection and responsibility-sharing: both instruments remind us that responsibility-sharing is an essential component of the refugee regime, independently from the duration of the need for protection.

Even if temporary protection (as opposed to visas that are 'simply' temporary) remains confined to EU law, there are indications that contemporary State practice bears out the minimum understanding of temporary refuge, namely as *non-refoulement* and admission on a large scale, including in non-party States and in the absence of firm commitments to physical burden-sharing. In 2019, Bangladesh hosted some 700,000 Rohingya refugees from Myanmar, and while repatriation of the entire caseload was touted as the only solution, Bangladesh's attitude seemed more principled than on the occasion of the previous influx (1991–93) with respect to the preconditions to be met in the country of origin. Undoubtedly, though, the most noteworthy development in the

[86] For a critique of UNHCR's recent literature on temporary protection and related issues, see Durieux (n 2) 245–8.

[87] I believe it is not: ibid 249. cf Ineli-Ciger (n 83) 264, who offers consolidated guidelines on temporary protection 'as a new starting point for rethinking this issue'.

[88] Fitzpatrick (n 5) 305.

[89] See Durieux (n 2) 251.

[90] Alice Edwards, 'Temporary Protection, Derogation and the 1951 Refugee Convention' (2012) 13 Melbourne Journal of International Law 595; Durieux (n 2) 247–8, 251; Durieux and McAdam (n 31).

[91] Fitzpatrick (n 5) 305. A similar argument is made by Ineli-Ciger (n 83) 45.

last two decades has occurred in the Middle East, a region traditionally impervious to 'classic' refugee law standards. The tipping point was the exodus of Iraqi nationals in the wake of the US invasion (2003). On that occasion, Syria and Jordan were persuaded to function as traditional 'countries of first asylum' very much in the same way as Southeast Asian States were in the late 1970s: the international community implicitly acknowledged that the problem affecting frontline States was of 'foreign' origin, and it offered massive assistance (albeit not in the form of mass resettlement). This opening paved the way for the response to the next crisis, this time affecting Syria. Lambert sees in the response of States neighbouring Syria a confirmation of the existence of a regional custom of temporary refuge, vindicating the emergence of a universal customary norm.[92] She suggests that every new refugee emergency, particularly outside the area of application of the Refugee Convention, is a rich terrain for debating the sense of obligation underpinning humanitarian responses. However, as Goodwin-Gill recently observed, '[i]t is in the nature of customary international law to be contested . . . particularly in the absence of a final authoritative ruling by a competent international tribunal'.[93]

Creative thinking about *opinio juris* was definitely an important element of Perluss and Hartman's analysis—but other insights deserve to be rescued from their work, not least those that carry on Coles' search for a link between protection and solutions, and between *non-refoulement* and international solidarity. Reflecting upon this link, Goodwin-Gill asserts that a 'good case can be made for de-linking the concepts of refuge and *non-refoulement*, and in developing refuge itself as the overarching principle of protection'.[94] His arguments for temporary refuge, along with the earlier ones of Perluss and Hartman, are, in any event, 'located against a broad, normative background, which included . . . that much older body of principles encompassing the specific needs of those in distress by reason of *force majeure*'.[95] The challenge resides, it seems, in identifying and defining a corresponding legal duty that would be incumbent, not only on States of 'first refuge', but indeed on all actors in the international regime. If the phrase 'temporary refuge' does not sufficiently convey this collective dimension, the duty to rescue refugees offers itself as alternative terminology.[96]

[92] Lambert (n 83) 723–45. Her discussion of *opinio juris* is fully in line with Perluss and Hartman (n 34). In a rather daring move, Lambert includes the treatment of Palestinian refugees in the custom-generating practice of Arab States.

[93] Goodwin-Gill (n 19) 444. [94] ibid 458.

[95] ibid 440. [96] See Durieux (n 28).

CHAPTER 38

THE INTERNAL PROTECTION ALTERNATIVE

BRÍD NÍ GHRÁINNE

1. Introduction

The Internal Protection Alternative (IPA) has been referred to as 'a shorthand way of describing a factual situation'[1] and stems from the premise that if there is a safe place within an individual's State of nationality or habitual residence where they can relocate, they are not a refugee. The IPA concept emerged in domestic German jurisprudence in the 1980s and quickly spread unevenly across the jurisprudence of developed countries.[2] Today it is an inherent part of refugee status determination in most Contracting States of the Refugee Convention and has been incorporated into article 8 of the 2011 Recast European Union (EU) Qualification Directive.[3] Examples of the application of the IPA could include relocating from the countryside to the city where an individual is less likely to be found by his or her persecutors;[4] or relocating to an area where a clan, tribe, militia, or international organization could provide protection.[5]

[1] *Thirunavukkarasu v Canada (Minister of Employment and Immigration)* 1993 CarswellNat 160, [1993] ACF 1172 para 2 (*Thirunavukkarasu*).

[2] Bríd Ní Ghráinne, 'The Internal Protection Alternative Inquiry and Human Rights Considerations—Irrelevant or Indispensable? (2015) 27 IJRL 29, 30.

[3] EU Qualification Directive, art 8.

[4] *KAB v Sweden,* App No 886/11 (ECtHR, 5 September 2013).

[5] *Elmi v Minister of Citizenship and Immigration* 1999 CarswellNat 390, [1999] FCH 336; *DM (Majority Clan Entities can Protect) Somalia v Secretary of State for the Home Department* [2005] UKAIT 00150; EU Qualification Directive, art 7(1)(b). The actor of protection is not just relevant to the IPA analysis but also to the meaning of protection more broadly in the Refugee Convention.

The IPA does not appear in the refugee definition and no explicit reference was made to its existence at the time of drafting.[6] As refugee law lacks an international mechanism capable of providing a common interpretation of the Refugee Convention, the IPA's interpretation has primarily been left to Contracting States by means of domestic court decisions. International courts and Treaty Monitoring Bodies (TMBs) have also interpreted how the IPA is applied under the respective instruments they are tasked to monitor, which has helpfully shed light on the IPA's meaning under the Refugee Convention.[7] Unsurprisingly, the views of courts, TMBs, and scholars on the IPA's interpretation have varied widely, leading to a divergence in protection standards across States. For example, Germany and Slovakia consider that most parts of Russia can constitute an IPA for Chechen asylum claimants, whereas in France the IPA is not applied to this group.[8] Cyprus, Germany, Sweden, Norway, and the UK consider that Mogadishu can be an IPA for Somali asylum seekers, whereas Italy, Malta, and Spain do not.[9] Finally, Austria, the UK, Netherlands, Australia, and Finland all consider that Kabul can be an IPA for Afghan asylum seekers, whereas Switzerland and France do not.[10]

These divergent approaches to the IPA analysis are reflected in the different names attached to the concept, including the 'Internal Flight Alternative' (IFA) and the 'Internal Relocation Alternative' (IRA).[11] The choice of words is not neutral.[12] The terms IFA and IRA imply a retrospective analysis and a focus on the ability to relocate rather than the availability of protection, respectively. The term IPA is preferable because it accurately reflects the fact that the protection/relocation analysis is

[6] Nehemiah Robinson, 'Convention relating to the Status of Refugees: Its History, Contents and Interpretation, a Commentary' (World Jewish Congress 1953) para 10.

[7] The role of international courts and treaty bodies in informing the meaning of the IPA under the Refugee Convention is explained in Section 3.

[8] Jessica Schultz, *The Internal Protection Alternative in Refugee Law* (Brill 2018) 6. See also UNHCR, 'Asylum in the European Union: A Study of the Qualification Directive' (November 2007); AIDA, 'Mind the Gap: An NGO Perspective on Challenges to Accessing Protection in the Common European Asylum System' (Annual Report 2013–14).

[9] European Migration Network, 'EMN Ad-Hoc Query on Assessment of the security situation in Mogadishu, Somalia' (4 May 2017) <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/2017.1176_no_assessment_of_the_security_situation_in_mogadishu_somalia__0.pdf> accessed 3 September 2019.

[10] European Council for Refugees and Exiles, 'Case Law on Return of Asylum Seekers to Afghanistan 2017–2018' (2019) <https://www.ecre.org/wp-content/uploads/2019/02/Case-Law-on-Return-of-Asylum-Seekers-to-Afghanistan-2017%E2%80%932,018.pdf> accessed 3 September 2019; Australian Government, Department of Foreign Affairs and Trade, 'Draft Country Information Report: Afghanistan' (27 June 2019) <https://dfat.gov.au/about-us/publications/Documents/country-information-report-afghanistan.pdf> accessed 3 September 2019.

[11] UNHCR 'An Overview of Protection Issues in Western Europe: Legislative Trends and Positions Taken by UNHCR' (September 1995) 95; Andreas Zimmermann, *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: A Commentary* (OUP 2010) 446; Nora Honkala, 'A Feminist Human Rights Perspective on the Use of Internal Relocation by Asylum Adjudicators' in James Green and Christopher Waters (eds), *Adjudicating International Human Rights: Essays in Honour of Sandy Ghandi* (Brill 2015).

[12] Gina Clayton, 'Even If…The Use of the IPA in Asylum Decisions in the UK' (Asylum Aid 1 July 2014) <https://www.refworld.org/docid/53c8d6024.html> accessed 3 September 2019.

prospective, and most accurately captures the essence of the concept, which is the availability of protection in the proposed area of relocation.[13] For these reasons, this chapter uses the term IPA.

This chapter aims to critically assess the application of the IPA. Section 2 will conceptualize the IPA and Section 3 will examine how it has become well entrenched in State practice. Section 4 will illustrate that there is a wide divergence amongst States and scholars on how the IPA is applied. Section 5 will show that, using the rules of treaty interpretation, it is nonetheless possible to distil a minimum binding standard of relevant IPA criteria from both State practice and the text of the Refugee Convention itself. These criteria are that (i) the proposed IPA must be accessible to the applicant, (ii) there is no risk of exposure to the original risk of persecution, and (iii) there must be no new risk of persecution or of *refoulement* in the proposed IPA, and the conditions there must not be so unreasonable as to risk driving the individual to a place where there is a risk of persecution. The conclusion will briefly set out the main contributions of the chapter and future directions for research.

2. Conceptualizing the Internal Protection Alternative

It is difficult to pinpoint the exact source of the IPA concept in international law. As aforementioned, there is no mention of an IPA in the refugee definition and no explicit reference was made to its existence at the time of drafting. This is not surprising, considering that the traditional assumption was that State sovereignty extended over the whole of the State and that States were the primary actors of persecution. It was hence presumed that an individual's ability to receive protection would not depend on whether he or she could relocate within the State. Nonetheless, two years after the conclusion of the Refugee Convention, Robinson alluded to the IPA concept. Regarding the meaning of persecution, he commented that 'happenings of a local character, for instance, riots in a certain region or events which are being combated by the authorities' would not qualify a person for refugee status 'because in such cases there would be no reason for a person possessing a nationality to be unwilling to avail himself of the protection of his country'.[14]

[13] James C Hathaway and Michelle Foster, 'Internal Protection/Relocation/Flight Alternative as an Aspect of Refugee Status Determination' in Erika Feller, Volker Türk, and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultation on International Protection* (CUP 2003); European Legal Network on Asylum, 'Research Paper on the Application of the Concept of Internal Protection Alternative' (2000); James C Hathaway and Michelle Foster, *Law of Refugee Status* (2nd edn, CUP 2014).

[14] Robinson (n 6) 46.

Authorities in the field generally accept that the IPA is consistent with international refugee law.[15] This is because, as Hathaway explains, 'international protection is designed only to provide a back-up source of protection' or 'surrogate protection' to persons seriously at risk.[16] States have held that there exists a nexus between the IPA and the refugee definition in two main respects. The first is based on the definition's requirement that the fear must be 'well founded'. This has been interpreted to mean that the fear is not well founded where the persecutory source of the fear could be avoided by relocating to a safe area within the country of origin.[17] The second basis for the IPA lies in the notion of 'protection'.[18] If within that country, obtaining its 'protection' is merely a question of relocating, it implies that inability or unwillingness to return is for reasons extrinsic to those set out in the Refugee Convention and that the claimant is therefore not a refugee. As Sections 4 and 5 will illustrate, both of these elements are drawn upon when establishing the applicable criteria in the IPA analysis. Before setting out IPA criteria, however, Section 3 will illustrate how the IPA came to be an intrinsic part of the refugee status determination of most Contracting States to the Refugee Convention.

3. History and Development of the Internal Protection Alternative

IPA practice emerged in 1970s German cases.[19] The practice of applying the IPA bloomed in the mid-1980s, owing to the arrival of increased numbers of refugees from countries that were very different from Western asylum States, and a growing number of individuals fleeing largely regionalized threats rather than aggressor States.[20] In response to the increased application of the IPA, UNHCR tried to limit its use by issuing guidelines on its application.[21] The *Handbook on Procedures and Criteria for*

[15] Ní Ghráinne (n 2). See also James C Hathaway, 'International Refugee Law: The Michigan Guidelines on the Internal Protection Alternative' (1999) 21 Michigan Journal of International Law 131; Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, OUP 2011).

[16] Hathaway (n 15) 131.

[17] *Januzi v Secretary of State for the Home Department* [2006] UKHL 5, [2006] 2 AC 426, para 7; Hathaway and Foster 2014 (n 13) 332–42.

[18] *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 52 FCR 437, 124 ALR 265, para 8; *Refugee Appeal No 76044* [2008] NZRSAA 80, para 110.

[19] Reinhard Marx, 'The Criteria of Applying the "Internal Flight Alternative" Test in National Refugee Status Determination Procedures' (2002) 14 IJRL 179, 181.

[20] Hathaway (n 15) 132; Hathaway and Foster 2003 (n 13) 361–81.

[21] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (September 1979); UNHCR, 'Discussion Note on the Application of the "Ceased Circumstance" Cessation Clauses in the 1951 Convention' (1991); UNHCR, 'UNHCR Position Paper on Relocating Internally as a Reasonable Alternative to Seeking Asylum (The So-Called "Internal Flight Alternative" or "Relocation Principle")' (9 February 1999); UNHCR, 'Guidelines on International Protection: "Internal Flight or Relocation Alternative" within the Context of Article lA(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees,' HCR/GIP/03/04 (23 July 2003).

Determining Refugee Status—which has been referred to as encapsulating the classic formulation of the IPA[22]—permits a narrow scope for IPA practice if a reasonable IPA was available at the time the claimant became a refugee and continues to be available at the time of status determination. Paragraph 91 states:

> The fear of being persecuted need not always extend to the whole territory of the refugee's country of nationality. Thus in ethnic clashes or in cases of grave disturbances involving civil war conditions, persecution of a specific ethnic or national group may occur in only one part of the country. In such situations, a person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country, if under all the circumstances it would not have been reasonable to expect him to do so.[23]

UNHCR has issued various subsequent statements regarding the IPA's scope and content, but such statements have neither been consistent nor clear. UNHCR has referred to the IPA by various different terms, including the IFA,[24] and the IRA.[25] As set out in the introduction to this chapter, the choice of terms is not neutral and connotes different interpretations of the relevant criteria in the IPA analysis. Moreover, UNHCR has been inconsistent in identifying the doctrinal basis, if any, for the IPA test. It initially stated that the IPA principle 'rests on understandings which are basically at odds with those underlying the fundamental refugee protection principles',[26] implying that it was contrary to the Refugee Convention's object and purpose. In 1995, it accepted that the IPA test is relevant to the question of the willingness and capacity of the State of nationality to provide protection,[27] but in 1999 implicitly reversed this proposal and stated that the IPA test is relevant to whether an applicant's fear is well-founded.[28] In its guidance on the criteria of the IPA, UNHCR uses terms such as 'reasonableness',[29] 'safety',[30] and 'durability'[31] without explaining how these terms relate, if at all, to the Refugee Convention. As a result, it is unclear what UNHCR's position is on the IPA's treaty basis, interpretation, and application.

Despite (or perhaps because of) these inconsistent declarations, the IPA has been widely adopted across both domestic and regional refugee law.[32] At present, it is a discretionary provision in the EU Recast Qualification Directive but it is applied by most Member States,[33]

[22] *Randhawa* (n 18) 442; *Januzi* (n 17) para 9.

[23] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/1P/4/ENG/REV.4 (1979, reissued 2019) para 91.

[24] UNHCR 1999 (n 21) para 1; UNHCR 2003 (n 21) 1; UNHCR, 'Information Note on Article 1 of the 1951 Convention' (1 March 1995).

[25] UNHCR 1999 (n 21) para 2; UNHCR 2003 (n 21) 2.

[26] UNHCR 1999 (n 21) 7.

[27] UNHCR (n 24).

[28] UNHCR 1999 (n 21) 9.

[29] ibid 2.

[30] ibid 7.

[31] ibid 14.

[32] EU Qualification Directive.

[33] Kay Hailbronner and Daniel Thym (eds), *EU Immigration and Asylum Law* (Hart 2016) 1131–65.

and will likely become mandatory in the future.[34] EU practice has shed valuable insight into the meaning and scope of the IPA, as EU asylum law constitutes State practice in the implementation of the Refugee Convention. The practice of the EU and its Member States informs the analysis of the IPA criteria in Sections 4 and 5.

The IPA has also been examined by the European Court of Human Rights (ECtHR) and the Committee against Torture,[35] in relation to the ECHR and the CAT, respectively. Although these bodies do not interpret the Refugee Convention, their views inform our understanding of the IPA under the Refugee Convention for three main reasons. First, the ECtHR and Committee against Torture interpret 'relevant rules of international law', which ought to be taken into account when interpreting the Refugee Convention.[36] There is a significant body of literature that views human rights law as a mandatory interpretative tool of the Refugee Convention generally,[37] and the IPA analysis specifically.[38] Secondly, the views of the Committee against Torture and ECtHR are relevant to the broader analysis on IPA application in refugee law because of their normative influence on affirmative claims for international protection.[39] Thirdly, persons considered for complementary protection may, in fact, be unrecognized refugees and thus their factual situations may be very similar to those that appear before refugee status determination bodies. For these three reasons, the views of these bodies represent an important source of interpretation of the IPA under the Refugee Convention.

Finally, it is important to note that although there exist regional systems of refugee protection in both Africa and Latin America, the IPA is generally accepted to not be applicable to the two main refugee protection instruments in these regions—the OAU

[34] The IPA has been incorporated into article 8 of the EU Qualification Directive. The European Commission has proposed to replace the Qualification Directive with a new Regulation. See European Commission, 'Completing the reform of the Common European Asylum System: Towards an Efficient, Fair and Humane Asylum Policy' (13 July 2016) <http://europa.eu/rapid/press-release_IP-16-2433_en.htm> accessed 28 January 2019.

[35] ECtHR: *Salah Sheekh v Netherlands* (2007) 45 EHRR 50; *Sufi and Elmi v United Kingdom* (2012) 54 EHRR 9; *SHH v United Kingdom* (2013) 57 EHRR 18; *KAB v Sweden* (n 4). See also Committee against Torture: *Alan v Switzerland*, UN doc CAT/C/16/D/21/1995 (13 May 1996); *Ayas v Sweden*, UN doc CAT/C/21/D/097/1997 (12 November 1997; *Haydin v Sweden*, UN doc CAT/C/21/D/101/1997 (16 December 1998).

[36] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT), art 31(3)(c).

[37] UNHCR, 'UNHCR and Human Rights: A Policy Paper Resulting from Deliberations in the Policy Committee on the Basis of a Paper Prepared by the Division of International Protection' (1997) <https://www.refworld.org/pdfid/3ae6b332c.pdf> accessed 14 November 2019; Erika Feller, 'International Refugee Protection 50 Years On: The Protection Challenges of the Past, Present and Future' (2001) 83 International Review of the Red Cross 581, 582; Alice Edwards, 'Human Rights, Refugees and the Right "to Enjoy" Asylum' (2005) 17 IJRL 293, 297. For a summary of the contrary positions, see Ní Ghráinne (n 2) 32–6.

[38] Marx (n 19) 206. [39] Schultz (n 8) 299.

Convention,[40] and the Cartagena Declaration, respectively.[41] Article 1(2) of the OAU Convention states that:

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

The non-binding Cartagena Declaration employs a similar expanded definition of a refugee. While it does not state that the reason for being outside the country of origin may have its locus 'in either part of the whole' of a country of origin, it does state the necessity 'of bearing in mind . . . the precedent of the OAU Convention (article 1, paragraph 2)'.[42]

The reference to 'either part or the whole of [the] country of origin' in the OAU Convention, and the reference in the Cartagena Declaration to the OAU Convention, respectively, has led to a general agreement that the above Conventions preclude the existence of an IPA.[43] Hathaway specifies three reasons why this approach is contextually sensible: (i) issues of distance from, or unavailability of, escape routes may prevent travel to a putative IPA; (ii) political instability of many developing States may mean that a 'safe' region today may be dangerous tomorrow; and (iii) colonial-imposed boundaries make the identification of a putative IPA artificial.[44]

Having established the regions and bodies that apply the IPA most frequently, the following sections will illustrate the criteria taken into account in their decisions relating to the IPA.

[40] See Hugo Storey, 'The Internal Flight Alternative Test: The Jurisprudence Re-examined' (1998) 10 IJRL 499, 502; Schultz (n 8) 162.

[41] Cartagena Declaration, although the declaration is not binding as a matter of international law, it has been incorporated into the domestic legislation of many States. See Michael Reed-Hurtado, 'The Cartagena Declaration on Refugees and the Protection of People Fleeing Armed Conflict and Other Situations of Violence in Latin America', UNHCR Legal Protection and Policy Research Series PPLA/2013/03 (2013).

[42] Cartagena Declaration, conclusion III.

[43] Storey (n 40) 503; Schultz (n 8) 162. See also Marina Sharpe notes that 'while there is limited jurisprudence available on this issue, the decisions that explicitly consider it [. . .] universally reject the IFA requirement'. See Marina Sharpe, *The Regional Law of Refugee Protection in Africa* (OUP 2018) 61–2 and jurisprudence cited therein. For a contrary view, see Tamara Wood, 'Protection and Disasters in the Horn of Africa: Norms and Practice for Addressing Cross-Border Displacement in Disaster Contexts' (The Nansen Initiative January 2013) <http://www.nanseninitiative.org/wp-content/uploads/2015/03/190215_Technical_Paper_Tamara_Wood.pdf> accessed 5 September 2019, 28–9.

[44] James C Hathaway, *The Law of Refugee Status* (Butterworths 1993) 18–19.

4. Applicable Criteria

The criteria applied in the IPA analysis fall into two categories: (i) a long list of criteria which are applied by some States but do not have widespread acceptance; and (ii) a handful of criteria upon which there is consensus. This section outlines the range of criteria applied across Contracting States that are prevalent but not consistently applied or accepted.

a. Conditions within the Putative IPA

It is widely accepted that the conditions in the IPA should be reasonable, and/or not unduly harsh,[45] but there is disagreement over what these terms actually mean. Some argue that the availability of basic norms of civil, political, and socio-economic rights should inform the IPA inquiry,[46] but there is a lack of definition of what these standards entail. There is also considerable uncertainty regarding the meaning of effective protection from persecution and how it applies in the IPA analysis.[47] Relevant factors include whether the risk of persecution is 'permanently eradicated',[48] and/or whether there is a legal system in operation for the detection, prosecution, and protection of acts of persecution or serious harm.[49] Finally, some courts and scholars are of the view that the IPA analysis should be informed by the Refugee Convention's definition of protection, namely articles 2–33.[50] However, this approach has been criticized on the basis that it purports to use refugee rights to consider the situation of citizens in their country of origin, which goes against the object and purpose of the Refugee Convention.[51] Section

[45] UNHCR 2003 (n 21) 3; Hathaway and Foster 2014 (n 13) 351. See also 'Case Abstract IJRL/015' (1989) 1 IJRL 388 (Netherlands); *Judgment of 10 July 1989* 2 BvR 502/86m 2 BvR 1000/86, 2 BvR 961/86, BVerfGE 80 (Germany); *Judgment of 31 July 2002 1B 128/02*, 1 PKH 24/02, InfAuslR 24 (Germany); 'Case Abstract IJRL/0101' (1992) 4 IJRL 97 (France); *AH (Sudan) v Secretary of State for the Home Department* [2007] UKHL 49, [2008] AC 678; *Matter of AEM*, I & N Dec 3338 (BIA 1998); *Thirunavukkarasu* (n 1); *Butler v Attorney General* [1999] NZAR 205; European Legal Network on Asylum (n 13); Storey (n 40) 530; Goodwin-Gill and McAdam (n 15); EU Qualification Directive; Jonah Eaton, 'The Internal Protection Alternative Under European Union Law: Examining the Recast Qualification Directive' (2012) 24 IJRL 766, 789; Penelope Mathew, 'The Shifting Boundaries and Content of Protection: The Internal Protection Alternative Revisited' in Satvinder S. Juss (ed), *The Ashgate Research Companion to Migration Law, Theory and Policy* (Ashgate 2013).

[46] UNHCR 2003 (n 21) para 28.

[47] EU Qualification Directive. See also Joined cases C-175/08, C-176/08, C-178/08, and C-179/08 *Aydin Salahadin Abdulla (C-175/08), Kamil Hasan (C-176/08), Ahmed Adem, Hamrin Mosa Rashi (C-178/08) and Dler Jamal (C-179/08) v Bundesrepublik Deutschland* [2010] ECR I-01493.

[48] *Aydin Salahadin Abdulla* (n 47) para 73.

[49] ibid; EU Qualification Directive.

[50] Hathaway (n 15) 139. See also *Refugee Appeal No 71684/99* [1999] NZRSAA 296, para 57.

[51] Ní Ghráinne (n 2) 40. See also Ninette Kelley, 'Internal Flight/Relocation/Protection Alternative: Is it Reasonable?' (2002) 14 IJRL 4, 35; *Januzi* (n 17).

5 below attempts to show how linking the prohibition of *non-refoulement* to the 'reasonableness' requirement may clarify how this latter term is to be interpreted.

b. Can an IPA Exist when the State is the Agent of Persecution?

Some jurisdictions apply a presumption that the IPA is inapplicable where the State is the agent of persecution.[52] This is because the State is presumed to act throughout the territory of a country,[53] making it difficult, if not impossible, for a persecuted individual to avoid detection by the State. This presumption may be rebutted where there is compelling evidence of the ability to deliver durable protection in the proposed IPA, and/or where the threat is one that emanates from local government authorities rather than throughout the State, and/or where the threat is from a 'rogue' agent of the State.[54] A related question is whether non-State actors can provide protection, a point that is examined in more detail below.

c. Actors of Protection and the IPA

There is considerable disagreement over whether non-State actors can qualify as actors of protection for the purposes of establishing an IPA. Although some argue that the term 'protection' in the refugee definition refers only to lack of State protection,[55] there have been some suggestions in the literature and in case law that a modern-day interpretation of the Refugee Convention permits refugee status to be denied where effective protection is available from non-State actors such as international organizations, NGOs, shelters, or clans.[56] In addition, the EU Qualification Directive provides that international organizations can be actors of protection. Even if non-State actors can, *prima facie*, constitute actors of protection, questions remain about whether non-State actors are able to offer sufficient protection from persecution, and whether such protection

[52] *Chahal v United Kingdom,* App No 70/1995/576/663 (ECtHR, Grand Chamber 11 November 1996) para 95–107; *Minister for Immigration and Multicultural Affairs v Jang* [2000] FCA 1075. Hathaway and Foster note that 'some decision-makers have taken the view that whether or not the persecutor is the state is completely irrelevant'. See Hathaway and Foster 2003 (n 13) 394.

[53] Zimmermann (n 11).

[54] Hathaway and Foster 2014 (n 13) 347. See also *Thirunavukkarasu* (n 1).

[55] Bríd Ní Ghráinne, 'UNHCR's Involvement with IDPs—"Protection of that Country" for the Purposes of Precluding Refugee Status?' (2014) 26 IJRL 536, 538–42; James C Hathaway and Hugo Storey, 'What is the Meaning of State Protection in Refugee Law? A Debate' (2016) 28 IJRL 486, 486 (Hathaway's position).

[56] *Elmi* (n 5) para 17; AM & AM (Armed Conflict: Risk Categories) Somalia CG [2008] UKAIT 00091, para 160; *Salah Sheekh* (n 35) para 36; EU Qualification Directive, art 7; Maria O'Sullivan, 'Acting the Part: Can Non-State Entities Provide Protection Under International Refugee Law?' (2012) 24 IJRL 85, 98–108; Hugo Storey, 'What Constitutes Persecution? Towards a Working Definition' (2014) 26 IJRL 272 (Storey's position).

must be durable, which is explained in more detail below.[57] Research on domestic practice indicates that while decision-makers consider a broad range of non-State entities in the IPA inquiry, they often conclude that the proposed actor does not offer sufficient protection.[58]

d. The Relevance of the IPA's Durability[59]

Many States require that an IPA must be durable.[60] Article 7 of the EU Qualification Directive requires that protection must be 'non-temporary'. Although neither the Directive nor the Court of Justice of the European Union (CJEU) has given any further guidance on the meaning of 'non-temporary' as per article 7, the term has been examined in the context of the cessation clauses. In the case of *Abdulla*, the CJEU held that protection is of a 'non-temporary' nature when it can be said that the factors that formed the basis of the refugee's fear of persecution may be regarded as having been permanently eradicated.[61] This implies that the body providing protection need not be present permanently, but rather that it has the ability to completely eradicate the persecution feared. However, even though durability is a requirement under the Qualification Directive, a study by the European Council for Refugees and Exiles found that many EU Member States rarely assess the durability of protection in practice.[62] The ECtHR has taken a similar approach. Although it has found that the IPA must provide a reliable guarantee against persecution,[63] in the case of *Sufi and Elmi* it held that the fact that 'safe' areas were controlled by armed groups with a tenuous hold over the territory did not disqualify it on durability grounds.[64]

As is evident from the above analysis, there exist wide-ranging approaches to the IPA inquiry. This leads to a divergence in how the Refugee Convention is applied, which in turn leads to unpredictability and undermines the rule of law. It also incentivizes asylum

[57] See Ní Ghráinne (n 55) and literature cited therein.

[58] Schultz (n 8) 205.

[59] *Aydin Salahadin Abdulla* (n 47). See also UNHCR 1999 (n 21); *SS v Netherlands*, UN doc CAT/C/30/D/191/2001 (19 May 2003); European Council on Refugees and Exiles, 'ECRE Information Note on the Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification of Third Country Nationals and Others in Need of International Protection' (2004); *Salah Sheekh* (n 35); *AH (Sudan)* (n 45); *Sufi and Elmi* (n 35); *Judgment of 24 February 2011* No 10 C 310 (German Federal Administrative Court); EU Qualification Directive; Eaton (n 45) 784; Hathaway and Foster 2014 (n 13); Clayton (n 12); Schultz (n 8).

[60] Schultz (n 8) 241. See also UNHCR 1999 (n 21); UN Committee against Torture, *SS v Netherlands* (n 59); European Council on Refugees and Exiles (n 59); *Salah Sheekh* (n 35); *AH (Sudan)* (n 45); *Aydin Salahadin Abdulla* (n 47); EU Qualification Directive; Clayton (n 12).

[61] *Aydin Salahadin Abdulla* (n 47) para 73.

[62] European Council on Refugees and Exiles, 'The Impact of the EU Qualification Directive on International Protection' (2008) 18 <https://www.ecre.org/wp-content/uploads/2016/07/ECRE-The-Impact-of-the-EU-Qualification-Directive-on-International-Protection_October-2008.pdf> accessed 12 November 2019.

[63] *Hilal v United Kingdom* (2001) 33 EHRR 2.

[64] *Sufi and Elmi* (n 35) 272–7; Schultz (n 8) 306.

shopping, whereby States that offer higher levels of protection receive a larger number of asylum applications.[65] This in turn can lead to a 'race to the bottom',[66] whereby States are incentivized to offer lower standards of protection to deter refugees from seeking asylum.

It is therefore necessary to clarify which standards are applicable in the IPA analysis. Sections 5 and 6 will illustrate how the rules of treaty interpretation and State practice allow us to identify criteria which form a binding minimum standard for any State that wishes to apply the IPA.

5. A Treaty-based Approach

This section argues for recourse to the rules of treaty interpretation to clarify which criteria must be taken into account in the IPA analysis. As aforementioned, the IPA is often considered to be an implicit part of the Refugee Convention. The Vienna Convention on the Law of Treaties (VCLT) provides us with a number of rules that can help discern the meaning of the Refugee Convention, and therefore the meaning of the IPA and its applicable criteria.

First, article 31(1) of the VCLT provides that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of the treaty's object and purpose. The starting point for determining the criteria for the IPA (and hence how the refugee definition is interpreted) is therefore the terms of the refugee definition itself, as well as the text of the Refugee Convention as a whole, which forms part of the refugee definition's context.[67]

Secondly, 'subsequent practice' should be taken into account when determining the meaning of a treaty.[68] Both judgments of domestic courts and the practice of regional systems created by States (such as the EU) constitute subsequent practice for the purposes of interpreting the IPA and are thus relied upon heavily in the following sections.[69]

Thirdly, article 31(3)(b) of the VCLT directs us to take into account 'other relevant rules of international law' when interpreting the meaning of a treaty.[70] Understanding how the IPA has been interpreted in other treaty regimes helps us to understand how it should be interpreted in relation to the Refugee Convention.

[65] Virginie Guiraudon, 'The Constitution of a European Immigration Policy Domain: A Political Sociology Approach' (2011) 10 Journal of European Public Policy 263.

[66] Katrina Stats, 'Joining the "Race to the Bottom": The Rudd Government's "Tough but Humane" Approach to Asylum Seekers' (2017) 47/48 Arena Journal 98.

[67] VCLT (n 36) art 31(32).

[68] VCLT (n 36) art 31(3)(b).

[69] Oliver Dörr and Kristen Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2012) 597.

[70] VCLT (n 36) art 31(3)(c).

Applying these rules leads to the conclusion that three criteria are applicable in the IPA analysis, which are set out below.

a. The IPA Must Be Accessible to the Applicant

First, the IPA must be accessible to the applicant.[71] In the words of the Canadian Federal Court of Appeal:

> Any barriers to getting [to the proposed IPA] should be reasonably surmountable. The claimant cannot be required to encounter great physical danger or to undergo undue hardship in travelling there or in staying there. For example, claimants should not be required to cross battle lines where fighting is going on at great risk to their lives in order to reach a place of safety.[72]

UNHCR gives additional examples of when an area would not qualify as an IPA owing to accessibility reasons, such as where an individual would have to travel through mine fields, factional fighting, or shifting war fronts; and/or where travelling to the proposed location would put them in danger of banditry, or other forms of harassment or exploitation.[73]

The requirement that the IPA must be accessible results from an application of the VCLT rules of interpretation. Subsequent practice of Contracting States to the Refugee Convention informs the Convention's meaning, and it is clear that the requirement of accessibility is widely applied in State practice.[74] At a regional level, its omission from the 2004 Qualification Directive was heavily critiqued as omitting an essential requirement,[75] and it was introduced in the recast version. Moreover, the requirement of accessibility follows a 'good faith' interpretation of the Refugee Convention as per the general rule of interpretation in article 31 of the VCLT.[76] If the proposed IPA is not accessible, the applicant cannot be expected to seek protection from persecution there, and the applicant may qualify for international protection.

[71] EU Qualification Directive, art 8.
[72] *Thirunavukkarasu* (n 1) 687–8.
[73] Hathaway and Foster 2014 (n 13) 353. See also UNHCR 2003 (n 21) 4.
[74] *Thirunavukkarasu* (n 1); *Matter of H*, 21 I&N Dec No 337 (BIA 1996); *Dirshe v Canada (Minister of Citizenship and Immigration)*, 1997 CarswellNat 1371, 135 FTR 151; *Hashmat v Canada (Minister of Citizenship and Immigration)*, 1997 CarswellNat 791, [1997] FCJ 598; *R v Secretary of State for the Home Department, Immigration Appeals Tribunal, ex parte Robinson* [1998] QB 929 (QB); *Refugee Appeal No. 71684/99* (n 50); *Decision of 28 April 2000, 96/21/1036–7* (Austria); *Al-Amidi v Minister for Immigration and Multicultural Affairs* [2000] FCA 1081; *Salah Sheekh* (n 35); *Aydin Salahadin Abdulla* (n 47); EU Qualification Directive; *Sufi and Elmi* (n 35).
[75] Hathaway and Foster 2014 (n 13) 343.
[76] VCLT (n 36) art 31(1) provides that a treaty must be interpreted in good faith.

b. There Must Be Effective Protection from the Original Risk of Persecution

Effective protection from the original risk of persecution essentially means that the relocation area must be an 'antidote'[77] to the persecution feared. In the words of the House of Lords in *AH Sudan*

> [b]y definition, if the claimant had a well-founded fear of persecution, not only in the place from which he has fled, but also in the place to which he might be returned, there can be no question of internal [protection].[78]

A decision-maker must therefore examine (a) the ability of the agent of persecution to be present in the IPA; and (b) the likelihood of pursuit in the IPA.[79]

The criterion that there must be effective protection from the original risk of persecution is well established in State practice,[80] and is anchored in the text of the Refugee Convention. Article 1A provides that an individual is a refugee, *inter alia*, if he/she has a well-founded fear of persecution. It is generally accepted that if that fear of persecution can be remedied by relocating within the State, the individual does not qualify as a refugee.[81] However, if relocation would expose the individual to persecution, the area of relocation cannot be said to provide an antidote to the persecution feared and thus cannot qualify as an IPA.

There is no definition of what constitutes persecution in the Refugee Convention. Indeed, it is generally accepted that the drafters of the Refugee Convention intentionally declined to define 'being persecuted' because they recognized the impossibility of exhaustively listing all the forms of maltreatment that might entitle persons to refugee status.[82] However, many scholarly authorities propose a human rights interpretation of the term 'persecution',[83] and this approach is generally accepted in State practice.[84] It is nonetheless important to note that not all human rights violations will necessarily constitute persecution. Assessment will turn on factors including (i) the nature of the

[77] Hathaway and Foster 2003 (n 13) 392–400.

[78] *AH (Sudan)* (n 45) para 21.

[79] Hathaway and Foster 2003 (n 13) 393.

[80] *Ahmed v Canada (Minister of Employment and Immigration)* 1993 CarswellNat 294, [1993] FCJ 718; *Salah Sheekh* (n 35); *AH (Sudan)* (n 45); EU Qualification Directive, art 8.
Hathaway and Foster 2014 (n 13) 344–7.

[81] *Butler v Attorney General* [1999] NZAR 205, para 5; *Januzi* (n 17) para 7; *SZATV v Minister for Immigration and Citizenship* (2007) 233 CLR 18, para 56; EU Qualification Directive, art 8.

[82] Hathaway and Foster 2014 (n 13). See also UNHCR (n 23).

[83] Zimmermann (n 11); Goodwin-Gill and McAdam (n 15); Hathaway and Foster 2014 (n 13).

[84] For example, the EU's Qualification Directive has explicitly adopted the human rights approach by defining 'an act of persecution' as an act that is 'sufficiently serious by its nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made' or an 'accumulation of various measures, including violations of human rights' art 9(1)(a).

freedom threatened; (ii) the nature and severity of the restriction;[85] and (iii) the likelihood of the restriction eventuating in the individual case.[86]

The general acceptance that the term 'persecution' has a strong basis in human rights means that many of the considerations set out in Section 4 on the conditions within the proposed IPA can be taken into account when analysing whether there is a risk of persecution there. For example, whether relocation to a proposed IPA is 'reasonable' or 'unduly harsh' may be measured using the standard of serious harm sufficient to establish a risk of being persecuted such as a risk to life, the risk of torture or cruel, inhuman, or degrading treatment or punishment, slavery, risk of beatings or other physical violence, and the risk of violation of socio-economic rights.[87] Similarly, the proposition that human rights considerations should be taken into account in the IPA analysis can be addressed, at least in part, by ensuring that there is no risk of persecution in the proposed IPA. Finally, issues relating to durability of protection and whether non-State actors can provide adequate protection may be taken into account by assessing whether the threshold of protection against persecution is reached.

c. There Must Be No New Risk of Being Persecuted or of *Refoulement*

The third generally accepted criterion is that there must be no new risk of being persecuted or of *refoulement*.[88] This criterion is uncontroversial because, as set out above, lack of protection from persecution is one of the criteria for establishing refugee status, and *refoulement* is prohibited by article 33(1) of the Refugee Convention. This criterion prohibits the return of every individual who could face a new risk of persecution, or where there are substantial grounds for believing that he or she would be in danger of torture or cruel, inhuman, or degrading treatment or punishment if returned to a particular IPA.[89] In addition, there must be no risk of 'chain' or 'constructive' *refoulement*, that is, an applicant should not be returned to an inadequate IPA where the conditions there are such that an applicant may in desperation return to the territory of her persecutors or another area where there is a real risk of serious harm.[90] Thus, where conditions in the proposed area of relocation are 'unreasonable' or 'unduly harsh'—for example, because of poor socio-economic conditions, lack of employment prospects, lack of linguistic

[85] For example, the EU Qualification Directive notes that the violation(s) must be 'sufficiently serious by its nature or repetition' art 9(1)(a).

[86] Goodwin-Gill and McAdam (n 15) 90–131.

[87] ibid; *Chen v Holder*, 604 F3d 324 (7th Cir, 2010); *M93 of 2004 v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FMCA 252; *BG (Fiji)* [2012] NZIPT 800091; *BVerwG* [2013] 10 C 23.12 (Germany).

[88] Marx (n 19) 196–9; *Sufi and Elmi* (n 35); Zimmermann (n 11); EU Qualification Directive, art 8; *Salah Sheekh* (n 35); Eaton (n 45) 770; European Council of Refugees and Exiles, 'Actors of Protection and the Application of the Internal Protection Alternative' (2014); Hathaway and Foster 2014 (n 13) 347; Ní Ghráinne (n 2) 46–50; Hailbronner and Thym (n 33); Schultz (n 8) 387.

[89] Goodwin-Gill and McAdam (n 15) 90–131.

[90] *Sufi and Elmi* (n 35) para 291; Hathaway and Foster 2014 (n 13) 347–50.

skills, and/or the presence of armed conflict or national disasters—the proposed area would not constitute an IPA.

6. The Benefits of a Treaty-based Approach

Distilling the IPA criteria from a treaty-based approach is preferable for four reasons. First, it provides much-needed clarity to the IPA analysis. Concepts applied by States such as 'safety' and 'reasonableness', and 'unduly harsh' are not anchored in the text of the Refugee Convention, are vague, and have led to highly diverging interpretations and applications amongst States.[91] Linking these concepts to the terms of the treaty and specifically the prohibition of *refoulement* allows for a more principled and clearer approach to the IPA analysis.

Secondly, and relatedly, Eaton notes that

> Some States have arguably used the IPA to effectively raise the standard for who qualifies for protection, or in its most restrictive form, use the IPA as a threshold test requiring an asylum applicant to show 'country-wide persecution' or to prove that she had a well-founded fear of persecution in all regions of her country of origin.[92]

Locating the IPA analysis in the binding rules of treaty interpretation limits the discretion of States in applying the IPA. For example, linking the reasonableness requirement to the terms of the treaty may encourage States such as Norway and Australia, which do not formally consider reasonableness as a criterion in the IPA analysis, to reconsider their approach.[93] Limiting State discretion in this way may in turn lead to further convergence amongst States on the relevant IPA criteria. Such convergence is desirable from both a legal and a practical perspective. Legally, States are under the obligation to use the same rules of treaty interpretation.[94] In the case of the EU, Member States have an obligation to interpret the Refugee Convention uniformly.[95] Thus States should interpret the Refugee Convention in a harmonious manner. From a practical perspective, fragmented interpretation leads to diversity in protection standards and asylum shopping, as outlined in Section 4 above.

Thirdly, locating the IPA analysis in the terms of the Refugee Convention itself helps distinguish refugee claims from those based on humanitarian reasons. Human rights considerations only enter the IPA inquiry where relevant to a State's obligations under

[91] Hathaway and Foster 2014 (n 13) 350–61.

[92] Eaton (n 45) 770.

[93] Jessica Schultz, 'Understanding the Internal Protection Alternative (Part I)' (*EU Immigration and Asylum Law and Policy*, 16 January 2019) <https://eumigrationlawblog.eu/understanding-the-internal-protection-alternative-part-i/> accessed 3 September 2019.

[94] VCLT (n 36); Hugo Storey, 'The Advanced Refugee Law Workshop Experience: An IARLJ Perspective' (2003) 15 IJRL 422, 423.

[95] See, *inter alia*, Case C–497/10 *Barbara Mercredi v Richard Chaffe* [2010] ECR I–14358; Case T–135/15 *Republik Griechenland v Grigorios Nikiforidis* [2016] ECR 703.

the Refugee Convention. For this reason, only those who fit the refugee definition will be able to invoke the Refugee Convention to preclude expulsion and it will not be possible to invoke the Refugee Convention to provide international protection for those who seek to escape a life of poverty (but not necessarily persecution).

Finally, as noted in Section 5, many of the divergent criteria set out in Section 4 can be streamlined into the IPA analysis using the rules of treaty interpretation. By using a doctrinal basis to justify the applicable IPA criteria, the IPA analysis incorporates a human rights approach but in a principled, defined way. Importantly, the requirement of 'reasonableness', which has received widespread acceptance in both literature and practice, can be incorporated into the prohibition of constructive *refoulement*. In sum, a treaty-based approach to the IPA analysis addresses, at least in part, Marx's plea to determine more 'clear cut'[96] criteria in the IPA analysis.

7. Conclusion

Regardless of the treaty basis of the IPA, it is now so well ingrained in State practice that it is too late to resile from it. Its widespread adoption by States has led to divergent approaches, which in turn has contributed to further fragmentation in refugee protection standards. Using the rules of treaty interpretation, this chapter has argued that there are three binding criteria in the IPA analysis: (i) the IPA must be accessible to the applicant; (ii) there must be effective persecution from the original risk of persecution; and (iii) there must be no new risk of being persecuted or of *refoulement*.

These three criteria are cumulative, meaning that a failure to satisfy even one criterion means that the location being examined does not qualify as an IPA. However, these three criteria set a low bar. This author does not necessarily agree in normative terms that this low threshold should be the yardstick by which a lawful IPA is measured, but accepts that the terms of the treaty itself and the actual practice of States,[97] as set out in the VCLT, are amongst the most important barometers in establishing the criteria applicable in the IPA inquiry. States alone apply the Refugee Convention, and States are the predominant creators of international law.

As refugee numbers grow, so does the hostility of States towards refugees, and consequent divergence in the IPA's application. This makes the IPA an important topic for future study, and research is particularly encouraged on the relationship between the IPA and the Refugee Convention's cessation clauses,[98] the practice of Global South States in interpreting and applying the IPA, and the relationship of the ever-developing body of human rights jurisprudence with the IPA's application in asylum cases. Scholars, lawyers, and advocates have a crucial role to play in monitoring how the IPA develops over time.

[96] Marx (n 19) 204.
[97] VCLT (n 36) arts 31, 31(3)(b).
[98] See eg *Secretary of State for the Home Department v MS (Somalia)* [2019] EWCA Civ 1345.

CHAPTER 39

EXCLUSION

GEOFF GILBERT AND
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1. Introduction

The Refugee Convention was drafted in a very different era, but one that displays many of the characteristics of today. The period 1933–45 had seen persecution of groups based on religion, political opinion, nationality, race, and membership of particular social groups. It had seen States closing their borders to those fleeing that persecution, people who were fleeing statelessness, and those without travel documents. The post-war era saw many people who had been involved in that persecution now displaced themselves and seeking to create new lives where they could hide their past crimes and activities under a new identity. At another level, however, the idea of universal human rights was still very much in its infancy: there were no extant international human rights law treaties with effective treaty bodies to monitor how States treated individuals within their territory or jurisdiction. The idea that international law might provide a forum where individuals could hold States to account was not accepted, with the United Nations still finding its way in this regard, having only recently promulgated the non-binding UDHR in 1948.

That background partly explains the approach taken in the Refugee Convention: the protection of the individual balanced by the capacity to withdraw or deny that protection; and UNHCR's supervisory function under article 35, albeit without a forum before which to hold States to account, except insofar as other States would be willing to take cases before the International Court of Justice under article 38. During the almost 70 years of its operation, UNHCR has viewed interpreting the Convention as part of its article 35 supervisory function, while recognizing that Contracting States' courts would also interpret it. There has been a willingness by courts to consider UNHCR's views, but there has also been independent interpretation of the treaty as judges and other decision-makers have applied their own legal understanding and canons of interpretation.[1] When it is remembered that the Convention will often have been incorporated into domestic law, often in a language different from the original official English and French texts, and, generally, as part of a State's immigration control regime rather than as part of a *protection* framework, the scope for variation and disagreement is clearly huge—and that is before one notes that the Convention itself is not consistent in the language it uses when dealing with similar concepts.[2] In the areas of exclusion and national security, these factors are magnified. There is broad scope for differences in interpretation when the Convention uses phrases such as 'serious reasons for considering', 'reasonable grounds for regarding', 'serious non-political crime', 'particularly serious crime', 'danger to the security of the country', and 'national security or public order (*ordre public*)'. Furthermore, as explained below, article 1F can only properly be understood when analysed in the context of international criminal law and the international law of armed conflict.

The language used in articles 1F, 33(2), and 32 of the Refugee Convention is very different, yet much of the domestic case law fuses the concepts. This is not only because domestic legislation has not simply transposed the wording of the Convention and has mixed up ideas from the different provisions, but also because the provisions are wrongly perceived as serving a similar function, namely, lawfully removing refugees and asylum seekers from the State. Article 1F provides that the Convention shall not apply to persons with respect to whom there are serious reasons for considering that they have committed (a) war crimes, crimes against humanity, crimes against peace, (b) serious non-political crimes, or those who (c) are guilty of acts contrary to the purposes and principles of the UN Charter. Article 33(2) denies the benefit of *non-refoulement* to those convicted of a particularly serious crime who are a danger to the community of the country of asylum or where there are reasonable grounds to regard them as a danger to the security of that country, while article 32 prohibits expulsion from the country of asylum 'save on grounds of national security or public order'.[3] Implementation at the domestic level and the trans-jurisdictional borrowing of ideas in the case law render it very difficult to make a clear distinction in any analysis of exclusion and security issues as to whether certain facts will be treated as falling within article 1F or 33(2).[4] Therefore, while this chapter does not analyse the content of articles 33(2) and 32,[5] it recognizes the connections between these provisions. It should also be noted that UNHCR's separate treatment of each of these provisions leaves the 2003 UNHCR Guidelines on Exclusion failing to address all the issues in some domestic cases, as ideas from articles 1F, 33(2),

[1] Guy S Goodwin-Gill, 'The Search for the One, True Meaning…' in Guy S Goodwin-Gill and Hélène Lambert (eds), *The Limits of Transnational Law: Refugee Law, Policy Harmonization and Judicial Dialogue in the European Union* (CUP 2010).

[2] For example, consider the relationship between cessation under art 1C(5) and 'unable or unwilling to avail oneself of the protection' of the country of nationality in art 1A(2), let alone the different categorization of 'refugee' depending on which rights are being accorded in arts 12–33.

[3] On national security, see also arts 9 and 28.

[4] See Bertrand Ramcharan, *Human Rights and Human Security* (Brill 2002); David Forsythe, *Human Rights in International Relations* (4th edn, CUP 2017).

[5] See Chapter 50 in this volume.

and 32 are often fused in domestic practice.[6] States often regard these provisions as a suite of measures enabling the deportation of refugees, a view that has been enhanced and emboldened by those 2003 Guidelines with their retroactive application of article 1F(a) and 1F(c) where there are serious reasons for considering that there has been criminal behaviour, or activity falling within those sub-paragraphs after refugee status has been properly accorded under article 1A(2).[7]

This chapter explores how article 1F was initially understood, before considering its application in practice and the increasing intermingling of certain ideas: exclusion as pre-status and retroactive; the difficulties of conceiving of refugee status without the guarantee of *non-refoulement*; the overlap of the different phrases used in the Refugee Convention when dealing with crimes and the security of the country of asylum; and how crimes that are not particularly serious might yet indicate a danger to the security of the hosting State or be contrary to the purposes and principles of the United Nations, a threat to national security, or even simply a public order concern. In addition, standards of proof, sequencing, regional mechanisms, and complementary human rights protection regimes[8] add layers of complexity to the analysis. In sum, to focus just on exclusion, as much previous scholarship has done, misses the context in which these provisions are applied. As such, this chapter seeks to provide a more comprehensive framework for their analysis.

2. Background to Article 1F

Article 1F has been the object of much analysis and discussion over the past 20 years.[9] The 2003 Guidelines and their accompanying Background Note reflect in great part UNHCR's continuing view of the meaning of the provision.[10]

[6] UNHCR, 'Guidelines on International Protection No 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees', HCR/GIP/03/05 (4 September 2003) see also accompanying Background Note. And see *Abramov v Minister for Justice, Equality and Law Reform* [2010] IEHC 458.

[7] UNHCR (n 6) para 6. This is often coupled with the use of diplomatic assurances, which are utilized where international human rights law would protect the individual who has been excluded under art 1F, or denied the guarantee of *non-refoulement* under art 33(2), or simply made liable to expulsion under art 32 (but who should still benefit from *non-refoulement*).

[8] See Chapters 11 and 36 in this volume.

[9] See Yao Li, *Exclusion from Protection as a Refugee* (Brill 2017); Geoff Gilbert, 'Current Issues in the Application of the Exclusion Clauses' in Erika Feller, Volker Türk, and Frances Nicholson (eds), *Refugee Protection in International Law* (CUP 2003); Geoff Gilbert, 'Hierarchies, Human Rights and Refugees' in Erika de Wet and Jure Vidmar (eds), *Hierarchy in International Law: The Place of Human Rights* (OUP 2012); Geoff Gilbert, 'Exclusion is Not Just about Saying "No": Taking Exclusion Seriously in Complex Conflicts' in David J Cantor and Jean-François Durieux (eds), *Refuge from Inhumanity: War Refugees and International Humanitarian Law* (Brill 2014); Geoff Gilbert and Anna Magdalena Rüsch, 'Jurisdictional Competence through Protection: To What Extent Can States Prosecute the Prior Crimes of Those to Whom They Have Extended Refuge?' (2014) 12 Journal of International Criminal Justice 1093; Geoff Gilbert, 'Undesirable but Unreturnable: Extradition and Other Forms of Rendition' (2017) 15 Journal of International Criminal Justice 55; Geoff Gilbert and Anna Magdalena Rüsch, 'International Refugee and Migration Law' in Malcolm Evans (ed), *International Law* (5th edn, OUP 2018).

[10] UNHCR (n 6).

First and foremost, if an individual falls within article 1F, then that person cannot be a refugee. Since the benefits of the Refugee Convention are only accorded to refugees and, in varying degrees, to asylum seekers, the consequence is that none of the guarantees set out in articles 3 to 34 are available, most notably protection from *refoulement* under article 33(1).[11] This distinction is particularly significant because some rights under the Refugee Convention persist under article 33(2) and, more so, article 32.

According to the *travaux préparatoires*, two purposes were sought to be achieved through article 1F: that serious transgressions prior to entry should bar an applicant from refugee status, and that no one who had committed such crimes should escape prosecution through obtaining refugee status.[12] In international human rights law, which applies to everyone, exclusion is an alien concept.[13] Therefore, given that article 1F is a limitation on a humanitarian provision, it must be interpreted narrowly.[14] Moreover, as was stated by the Grand Chamber of the Court of Justice of the European Union (CJEU), article 1F is also exhaustive; there are no further grounds for exclusion.[15]

3. Content of Article 1F

Turning to the content of the sub-paragraphs of article 1F, it is worth noting the provision's interrelatedness with articles 33(2) and 32, even if there is no direct mapping.[16] Article 1F crimes would certainly fall within any set of particularly serious crimes, yet under article 1F there does not need to be a conviction by a final judgment or a con-

[11] Equally, the person will be outside the remit of UNHCR under paragraph 7(d) of the Statute of the United Nations High Commissioner for Refugees (adopted 14 December 1950) UNGA res 428(V) (1950 Statute).

[12] See Standing Committee of the Executive Committee of the High Commissioner's Programme, 'Note on the Exclusion Clauses', EC/47/SC/CRP.29 (30 May 1997) para 3; see also Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the 24th Meeting (27 November 1951) UN doc A/CONF.2/SR.24, 4–11 (statements of M Herment, Belgium and Mr Hoare, UK).

[13] See Chapter 36 in this volume.

[14] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/1P/4/ENG/REV.4 (1979, reissued 2019). See also *Gurung v Secretary of State for the Home Department* [2002] UKIAT 04870, para 151.1. *Gurung* was overruled in *JS (Sri Lanka) v Secretary of State for the Home Department* [2010] UKSC 15, [2011] 1 AC 284, but note para 2 on this point.

[15] Joined Cases C-391/16, C-77/17 and C-78/17 *M v Ministerstvo vnitra, X v Commissaire général aux apatrides et aux apartrides* [2019] OJ C255/2, para 76.

[16] There is not so much an overlap between these articles as a convergence of influences and interactions, like the wakes of three speedboats affecting three separate water skiers on some *Escher-ian* lake on three different planes—see MC Escher, 'Relativity' <http://www.mcescher.com/lw-389/> accessed 13 November 2019.

tinuing danger to the community,[17] but only serious reasons for considering that the applicant for refugee status, or the refugee, has committed such a crime or is guilty of such an act.

a. Article 1F(a)

Sub-paragraph (a) applies to war crimes, crimes against humanity, and crimes against peace 'as defined in the international instruments drawn up to make provision in respect of such crimes'. As such, it is emblematic of the complexities of exclusion: article 1F draws on other sub-disciplines of international law, that is, international criminal law and the international law of armed conflict, but how they should be applied vis-à-vis a restriction on a humanitarian provision in an international refugee law treaty is open to interpretation. Although there may have been issues regarding being 'defined in international instruments', particularly as regards crimes against humanity in relation to which there is no specific international convention,[18] they have been effectively resolved by the Rome Statute of the International Criminal Court,[19] even if not every Contracting State to the Refugee Convention is a party to the Rome Statute, and while at all times remembering that article 1F is part of a treaty for humanitarian protection. Crimes against humanity, for the purposes of article 1F, must fall within article 7(1) of the Rome Statute and be part of a widespread or systematic attack on a civilian population with knowledge of that attack. Likewise, a crime against peace would be classified as 'aggression' under article 8 *bis* of the Rome Statute. The same is not true, though, as regards 'persecution' in article 1A(2) of the Refugee Convention, because that is a provision focused on protecting the individual, not characterizing criminality—the use of the same word in article 7(1) of the Rome Statute does not indicate a common understanding.

[17] Although the Dutch Council of State, Administrative Jurisdiction Division, in *State Secretary of Security and Justice v X*, 201401560/1/V2 (16 June 2015) found that previous exclusion under art 1F proved the person had committed the crimes and that crimes of that nature meant that he constituted 'a direct threat to the Dutch legal order and the peace of mind of the Dutch people' and a 'present danger' for the purposes of art 27 Council Directive (EC) 2004/38 on the Right of Citizens of the Union and their Family Members to Move and Reside Freely Within the Territory of the Member States Amending Regulation (EEC) No 1612/68 and Repealing Directives 64/221/EEC, 68/221/EEC, 72/360/EEC, 73/148 EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEc and 93/96/EEC [02004] OJ L158/77. cf Joined Cases C-331/16 and C-366/16 *K v Staatssecretaris van Veiligheid en Justitie, HF v Belgische Staat* (CJEU, 2 May 2018) that held that previous exclusion of a member of the family could not automatically prove that their mere presence was a present and serious danger to the security of the State.

[18] See however International Law Commission, 'Fourth Report on Crimes against Humanity by Sean D Murphy, Special Rapporteur', UN doc A/CN.4/725 (18 February 2019) (referred to the Drafting Committee, 7 May 2019). Of course, genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 would count as a 1F crime against humanity.

[19] See Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (Rome Statute), art 25(3)(e).

As for war crimes, there would need to be some form of armed conflict for an applicant to be excluded for this reason,[20] distinguishing war crimes from crimes against humanity. The international law of armed conflict distinguishes between different types of armed conflict—international and non-international. Treaty-based war crimes are set out in the grave breach provisions of the Geneva Conventions of 12 August 1949[21] and Additional Protocol I of 1977.[22] However, article 1F(a) war crimes are not limited to those crimes. Grave breaches can only occur in international armed conflicts,[23] and neither common article 3 of the four Geneva Conventions of 1949 nor Additional Protocol II of 1977 explicitly provide for individual criminal responsibility in non-international armed conflicts.[24] However, since *Tadić*,[25] it has been accepted that breaches of either could give rise to individual criminal responsibility. Thus, given the principle of *nullum crimen sine lege*, an applicant should only be excluded if, under the international law of armed conflict or international criminal law, there are serious reasons for considering that she has committed a war crime, a crime against humanity, or aggression, as defined.

b. Article 1F(b)

The concept of the political offence comes from extradition law, which, during the nineteenth century, developed an exception for fugitive offenders where the crime for which their surrender was sought was political in character.[26] Overthrowing a government

[20] See *Prosecutor v Ljube Boškoski and Joran Tarčulovski*, Case No IT-04-82-A ICTY (19 September 2010) paras 19ff, especially para 22, dealing with art 3 of the ICTY Statute. The Appeals Chamber of the ICTY took into account, amongst many other things, the frequency of the fighting, its geographic scope, the use of heavy weaponry, the role of the ICRC, the mass displacement of persons, but also, interestingly, that the governmental forces were ordered to 'destroy terrorists' and that the Security Council condemned the 'terrorist activities', showing that there is no clear line in international law between armed conflict and terrorism.

[21] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 (First Geneva Convention); Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed forces at Sea (adopted 12 August 1949, entered into force 21 October 1951) 75 UNTS 85 (Second Geneva Convention); Geneva Convention relative to the Treatment of Prisoners of War (adopted August 12 1949, entered into force 21 October 1951) 75 UNTS 135 (Third Geneva Convention); Geneva Convention relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1951) 75 UNTS 287 (Fourth Geneva Convention).

[22] Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (Additional Protocol I).

[23] See *Duško Tadić aka 'Dule', Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction before the Appeals Chamber of ICTY*, Case No IT-94-1-AR72 ICTY (2 October 1995) especially paras 134, 137.

[24] Eg. Fourth Geneva Convention (n 21) art 3; Protocol Additional to the Geneva Convention of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (Additional Protocol II).

[25] *Duško Tadić* (n 23).

[26] See Geoff Gilbert, *Responding to International Crime* (Martinus Nijhoff 2006) especially ch 5.

was originally seen as the archetypal political offence.[27] Almost immediately, the scope of the political offence exemption was queried with respect to crimes of violence, as self-proclaimed alleged anarchists adopted 'propaganda by the deed'. Over the course of the twentieth century, courts in various jurisdictions developed the understanding of the political offence, often in response to fugitive offenders whose crimes were described as terrorist in nature.

While extradition and refugee status determination have diametrically opposed objectives—the former facilitating prosecution or punishment, the latter protection—in this regard they both address the same issue: is the crime in question political in character? Nevertheless, evidence for an extradition hearing is with a view to sending a person back to face trial where any crime would need to be proven beyond reasonable doubt; exclusion from refugee status is the final step in the process leading to deportation, so one should expect more evidence than is demanded for extradition cases.

The leading UK case on political offences relates to exclusion from refugee status. In *T v Secretary of State for the Home Department*,[28] the then House of Lords adopted the Swiss approach to political offences, one that looks for proximity to the ultimate goal of the organization to which the fugitive belongs and proportionality in seeking to achieve that goal: 'Homicide, assassination and murder, is one of the most heinous crimes. It can only be justified where no other method exists of protecting the final rights of humanity.'[29] Therefore, if there are serious reasons to consider that an applicant for refugee status has engaged in indiscriminate violence constituting a crime 'prior to [her/his] admission to that country as a refugee', then she would fall within article 1F(b) of the Refugee Convention and forfeit her/his protection under the treaty.

The overlap between serious non-political crime and particularly serious crime in article 33(2) is clear, but the focus must be on 'particularly', not 'non-political', since a particularly serious 'political' crime committed in the host State is, at one level, just another crime and, if committed vis-à-vis a third State, one that will likely, in practice, not be pursued against a refugee. 'Serious non-political crime' is peculiar to the Convention but is left undefined, but it ought to be interpreted in its context,[30] that is, it should be compared with war crimes, crimes against humanity, crimes against peace,

[27] *In re Castioni* [1891] 1 QB 149.

[28] *T v Secretary of State for the Home Department* [1996] UKHL 8, [1996] AC 742, 785–6 (Lord Lloyd).

[29] *In re Pavan* [1927–28] Annual Digest of Public International Law Cases 347, 349. cf *Watin v Ministère Public Fédéral* [1964] 72 ILR 614 (Swiss Federal Tribunal).

[30] See Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (Vienna Convention) art 31. Part of that context must be extradition law because art 1F(b) clearly draws on the concept of the political offence, that is, where a fugitive would not be extradited if their crime were deemed to be political in character—so, only if the crime is not political in character and is sufficiently serious should refugee status be denied. The political character ordinarily depends not so much on motive, but whether the crime was part, and in furtherance, of a political disturbance, not too remote from the ultimate goal of the organization to which the applicant belongs, and is proportionate; *T v Secretary of State for the Home Department* (n 28); *In re Nappi* [1952] 19 ILR 375 (Swiss Federal Tribunal); *Watin* (n 29); *Pavan* (n 29). Given that part of that test is that the crime in question ought not to be too remote from the ultimate goal of the organization to change the political environment in a State, then quite clearly these will be 'serious' just to pass that threshold.

and acts contrary to the purposes and principles of the United Nations in terms of seriousness, even if the context is wholly domestic. That several different States treat certain behaviour as a 'serious' crime is indicative that it should be regarded as potentially falling within article 1F(b).

c. Article 1F(c)

Sub-paragraph (c) excludes persons who are 'guilty of acts contrary to the purposes and principles of the United Nations'. Not all the purposes and principles could render an individual 'guilty' and, having regard to paragraph 7(d) of the 1950 Statute,[31] the drafters probably considered that it reflected article 14(2) of the UDHR (violations of international human rights law not amounting to crimes against humanity). Nevertheless, it has been interpreted more broadly and applied more widely than simply to persons in senior government positions, who might be recognized as having responsibilities vis-à-vis the Charter, and thus article 1F(c) excludes persons more generally.[32]

The case law on 'danger to the security' of the hosting State under article 33(2) has made direct analogies to article 1F(c), and this interconnectedness is significant. According to paragraph 6 of the 2003 Guidelines,[33] articles 1F(a) and 1F(c) can be applied to deny refugee status where it had previously been properly accorded.[34] Thus, a refugee could lose protection under article 1F(c) or article 33(2) on the same facts. Article 33(2), however, does not deny the refugee the protection of the Convention, and various rights persist after its application. That very overlap raises a concern, though, regarding the scope for domestic courts to apply the Refugee Convention, as filtered through domestic legislation that has fused articles 1F and 33(2) in a manner that undermines the guarantees set out separately in each article.[35]

At one level, it is good that 'danger to the security' of the hosting State is seen as parallel to article 1F(c) because 'guilty of acts contrary to the purposes and principles of the United Nations' ought to be seen as establishing a high threshold. Both are vague, however, and the case law on article 33(2) can be read to suggest that there has been an apparent equalization down.[36]

[31] See 1950 Statute (n 11).

[32] *Georg K v Ministry of the Interior* [1969] 71 ILR 284 (Austrian Admin Court); *Al-Sirri and DD (Afghanistan) v Secretary of State for the Home Department* [2012] UKSC 54, [2013] 1 AC 745.

[33] See UNHCR (n 6).

[34] See also *Othman (aka Abu Qatada) v Secretary of State for the Home Department* [2007] UKSIAC 15/2005, para 100.

[35] See *Canadian Immigration and Refugee Protection Act*, SC 2001, c 27, ch 1, ss 33–43.

[36] See *M47/2012 v Director General of Security* (2012) 251 CLR 1, 82 (Hayne J). See also *VV v Secretary of State for the Home Department* [2007] UKSIAC 59/2006 where, from the open evidence, virulent language in his will and two CDs with terrorist information was deemed sufficient.

d. Burden and Standard of Proof

The burden of proof is on the State to show that there are serious reasons for considering that the applicant is suspected of having committed the relevant crimes or acts that fall within article 1F. While the Refugee Convention does not set out any procedure for refugee status determination, given that it is generally accepted that the applicant must show she falls within article 1A(2) and that article 1F is a limitation on a humanitarian provision, the burden is on the State to present evidence to exclude someone who would otherwise qualify as a refugee.[37]

The 'serious reasons for considering that' test is less stringent than either 'beyond reasonable doubt' or even 'the balance of probabilities', the usual standards of proof applied by courts in criminal and civil litigation respectively. However, it 'sets a standard above mere suspicion'.[38] Even though the standard of proof is not 'beyond reasonable doubt', exclusion under article 1F is still associated with the attribution of criminal behaviour to an individual that entails very serious consequences, namely exclusion from refugee status. Thus, while the benefit of the *doubt* should in strict grammatical terms only attach to the beyond reasonable *doubt* test, such a narrow approach belies the commonly understood meaning of the phrase and undermines the accepted view that any limitation on a fundamental right should be interpreted restrictively.[39]

On that issue, how do the different standards of proof in articles 1F and 33(2) affect the protection of the individual? According to the existing jurisprudence, article 1F imposes a more demanding standard.[40] This poses some problems when one has regard to the text in the equally authentic English and French versions of the Convention: while the English text refers to 'serious reasons for considering that' and 'reasonable grounds for regarding', the French text refers to '*raisons sérieuses de penser que*' in article 1F, and to '*raisons sérieuses de considérer comme*' in article 33(2). Thus, at first blush, article 33(2) in the French text uses the same terminology as article 1F in the English text. Unfortunately, it is not that straightforward: in French, there is no difference between '*penser*' and '*considérer*' in this context and the use of different terms can be explained by the phraseology of the rest of the provision—'*penser que*' and '*considérer comme*'. That does mean, though, that the French text equates the standard of proof for articles 1F and 33(2). Nevertheless, the practice in Anglophone courts is to require a higher standard of proof for article 1F exclusion, even if that is not explicit in the French language version of the Convention.[41]

[37] See UNHCR (n 6) para 34. See also the requirements in art 32(2) of the Refugee Convention, where the consequences are not as serious.

[38] *Al-Sirri v Secretary of State for the Home Department* [2009] EWCA Civ 222, [2009] Imm AR 115, para 33; *JS (Sri Lanka)* (n 14) 39; *Al-Sirri and DD* (n 32) 75, following UNHCR (n 6) para 34.

[39] See UNHCR (n 14) paras 203–4; UNHCR (n 6). See also *Al-Sirri* (n 38) 27 (Sedley LJ).

[40] See Michael Bliss, '"Serious Reasons for Considering": Minimum Standards of Procedural Fairness in the Application of the Article 1F Exclusion Clauses' (2000) 12 (supp) IJRL 92.

[41] See *Al-Sirri* (n 38) para 33; *M47* (n 36) para 319. Our thanks are due to Professor Hélène Lambert on this point.

e. Participation

Article 1F refers to crimes or acts having been committed. Clearly, that covers direct perpetration. What further forms of participation in a crime, though, justify exclusion? Reference can be made to article 25 of the Rome Statute.[42] Command and superior responsibility suffice.[43] Attempts and conspiracies are enough to satisfy article 1F, but not mere membership of a group.[44] Three other potential forms of indirect participation might justify exclusion: joint criminal enterprise, complicity, and aiding and abetting, which cannot always be distinguished in practice.[45]

Joint criminal enterprises (JCEs) in international criminal law were the subject of much debate before the International Criminal Tribunal for the Former Yugoslavia (ICTY), with three different types eventually being recognized. The third type was the most controversial, as being too broad, and article 25(3)(d) of the Rome Statute adopts only the first two interpretations.[46] The logic must be that only those types of JCE should suffice to exclude individuals from protection, not the previous broader and more far-reaching type in JCE III.[47]

Complicity was a term used in the Nuremberg cases and the trials in the courts set up by the Allies in post-Second World War Germany and other occupied countries. It is undoubtedly the case that persons who were senior members of government, financiers, and industrialists were deemed complicit in the Nazi era war crimes. However, in all those cases, there was a direct link between the role of the complicit criminal and the crimes perpetrated. For instance, in *Bruno Tesch and Two Others*,[48] the accused were the principal suppliers of Zyklon B to the concentration camps in Nazi-controlled territories east of the Elbe.[49] This requirement is not settled in international criminal law, and exclusion hearings, which should be more protection-oriented, may or may not adopt it.

International criminal law on aiding and abetting is not clear. The ICTY adopted a singular and very restrictive approach. In *Prosecutor v Perišić*, the Appeals Chamber held 'that specific direction is an element of the *actus reus* of aiding and abetting', that is, that the aider and abettor acted specifically to further the crime, which is difficult to prove where they are remote from its place of perpetration.[50] Subsequently, in

[42] See Rome Statute (n 19). [43] ibid art 28. [44] See *JS (Sri Lanka)* (n 14) 38, 49.

[45] With respect to genocide, incitement should also be recognized, Rome Statute (n 19) art 25(3)(e).

[46] Rome Statute (n 19).

[47] An example of JCE III would be where an act by one of the perpetrators, outside the common plan, can still be considered a natural and foreseeable consequence of the common purpose and the perpetrator willingly took that risk, *Prosecutor v Ntakirutimana and Ntakirutimana*, Case No ICTR-96-10-A and ICTR-96-17-A (13 December 2004) paras 463–6.

[48] Case No 9, *Trial of Bruno Tesch and Two Others* (1–8 March 1946) UNWCC, 1 LRTWC 93, 103.

[49] Miles Jackson, *Complicity in International Law* (OUP 2015). See also Case No 10, *The United States of America v Alfried Krupp and Others* (Trials of War Criminals before the Nuremberg Military Tribunals, 1948); Case No 58, *Trial of Krupp von Bohlen and Others* (17 November 1947–30 June 1948) UNWCC, 10 LRTWC 69.

[50] Case No IT-04-81-A ICTY (28 February 2013) para 30 fn 76. See also paras 37–40 and 42. cf *Prosecutor v Šainović, Pavković, Lazarević and Lukić*, Case No IT-05–87A, ICTY (23 January 2014).

Prosecutor v Taylor,[51] the Appeals Chamber of the Special Court for Sierra Leone (SCSL) decided '475 … that the *actus reus* of aiding and abetting liability under Article 6(1) of the [SCSL] Statute and customary international law is that an accused's acts and conduct of assistance, encouragement and/or moral support had a substantial effect on the commission of each charged crime for which he is to be held responsible'. Given, however, this disagreement between the different courts and tribunals in the area of international criminal law, courts dealing with exclusion in relation to refugee status determination are entitled to apply the most appropriate approach when deciding whether the applicant has been involved in aiding and abetting. Reference to international criminal law is central to a coherent and informed approach, but the exclusion clause requires that refugee status determination adopt an autonomous understanding appropriate to the particular process.[52] Equally, the Supreme Court of Canada, in *Ezokola*, held that 'the factors will be weighed with one key purpose in mind: to determine whether there was a voluntary, *significant*, and knowing contribution to a crime or criminal purpose'.[53]

Given the lack of agreement and the complexity of the issues that turn on the specific wording of international criminal law instruments, it is proposed that 'committed' and 'guilty of' in article 1F of the Refugee Convention must be given an autonomous meaning that respects the principle that, since article 1F is a limitation on a humanitarian provision, it must be interpreted restrictively, namely, in favour of the applicant for refugee status.[54]

f. Proportionality

The final aspect of article 1F also highlights an issue pertinent to article 33(2): proportionality. Should there be a balancing exercise between the nature of the crime or acts for article 1F and the treatment risked in the country of nationality if the applicant for refugee status were to be returned? Academic literature and UNHCR suggest there ought to be.[55] At one level, proportionality is intrinsic to making a full assessment of all the facts of the claim before deciding whether or not to exclude. For example, while it might seem appropriate to exclude someone who shot at another person with the intent to kill, this

[51] Case No SCSL-03-01-A (26 September 2013) paras 466ff. See also ibid paras 2 and 4 (Joint Separate Opinion of Judges Meron and Agius).

[52] *Attorney-General (Minister of Immigration) v Tamil X* [2010] NZSC 107 para [32]–[39], [70].

[53] *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40, [2013] 2 SCR 678 para 92 (emphasis added). See also *AA-R (Iran) v Secretary of State for the Home Department* [2013] EWCA Civ 835, para 31, in relation to complicity: 'Once there is evidence that he made significant contributions to the acts of an organisation of whose malign activities he was aware, he is complicit in those acts.'

[54] See *R v Secretary of State for the Home Office, ex parte Adan and Aitseguer* [2001] 2 AC 477, 517 (Lord Steyn).

[55] UNHCR (n 6) para 24; UNHCR (n 14) para 156; UNHCR, 'Comments on the European Commission Proposal for a Qualification Regulation: COM (2016) 466' (February 2018) 20 <http://www.refworld.org/docid/5a7835f24.html> accessed 13 November 2019. See also Sibylle Kapferer, 'Exclusion Clauses in Europe—A Comparative Overview of State Practice in France, Belgium and the United Kingdom' (2000) 12 (supp) IJRL 195, 217; *SAM v BFF*, Swiss Asylum Board (27 November 1992); Gilbert (n 9) 450–5.

analysis might change when taking into account additional facts, such as, that only a superficial wound was caused, and that the perpetrator would fear being tortured and killed by extremist groups as well as the government if returned to her/his country of origin. Furthermore, the principle of *non-refoulement* is now recognized as customary international law,[56] and both international human rights law[57] and international criminal law have developed exponentially, with several UN anti-terrorism treaties prohibiting surrender where there is a fear of prosecution or punishment on grounds of race, religion, nationality, or political opinion.[58] However, case law weighs heavily against including a proportionality test, based, according to the courts, on a plain reading of the text of the Convention,[59] although sometimes that case is overstated.[60] Even so, the traditionalists asserting the so-called straightforward language of the Convention are not as traditional as they claim. Denmark, participating in the drafting process, argued that one needed to balance the seriousness of the crime against the persecution feared.[61] Nevertheless, as regards article 1F, the weight of jurisprudence from different jurisdictions is that there is no proportionality test.

4. Regional Variations

For UNHCR, other regional refugee instruments always have to be interpreted within the framework provided by the Refugee Convention.[62]

a. Africa

Articles I(4), I(5), and III of the OAU Convention are pertinent to this discussion. Paragraphs I(4) and I(5) are similar but not identical to article 1F of the Refugee

[56] Sir Elihu Lauterpacht and Daniel Bethlehem, 'The scope and content of the principle of *non-refoulement*: Opinion' in Feller, Türk, and Nicholson (eds) (n 9). See also Chapter 50 in this volume; Cathryn Costello and Michelle Foster, 'Non-refoulement as Custom and Jus Cogens? Putting the Prohibition to the Test' (2015) 46 Netherlands Yearbook of International Law 273. This is even more pertinent for proportionality in relation to article 33(2).

[57] *Chahal v UK*, App No 70/1995/576/662 (ECtHR, Grand Chamber, 11 November 1996) 73. See also International Law Commission (n 18) 49–52 regarding draft art 5 of the Draft Articles on Crimes against Humanity.

[58] See eg International Convention for the Suppression of Terrorist Bombing (adopted 15 December 1997, entered into force 23 May 2001) 2149 UNTS 256.

[59] See Joined cases C-57/09 and 109/09 *Bundesrepublik Deutschland v B and D* [2010] ECR I -10,979. cf *Al-Sirri and DD (Afghanistan)* (n 32) 16, and *Ra 2014/01/0154* (Austrian Supreme Administrative Court, 21 April 2015), both cited in UNHCR (n 55) 19.

[60] *B and D* (n 59) paras 109–11.

[61] Conference of Plenipotentiaries (n 12) 13. However, this is not the present Scandinavian stance. cf *Ra 2014/01/0154* (n 59) reasserting the Danish position set out in the *travaux préparatoires*.

[62] UNHCR (n 6) para 7; cf Marina Sharpe, *The Regional Law of Refugee Protection in Africa* (OUP 2018) ch 4. On regional protection generally, see Chapters 15 to 24 in this volume.

Convention. It is the differences that raise questions. The OAU Convention 'ceases to apply' if a person commits 'a serious non-political crime outside his country of refuge after his admission to that country as a refugee', or seriously infringes the purposes and objectives of the OAU Convention. Article I(5) effectively extends article 1F(c) to cover the purposes and principles of the African Union too. While article I(4)(f) looks, at first sight, like article 1F(b) of the Refugee Convention, it is more akin to the particularly serious crime limb of article 33(2). Unlike article 1F(b), it is not enough that there are merely 'serious reasons for considering that' the serious non-political crime has been committed by this refugee. The rest of the provision referring to the geographical location of the crime would indicate not so much that there is danger to the community of the country of refuge, but that the refugee is a threat to national security or public order. This is difficult to reconcile completely with the Refugee Convention, but it is possible to read it sufficiently narrowly. Sub-paragraph (g), on the other hand, has no direct correlation with the text of the Refugee Convention, but does reflect part of the *travaux préparatoires* on the purpose of article 1F generally: refugee status was to be protected from abuse by prohibiting it from being granted to undeserving cases, namely those who had committed serious transgressions prior to entry. Here, there is an intrinsic link 'between ideas of humanity, equity and the concept of refuge'.[63] As such, it is no great leap to exclude someone who has 'seriously infringed the purposes and objectives of [the OAU] Convention'.[64] As for article I(5), it does follow article 1F, except as regards sub-paragraph (c). Following the same basic principle, that the OAU Convention complements the Refugee Convention, someone applying under the OAU Convention should only be excluded if the purposes and principles of what is now the African Union that have been violated are in line with those of the United Nations.

Article III requires OAU Convention refugees to conform to the laws and regulations of the country of asylum and to 'abstain from any subversive activities against any Member State of the [AU]'. There is no individual consequence set out in the article for its violation, but 'subversive activities' could fall within article I(4)(g). Moreover, there are parallels with article 2 of the Refugee Convention and the concept could, on appropriate facts, be brought within the remit of article 1F(c), applied retroactively, or the danger to the security limb of article 33(2). Only if the subversive activities were to fall within article 1F(c) or article 33(2) of the Refugee Convention could a State use them to remove a refugee's protection under the OAU Convention. Regardless, like all the provisions that render the Convention inapplicable or remove the guarantee of *non-refoulement*, the State would still have to respect international human rights law. In *Organisation mondiale contre la torture, Association Internationale des juristes démocrates v Rwanda*,[65]

[63] See Standing Committee (n 12) para 3.
[64] UNHCR (n 6) fn 7.
[65] *Organisation mondiale contre la torture, Association Internationale des juristes démocrates, Commission internationale des juristes, Union interafricaine des droits de l'Homme v Rwanda*, African Commission on Human and Peoples' Rights, Comm Nos 27/8, 46/91, 49/91, 99/93 (October 1996).

the African Commission of Human Rights, applying the African Charter of Human and Peoples' Rights, prohibited the deportation of refugees accused of subversive activities within article III.

b. Europe

Europe has a complex set of multilayered legal regimes.[66] The Council of Europe's European Court of Human Rights does not apply the Refugee Convention, but it provides protection from *refoulement* under human rights law.[67] Where persons are not protected under the Refugee Convention, the court often deals with those who would otherwise be refugees. Usually, this is based on freedom from torture or inhuman or degrading treatment (article 3) or arbitrary deprivation of life (article 2), but family life (article 8), the right to liberty (article 5), fair trial (article 6), freedom of expression (article 10),[68] and freedom from expulsion for aliens (article 1, Protocol 7)[69] have all been prayed in aid. The court has also taken a strict line against diplomatic assurances that were being used to deport to the country of nationality under article 32, the assurance allegedly discounting the threat to life or freedom.[70] While the European Court of Human Rights has held that article 6 on the right to a fair trial does not apply to deportation or extradition proceedings,[71] it has held that, under article 13 on the right to an effective remedy, domestic courts cannot be overly deferential to the executive in carrying out a meaningful analysis of proportionality with respect to an expulsion order.[72] Akin to article 32(2) of the Refugee Convention, the court has established proper procedures for deportation hearings, as set out in article 1(2) of Protocol 7.[73] The Refugee

[66] See Geoff Gilbert, 'Europe, International Law and Refugees' (2004) 15 European Journal of International Law 963.

[67] See *Labsi v Slovakia*, App No 33809/08 (ECtHR, 15 May 2012) para 117, the court held that it was to decide simply 'whether that individual's deportation [is] compatible with the [ECHR]'. Note that while the court is limited to deciding cases as regards the Council of Europe Member States, the rights in the ECHR are mirrored in the ICCPR and the other regional human rights mechanisms, so the arguments are transposable. See below, 'serious harm' and subsidiary protection.

[68] See *R (on the application of Lord Carlile of Berriew QC and others) v Secretary of State for the Home Department* [2014] UKSC 60, [2015] AC 945 para 57.

[69] Protocol No 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 22 November 1984, entered into force 01 November 1988) ETS 117, art 1. See Chapter 36 in this volume.

[70] See *Saadi v Italy*, App No 37201/06 (ECtHR, Grand Chamber, 28 February 2008); *Othman* (n 34) 252, 276, 292, 490; for the Anglo-Jordanian MoU see 134–44. On diplomatic assurances generally, see Home Office, *Deportation with Assurances* (Cm 9462, 2017).

[71] *Maaoui v France*, App No 39652/98 (ECtHR, Grand Chamber, 5 October 2000); cf *QX v Secretary of State for the Home Department* [2020] EWHC 1221 (Admin).

[72] *Raza v Bulgaria*, App No 31465/08 (ECtHR, 11 February 2010) 63. In *Labsi* (n 67) 137, the court held that to be effective in deportation proceedings, starting a complaint under the ECHR must have a suspensive effect on domestic proceedings.

[73] *Geleri v Romania*, App No 33118/05 (ECtHR 15 February 2011) 44. Given that States can control entry to their territory and that criminal convictions can justify expulsion, the right to a family life under art 8 ECHR will generally not override exclusion under arts 1F, 33(2), or 32 of the Refugee Convention: see *Krasniqi v Austria*, App No 41697/12 (ECtHR, 25 April 2017) 46.

Convention is applied more restrictively and protection is denied or limited under article 1F, but international human rights law mitigates some of its harshness.

The European Union (EU) impacts directly on refugee protection through its Common European Asylum System (CEAS), particularly the Qualification Directive.[74] While the Qualification Directive claims in its preamble to be based on the Refugee Convention and Protocol, which form the cornerstone of international refugee protection,[75] it does not faithfully transpose the text, and this is pertinent to the discussion here. Articles 12 and 14 of the Qualification Directive aim to implement article 1F, but do so along with articles 33(2) and 32.[76] Article 12(2) repeats article 1F, but broadens the reach of sub-paragraph (b) on serious non-political crimes by extending the timeframe to permit exclusion until status has been determined, rather than only up to the point of entry to the territory of the country of asylum. One of the most egregious glosses concerns preambular paragraph 37, which states that belonging to or supporting an association that supports international terrorism could be a threat to national security: mere membership of an organization is not usually sufficient for exclusion.[77]

Paragraphs (4), (5), and (6) of article 14 are the most problematic. Paragraph (5) allows Member States of the EU to apply a provision before status has been decided, which, under the Refugee Convention, can only be used against recognized refugees. While there may be situations where an applicant for refugee status has committed a particularly serious crime and would be a danger to the community, it may seem redundant to carry out an article 1A(2) determination only to immediately remove the guarantee of *non-refoulement*. However, article 14(5) of the Qualification Directive allows States to deny refugee status to someone with respect to whom there are mere 'reasonable grounds for regarding him or her as a danger to the security of the Member State in which he or she is present'. The Refugee Convention excludes under article 1F(c) where there are 'serious reasons for considering that' the applicant for refugee status 'is guilty of acts contrary to the purposes and principles of the United Nations', a much stricter demand. Thus, paragraph (5) is a significant threat to protection.

[74] See EU Qualification Directive. See also UNHCR, 'Comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Beneficiaries of International Protection and the Content of the Protection Granted: COM(2009)551, 21 October 2009' (July 2010). See also European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection and for the Content of the Protection Granted and Amending Council Directive 2003/109/EC of 25 November 2003 Concerning the Status of Third-Country Nationals Who Are Long-Term Residents' COM (2016) 466 final; UNHCR (n 55).

[75] EU Qualification Directive, preambular paras 3 and 4.

[76] Article 17 does much the same for subsidiary protection from serious harm, but that will not be discussed in this chapter.

[77] See *JS (Sri Lanka)* (n 14).

Secondly, does 'status granted to a refugee' refer to article 1A(2) of the Refugee Convention or to refugee status as set out in article 2(e) of the Qualification Directive, leaving Refugee Convention status intact?[78] The importance of this is that article 33(2) leaves the person falling within the sub-paragraph as a refugee (unlike article 1F), whereas article 14(4) of the Qualification Directive apparently ends this status. This contradiction has been noted in domestic case law.[79] The individual would remain a refugee under the Refugee Convention and would remain, even within the EU, entitled to the guarantee of *non-refoulement*, unless they were to fall within article 1F as well. That is part of the reasoning behind the conjoined Belgian and Czech cases,[80] where the CJEU held that those whose Qualification Directive status was revoked or refused under article 14(4) and 14(5) would continue to benefit from all the Refugee Convention rights set out in article 14(6), as well as the rights accorded to 'refugees' in the Refugee Convention.[81] Article 14(6) holds that, even after losing Qualification Directive status, the rights in article 33 of the Refugee Convention (protection from *refoulement*) persist.

5. Conclusion

Exclusion is an unusual concept for the contemporary world of protection, where international human rights law applies to all human beings no matter what they might have done.[82] It is a relic of the immediate post-war era that international refugee law preserves. However, its limits must be recognized: those that were understood at that time, and those that are part of the progressive development of international refugee law since 1951. Even so, when thinking about the Refugee Convention, one needs to be aware of contemporary attitudes to those seeking to enter the territory of a State in circumstances

[78] See Pieter Boeles, 'Non-refoulement: Is Part of the EU's Qualification Directive Invalid?' (*EU Law Analysis*, 2017) <http://eulawanalysis.blogspot.com/2017/01/non-refoulement-is-part-of-eus.html?spref=tw> accessed 15 November 2019. Part of this debate turns on the parallel application of the EU Qualification Directive, and Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L348/98; see also Case C-562–13 *Centre public d'action sociale d'Ottignies-Louvain-la-Neuve v Moussa Abdida* (GC, 18 December 2014). To a large extent, this is a question of EU law and is not pertinent to the interpretation of the Refugee Convention.

[79] In *EN (Serbia) and KC (South Africa) v Secretary of State for the Home Department* [2009] EWCA Civ 630, [2010] QB 633, 62–5. See also *IH (s.72: 'Particularly Serious Crime') Eritrea v Secretary of State for the Home Department* [2009] UKAIT 00012.

[80] See *M v Ministerstvo vnitra* (n 15) paras 99–100.

[81] ibid para 105.

[82] See also Chapter 11 in this volume; Vincent Chetail, 'Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law' in Ruth Rubio-Marín (ed), *Human Rights and Immigration* (OUP 2014) 37; Jane McAdam, *Complementary Protection in International Refugee Law* (OUP 2007) ch 6.

that immigration law would not usually permit. Their entry is permitted because they qualify as refugees; States see article 1F, along with articles 33(2) and 32, as a way of preserving control of their own borders. Requiring a narrow interpretation of restrictions on humanitarian provisions has to be the proper approach towards article 1F and other constraints on article 1A(2), advancing arguments derived from human rights and international criminal law in the twenty-first century, alongside fundamental principles of criminal justice: benefit of the doubt, expiation, and constraining the scope of participation.

CHAPTER 40

WOMEN IN REFUGEE JURISPRUDENCE

CATHERINE DAUVERGNE

1. Introduction

The challenge of summing up the state of refugee law jurisprudence about women is difficult because it is profoundly disheartening. What began with a huge burst of energy and creativity in the final decade of the twentieth century has stalled spectacularly. The past three decades of feminist work in refugee law advocacy stand as a cautionary tale. While scholars, policymakers, decision-makers, and activists have occupied this terrain for some time now, the central dilemmas for women seeking protection from a risk of being persecuted are remarkably similar to those of the late 1980s. There have been very significant wins, of course, but also major losses. Each win contains its own slippage. Each new policy statement fosters its own exceptions. And against this backdrop, the number of women (and men) who need the protection of the Refugee Convention has increased astronomically.

An obvious starting point for a chapter such as this is to survey recent scholarship in this area. I focused in particular on the short interval since the collection that I published with Arbel and Millbank in 2014.[1] In broad brushstrokes, this survey highlighted two points: first, that the production of scholarship about women as refugee claimants has slowed;[2] and second that the issues being researched and written about are generally

[1] Efrat Arbel, Catherine Dauvergne, and Jenni Millbank (eds), *Gender in Refugee Law: From the Margins to the Centre* (Routledge 2014).

[2] A search of the Westlaw and Lexis-Nexis databases showed three and six articles written about women in refugee law in the period 1980 to 1989, in each respectively. This number increased over 10 times by the period 1990 to 1999 with 46 and 71 articles, respectively. The number of articles increased slightly in the period 2000 to 2010 with 40 and 87 and decreased in the period 2010 to 2019 with 34 and 69 articles, despite many more employed scholars at this time.

the same as those on offer since the 1990s. Furthermore, many leading scholars who have undertaken seminal work in this area have not published anything new on this topic in the past six years. There was a time when many potential new graduate students interested in refugee law wanted to write about women; this is no longer the case. We can imagine a scholarly landscape with these features if it were the case that the 'problem' that had animated scholarship and advocacy had been resolved. This is not the case. It appears that research about women in refugee law has ceased to be topical, compelling, or maybe even publishable.

This brief chapter attempts to unravel why these twinned trends in jurisprudence and scholarship have occurred. The explanation is multifaceted, and tells us a great deal about how refugee law works at its coalface—in individual status determination settings around the world. It is also the case that taking a step back from advocacy work, and looking instead at the trajectory of that advocacy over a quarter of a century, reveals that in refugee law doctrine a number of key decisions were made early on that probably contributed to the current desultory state of the jurisprudence. Finally, this examination demonstrates something about the nature of scholarly pursuits.

Importantly, the lack of progress that is central to this narrative is both challenged and confirmed by the difficulty of getting good data. With others, I have written about this problem before.[3] This is the principal caveat to my argument here. The lack of information is truly far-reaching. In most jurisdictions, it is impossible to obtain even basic data such as how many women claim asylum annually and on what grounds. From this baseline, the problems only get worse—there is no jurisdiction anywhere where a complete set of first instance decisions is publicly available; there are few jurisdictions where those decisions that are available come with reasons; there is little capacity to gender our understandings of access to the status determination procedures around the world that end up generating jurisprudence.[4] What is unknown overwhelms what we know. How, then, is it possible to conclude that progress has stalled? Could it be that we simply do not have enough information to know? Part of the answer is that we have stalled in the very basic enterprise of attempting to know more. A second part makes up the core of this chapter: the central debates about women in refugee law jurisprudence have scarcely shifted since becoming the forefront of refugee jurisprudence more than a quarter of a century ago.

Stagnated progress is not to say that decisions about women have not become central to refugee law jurisprudence. With Arbel and Millbank, I wrote in 2014 that women had indeed moved 'from the margins to the centre' of refugee law.[5] Ironically, this may be part of the explanation for stagnation. The broad arc of refugee jurisprudence has tended towards expanding categories of inclusion. This is a trend explored throughout this volume. Despite this trend, however, it is not the case that success rates in asylum proceed-

[3] Efrat Arbel, Catherine Dauvergne, and Jenni Millbank, 'Introduction' in Arbel, Dauvergne, and Millbank (n 1).

[4] See Chapter 3 in this volume.

[5] Arbel, Dauvergne, and Millbank (n 1).

ings have increased over time.[6] In the few jurisdictions where this query can be easily addressed, there is no evidence of expanded protection in terms of the numbers of asylum seekers whose claims are successful; rather, it is the categories that are expanding. This observation supports two possible explanations: either weaker and weaker cases have been brought forward over time, or decision-makers have become more and more exacting. Parsing this dilemma is not necessary to make this point—the answer could be a bit of both. What matters is that this is a very broad trend; it is visible now with the experience of over half a century of refugee decision-making, in every part of the world. That jurisprudence about women, too, fits this trend is not surprising. But it is instructive. It tells us something both about women in refugee law and about the productivity of liminal spaces to generate new outcomes.

This chapter follows the approach of the leading texts on refugee law doctrine by analysing elements of the refugee definition in turn, considering how each applies to women. I have left out some areas where useful things could be said about women for the sake of focusing squarely on jurisprudential developments.[7] I have also rearranged some of the more traditional treatments of the elements of the refugee definition to reflect where the heft of jurisprudence about women has been generated, or where the absence of jurisprudence has particularly gendered characteristics. As a result, the sections are: well-founded fear; being persecuted (divided into the subsections of 'serious harm' and 'State protection'); reasons for being persecuted; nexus; and exclusion. I am obviously not attempting to catalogue every jurisprudential development, which would certainly be impossible in such a short piece.[8] Rather, this structure is a useful rubric for summarizing trends, and is ideal for demonstrating a central part of my argument: that because *every* element of the refugee definition must be satisfied in order for a claim to be successful, there is a significant tendency for problems to slip from one definitional element to another as the jurisprudence advances. In other words, once it becomes settled law that women can fit in the category of 'membership in a particular social group', a

[6] See Catherine Dauvergne, Leonara Angeles, and Agnes Huang, *Gendering Canada's Refugee Process* (Status of Women Canada 2006). See also Tara Carmen, 'Canada's Acceptance Rate of Asylum Seekers is the Highest in 27 Years—Here's Why', *CBC* (7 February 2018) <https://www.cbc.ca/news/canada/asylum-seekers-overview-data-1.4503825> accessed 18 March 2020; UN Women, *Report on the Legal Rights of Women and Girl Asylum Seekers in the European Union* (2017).

[7] An important example here is the matter of 'alienage'. For a variety of well-known reasons (money, care responsibilities, etc) men are more easily able to travel to foreign countries than women in order to seek asylum. The fact that more men than women claim asylum around the globe contributes to masculinist biases in jurisprudence, but the topic of alienage itself has yielded little by way of gendered jurisprudence. A similar comment can be made about cessation. In Canada there has been a recent spate of cessation cases, many triggered by individuals returning to their home countries to care for aging parents. See further Chapter 3 in this volume.

[8] There are several sources which present jurisprudential compendia: Immigration and Refugee Board of Canada, 'Chairperson Guidelines 4: Women Refugee Claimants Fearing Gender-Related Persecution' (1996) (Canadian Guidelines); the website of Hastings' Centre for Gender and Refugee Studies is another *Centre for Gender and Refugee Studies* <https://cgrs.uchastings.edu/> accessed 18 March 2020.

series of contestations then emerge in another area such as 'nexus' or 'State protection'. This tendency for slippage has driven much jurisprudential growth.

2. Well-founded Fear

The traditional approach views the well-founded fear criterion as having a subjective and an objective element.[9] Despite this alleged bifurcation, the existence of a subjective fear is rarely if ever a hurdle for those seeking protection, and the weight of jurisprudence has been focused on objective assessments of whether fear is well-founded.[10]

At the broadest level, assessments of well-founded fear are gendered. While it is difficult to parse the reasoning, there seem to be two factors that account for this. In terms of the subjective assessment, a gendering affect likely occurs because the idea of subjective fear is intertwined with credibility. Over time, and in assessments in many Western countries, refugee decision-makers appear to find women more believable than they find men.[11] There is a persistent, if small, difference in the acceptance rates of women's claims in comparison with men's. While no one has done the work required to conclusively explain this, the explanation offered by many Canadian decision-makers—that women are simply more believable—has not been seriously challenged.[12] The more reliable objective aspect of well-founded-ness arguably also has gendered aspects because there is robust evidence that women's human rights are poorly recognized and poorly protected in many parts of the world.

This observation signals the irony which surrounds the jurisprudence of refugee women: a trope in which vulnerable women from 'less advanced' societies are rescued by Western decision-makers has been present within Western refugee law ever since women became prominent and distinct subjects of this law.[13] This trope has often served individual women well; and thus scholars and advocates have trod carefully in challenging it. It also points to the troubling absence of non-Western perspectives in refugee law—something that I reinforce here by assembling an overview of leading trends in the law—none of which reflect Global South decision-making in any way, as Global South decisions have not attained that odd legal status of 'leading'.

[9] See UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/1P/4/ENG/REV.4 (1979, reissued 2019). See also James C Hathaway and Michelle Foster, *The Law of Refugee Status* (CUP 2014) 91–2; Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (OUP 2007) 63–4.

[10] But see Hathaway and Foster (n 9) 92, 105–10.

[11] See Thomas Spijkerboer, *Gender and Refugee Status* (Ashgate 2000). See also Dauvergne, Angeles, and Huang (n 6); UN Women (n 6).

[12] Dauvergne, Angeles, and Huang (n 6) 52.

[13] See Audrey Kobayashi, 'Challenging the National Dream: Canada's Immigration Laws' in Peter Fitzpatrick (ed), *National, Racism, and the Rule of Law* (Dartmouth 1995). See also Spijkerboer (n 11).

There is one final point to be made in regard to gender and well-founded fear. The analysis of well-founded fear sometimes engages with the question of why a claimant has taken so long to bring the true basis of her claim forward, or has changed her story part-way through the process. There is much psychological evidence that people often need time and support to reveal their experiences of sexual violence.[14] This is true of men and women, of course. But overwhelmingly more women than men are victims of sexualized violence. Some of the guidelines on women refugees are attuned to this issue, and caution against adverse credibility conclusions on the basis of a 'late' revelation of sexualized violence, or an altered narrative.[15] Nonetheless, a changing story continues to be a basis of adverse credibility assessments. Like so many aspects of gendered refugee jurisprudence, while the issue is widely understood, it cannot be said that this persistent problem has been solved.

3. Being Persecuted

Persecution is the core of the refugee definition. It has been the focus of considerable jurisprudential attention, which has resulted in progressive expansion of the categories of persecution as refugee law's connections with human rights norms have deepened. It has also provoked a predictable response as a number of States have sought to limit the ambit of persecution through legislative or policy statements.[16] Since at least the 1990s, persecution has been understood to include two aspects: serious harm and a failure of the State to effectively protect an individual against that harm. Both of these aspects of being persecuted have provoked significantly gendered jurisprudence.

a. Serious Harm

A number of serious harms that affect women predominantly or exclusively have become well established as categories of being persecuted. Predominant among these is female genital mutilation (FGM), which has been the harm at the core of leading cases in many jurisdictions.[17] Other gendered harms that have a significant presence in

[14] See Diana Bögner, Jane Herlihy, and Chris Brewin, 'Impact of Sexual Violence on Disclosure During Home Office Interviews' (2007) 191 British Journal of Psychiatry 75; see also Jane Herlihy, Kate Gleeson, and Stuart Turner, 'What Assumptions about Human Behaviour Underlie Asylum Judgments?' (2010) 22 IJRL 351.

[15] See Canadian Guidelines (n 8). See also UNHCR, 'Guidelines on International Protection No 1: Gender-related Persecution within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees', HCR/GIP/12/01 (7 May 2002).

[16] See eg Migration Act 1958 (Cth) ss 5J (4)–(6) (Australia); and EU Qualification Directive ch 3, art 9.

[17] *Matter of Kasinga*, 21 I&N Dec 357 (BIA 1996); *Fornah v Secretary of State for the Home Department* [2006] UKHL 46, [2007] 1 AC 412.

refugee law include forced abortion,[18] forced sterilization,[19] rape,[20] forced marriage,[21] allegations of witchcraft,[22] being forced to comply (or punished for failing to comply) with cultural or religious conventions,[23] and domestic violence.[24]

This list is revelatory. It demonstrates both how extensive serious gendered harms are globally, and also how contested the terrain of gendered harm has been. FGM has become a paradigmatic category in refugee jurisprudence about women, in part because there has been no sustained argument that boys or men face the same harm. Despite the existence and cultural embrace of male circumcision, this argument has not (for very good reasons) taken hold in refugee law. Further, FGM lurks at the very dark edges of the Western imagination, an almost unspeakable violation. In this way, it fits what might be called the 'exotic paradigm' of gendered harm, and as such it reinforces the image of the Western State, or decision-maker, as saviour and protector of women from 'backwards' places. Indeed, it is helpful in understanding gendered harms as persecution to map both of these vectors: gendered exclusivity and exoticism.

In the case of harms such as forced sterilization, rape, or forced marriage, advocates and analysts thoughtfully draw attention to the fact that men are also victims of these crimes. The incidence of these harms demonstrates that in every society where they occur, women comprise the majority of victims. Even when the victim is male, the harm has gendered aspects which shape and alter it, sometimes making it harder for men to come forward or to seek help, sometimes making it uniquely psychologically damaging,

[18] Caselaw in this area relates primarily to particularly harsh enforcement in some regions of the PRC's former one-child policy, see *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225; *Cheung v Canada (Minister of Employment and Immigration)*, [1993] 2 FC 314, 102 DLR (4th) 214.

[19] *Chan v Canada (Minister of Employment and Immigration)*, [1995] 3 SCR 593, 128 DLR (4th) 21.

[20] *Matter of LR* concerned a woman who fled Mexico after she was raped at gunpoint and then kept in captivity by her rapist for 20 years, repeatedly raping and beating her, see Department of Homeland Security, 'Supplemental Brief Matter of L-R' (BIA 13 April, 2009) <https://cgrs.uchastings.edu/sites/default/files/Matter_of_LR_DHS_Brief_4_13_2009.pdf> accessed 20 March 2020.

[21] See Catherine Dauvergne and Jenni Millbank, 'Forced Marriage as a Harm in Domestic and International Law' (2010) 73 MLR 57. See also Catherine Dauvergne and Jenni Millbank, 'Forced Marriage and the Exoticization of Gendered Harms in United States Asylum Law' (2010) 19 Columbia Journal of Gender and Law 898. See also Younous Arbaoui, 'Deux Poids, Deux Measures: A Critical Frame Analysis of the Dutch Debate on Family-Related Asylum Claims' (DPhil thesis, Vrije Universiteit Amsterdam, 2019).

[22] See Jenni Millbank and Anthea Vogl, 'Adjudicating Fear of Witchcraft Claims in Refugee Law' (2018) 45 Journal of Law and Society 370. See also Sara Dehm and Jenni Millbank, 'Witchcraft Accusations as Gendered Prosecution in Refugee Law' (2018) 28 Social & Legal Studies 202.

[23] The case that spurred the development of the Canadian guidelines was that of a woman named 'Nada' by the press who came from Saudi Arabia and claimed refugee status in Canada in 1991 because she was rebelling against cultural and social norms for women in Saudi Arabia by refusing to wear a veil. She was denied refugee status and her application to the Federal Court was denied but she was eventually granted status in 1993 after the media began reporting on her story; Immigration and Refugee Board Decision, File no M91–04822 (24 September 1991).

[24] Efrat Arbel, 'The Culture of Rights Protection in Canadian Refugee Law: Examining the Domestic Violence Cases' (2013) 58 McGill Law Journal 729.

sometimes ensuring the harm is deployed as a weapon against gender non-conforming persons, especially those born biologically male. The fact that these gendered harms are not visited exclusively upon women troubles their fit into the complicated categorical matrix that is the refugee definition. This becomes clearer in the analysis of grounds for being persecuted and the nexus between those grounds and the risk of harm, but the problem begins here, in understanding how these harms are gendered. The careful work of demonstrating the falsity of a women-only analysis makes it more difficult for the woman-as-victim trope to function within refugee law. A particularly clear example of this problem is provided by the 1995 Supreme Court of Canada case of *Chan*,[25] where a male claimant from the People's Republic of China sought protection on the basis of a fear of forced sterilization. While the Court did not question that forced sterilization could constitute being persecuted, the majority agreed with the conclusion that the claimant was not credible.

The exoticization vector is equally important. One of the most vexing harms for Western decision-makers has proven to be domestic violence. At least one aspect of the problem is that women seriously harmed by intimate partners are commonplace in Western societies, and so-called 'best efforts' by governments and police to end this have been met with limited success. As with the gendered-exclusivity problem, this issue reveals itself more completely when analysing both the grounds for being persecuted and the nexus between grounds and harm, but it begins here with understanding the harm (and in this case, the question of State protection). A prominent example of this problem occurred in the United States, where Attorney General Jeff Sessions intervened in 2018 to overturn a ruling that domestic violence could constitute persecution for the purposes of asylum claims.[26] Millbank and I found in analysing forced marriage claims that exotic circumstances were more likely to coincide with accepted claims.[27] A number of factors may be at work here; partially this struggle to accept domestic violence as a mode of being persecuted may be related to a floodgates fear, partially it may be that it fails to conform to the 'backwards society' trope (are all societies backward?).[28]

An important twist on the gendered exclusivity and exoticization vectors is presented by the rising prevalence of witchcraft in refugee caselaw. A narrative of women being persecuted for witchcraft is centuries old in Western societies. Millbank, Dehm, and Vogl have scrutinized the refugee cases and discovered significant patterns. While men appear in these cases most often as victims of witchcraft as persecution, women face risks of being persecuted as witches.[29] Interestingly, however, in these refugee claims credibility is often the problem—the women bringing these claims are simply not believed. It may be that there is a limit to the exoticization factor, or that as more cases

[25] *Chan* (n 19). [26] *Matter of AB*, 27 I&N Dec 316 (AG 2018).

[27] Dauvergne and Millbank (n 21) 87–8.

[28] See Arbel (n 24). See also Siobhan Mullaly, 'Domestic Violence Asylum Claims and Recent Developments in International Human Rights Law: A Progress Narrative?' (2011) 60 ICLQ 459.

[29] Millbank and Vogl (n 22); Dehm and Millbank (n 22).

arise, more international human rights groups will produce third party accounts that will add strength to these claims. In either case, the fact that gendered effects are evident for both men and women means that witchcraft cases remain an important area to monitor.

Finally, the length of this brief summary of gendered harms is itself a risk. There has been so much attention to the complexity of analysing gendered harms, that scant attention has been paid to how an analysis of non-gendered harms—which continue to make up the bulk of refugee law—may affect women differently. This risk was pointed out as early as 2000, by Spijkerboer in his seminal text *Gender and Refugee Status*.[30] It was also observable in my global study of political opinion claims.[31] In all of the scholarly production on women in refugee jurisprudence over the past three decades, I have not been able to locate even one article that focuses on harms that do not have a particularly gendered aspect. The various guidelines on women making refugee claims generally limit their attention to gender-related persecution, sometimes adding an unexplored mention of the potential relevance of gender in other aspects of refugee law or even the refugee definition.[32] The assumption that lies behind these mentions is that in the case of any serious harm that is not specifically gendered, women and men will be similarly situated. This is surely an assumption worth testing.

b. State Protection

When a third party is the agent of persecution, international refugee law can step in to provide surrogate protection to an individual as long as their own State is unable or unwilling to do so. Furthermore, State inability or unwillingness to protect can provide the vital nexus element of the refugee definition. For women seeking refugee protection, the issue of State protection has been persistently problematic. The principal reason for this is the gap between State laws that protect women from violent harms and the willingness or efficacy of enforcement of those laws. A secondary issue is the question of internal protection alternatives within a claimant's home State. Both of these aspects have gendered features.

A person is not required to seek State protection if it is reasonable to assume that it would be unlikely to be forthcoming.[33] Despite this straightforward and long-established principle, in the case of women seeking protection this point appears to require constant reaffirmation. The basic terrain of the State protection requirements

[30] Spijkerboer (n 11).

[31] Catherine Dauvergne, 'Towards a New Framework for Understanding Political Opinion' (2016) 37 Michigan Journal of International Law 243.

[32] See eg UNHCR Guidelines on gender-related persecution, UNHCR (n 15) para 2, and *Canadian Guidelines* (n 8) pt A.

[33] Hathaway and Foster (n 9) 323–30.

was well-mapped in two early leading cases involving claims made by Pakistani women for whom the police had refused to provide protection.[34] In the words of Lord Hoffman:

> What makes it persecution in Pakistan is the fact that according to evidence which was accepted by the special adjudicator in Mrs Islam's case and formed the basis of findings which have not been challenged, the State was unwilling or unable to offer her any protection. The adjudicator found it was useless for Mrs Islam, as a woman, to complain to the police or the courts about her husband's conduct. On the contrary, the police were likely to accept her husband's allegations of infidelity and arrest her instead. The evidence of men was always deemed more credible than that of women.[35]

Despite this guidance from pinnacle courts, the tendency of some decision-makers (especially in cases of domestic violence) is to review legal protections 'on the books' and to find that these are sufficient to ensure protection, even when there is evidence to the contrary.[36] This tendency reflects the concomitant standard within State protection jurisprudence that State protection need not be perfect. Furthermore, and following the exoticization theme, the fact that no State in the world is able to guarantee protection against domestic violence sometimes fuels a line of reasoning that privileges State efforts at protection (which are easier to document) over the results of those efforts (which are always more difficult to evince).[37] The jurisprudential standard of 'effective' or 'adequate' or 'sufficient' protection leaves a considerable space for slippage on this point, and the fact that courts have not settled on a single description of the standard is itself instructive.

By contrast, the matter of internal protection alternatives may be gendered in a way that advantages women, or that at least does not create disadvantage. This is so because many of the guidelines on protecting women call attention to the difficulties women may have in moving to a different part of the country, such as living in an area where they do not have a male relative to protect them, bringing children with them in a difficult move, or issues with safe travel.[38] It is impossible to say whether these guidelines are followed in routine decision-making, but they do provide clear direction. In the work

[34] *Minister of Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1 (*Khawar*); *R v Immigration Appeal Tribunal, ex parte Shah* [1999] UKHL 20, [1999] 2 AC 629 (*ex parte Shah*).

[35] *Ex parte Shah* (n 34) 648.

[36] The Australian case of *AZAAR v Minister for Immigration and Citizenship* [2009] FCA 912 is a notable example; coming seven years after the *Khawar* ruling, the Refugee Review Tribunal had persisted in elevating legal protections on the books in Vanuatu to the status of actual protections.

[37] See Arbel (n 24). See also Karen Musalo, 'A Tale of Two Women: The Claims for Asylum for Fauziya Kassindja, who fled FGC, and Rody Alvarado, a Survivor of Partner (Domestic) Violence' in Arbel, Dauvergne, and Millbank (n 1). See also Pia Zambelli, 'Problematic Trends in the Analysis of State Protection and Article 1F(a) Exclusion in Canadian Refugee Law' (2011) 23 IJRL 252, 266–7.

[38] Canada Guideline*s* (n 8); United Kingdom, Immigration Appellate Authority, 'Asylum Gender Guidelines' (2000); United States Immigration and Naturalization Service, 'Considerations for Asylum Officers Adjudicating Asylum Claims for Women' (1995).

Labman and I did reviewing use of the Canadian guidelines, internal protection did not appear to be a significant barrier to women's claims.[39]

4. Reasons for Persecution

Complexities and contours of the 'particular social group' category have dominated judicial and scholarly debate about women refugees. As is the case with gender-related modes of persecution, one consequence of this debate is that there is little analysis of how women are distinctly at risk of being persecuted on the basis of race, religion, nationality, or political opinion, and a concomitant assumption that, in relation to these other grounds, women and men are identical. Both of these intertwined trends contribute to the picture of refugee jurisprudence about women.

The core of the debate about particular social groups has always been whether 'women', as such, are a particular social group. As 'particular social group' is not defined in the Refugee Convention, various interpretational trends have governed over time and in varying jurisdictions. The three principal, sometimes overlapping, definitions have focused on: (a) innate and unalterable characteristics;[40] (b) social perceptions;[41] and (c) protected characteristics.[42] In almost all circumstances, a category labelled simply 'women' would fit within each of these approaches.

The origin of the problem with this straightforward approach seems to have been a desire by some decision-makers to craft a narrower category in order to resist an implicit or explicit floodgates argument. This has resulted in a series of contorted and unusual particular social groups such as 'single women living in a Muslim country without the protection of a male relative'.[43] Identifying groups in this way risks running into one of

[39] Shauna Labman and Catherine Dauvergne, 'Evaluating Canada's Approach to Gender-Related Persecution—Revisiting and Re-embracing "Refugee Women and the Imperative of Categories"' in Arbel, Dauvergne, and Millbank (n 1) 264. It is impossible to broadly generalize from this small sample, given that the larger matter that we found was that the well-respected Canadian guidelines appear to be infrequently explicitly referenced.

[40] This approach was most prominently launched in *Canada (Attorney General) v Ward*, [1993] 2 SCR 689, 103 DLR (4th) 1.

[41] This approach was most prominently launched by the High Court of Australia in *Applicant A* (n 18).

[42] This approach was most prominently launched by the *Acosta* case: *Matter of Acosta*, 19 I&N Dec 211, 232 (BIA 1985), the analysis being that social groups must be somehow similar to the other listed grounds using the *ejusdem generis* interpretation principle. A detailed analysis of how the particular social group jurisprudence is applied to women was published by Michelle Foster in 2012 'The "Ground with the Least Clarity": A Comparative Study of Jurisprudential Developments relating to "Membership of a Particular Social Group"', UNHCR Legal and Protection Policy Research Series, PPLA/2012/02 (2012), and with further observations, summarized in 2014 (in our edited book). Michelle Foster, 'The "Ground with the Least Clarity": A Comparative Study of Jurisprudential Developments relating to "Membership of a Particular Social Group"' in Arbel, Dauvergne, and Millbank (n 1).

[43] Canadian Guidelines (n 8) fn 11.

the firmest aspects of the jurisprudence: that a group will not qualify if it is defined solely by the persecution its members face.[44] While a number of leading courts, and UNHCR, have clarified that 'women' can indeed be a particular social group, this has not stopped first instance decision-makers from persisting in this practice.[45] In addition to sometimes creating a group that is then impermissible within refugee law, this approach can also create problems with the nexus and being persecuted analyses. Indeed, Foster summed up the central problem with this jurisprudence by stating that this approach imports all aspects of the refugee definition in the group definition.[46] The resistance to a broadly defined social group has, in some jurisdictions, been made explicit in policy statements. For example, the Dutch Aliens Act Implementation Guidelines state that women are not considered to be a social group on the basis of gender because the composition of the group is too diverse.[47] It seems, therefore, that the problem of uncertainty over whether women as such will be considered to be a particular social group is intransigent. This is a marked contrast with groups defined on the basis of sexual orientation or non-binary gender identity, with respect to which Western decision-makers do not appear to focus their floodgates fears at this definitional point, nor do they seem to have any concern about social cohesion.[48]

The one other ground that has attracted some gendered analysis is that of political opinion. This typically arises in the case of women who resist traditional social or religious mores and are at risk of punishment because of that resistance. Thus, for example, the desire to wear Western clothes, or to reject religious traditions, or sometimes to reject an arranged or forced marriage, is interpreted as a political opinion. This approach conforms with the generally very broad political opinion jurisprudence, but there are very few cases in comparison with those under the particular social group ground.[49] It is difficult to explain why this is the case given the intransigence of the particular social group jurisprudence. It may simply be that decision-makers and policymakers are unwilling to shift a significant number of women's cases to a ground where the analysis has generally been more inclusive. Another plausible

[44] This is discussed at length in *Applicant A*, and was briefly noted in the *Ward* ruling. It has been reflected in many other decisions, and is noted in the UNHCR (n 15) para 11. See *Ward* (n 40); *Applicant A* (n 18) 263–6 (McHugh J).

[45] Random examples from Canadian decision-makers in the past year include: 'unaccompanied women in Pakistan' (*Thornton v Canada (Citizenship and Immigration)*, [2019] FC 792, 306 ACWS (3d) 816); 'educated single Tamil women who speak English' (*Rasaiah v Canada*, [2019] FC 632, 306 ACWS (3d) 827); 'young women, old women, and women living in precarious housing in Haiti' (*Jacinthe v Canada (Citizenship and Immigration)*, [2019] FC 1558, 313 ACWS (3d) 808).

[46] Foster 2014 (n 42) 28.

[47] Netherlands, Vreemdelingencirculaire 2000 (Aliens Circular) art C.2.3.2 (Dutch Guidelines).

[48] The same Dutch Guidelines, ibid, that express this concern about women, address sexual orientation (art C.2.3.2) without any concern about social cohesion. See also Jenni Millbank, '"The Ring of Truth": A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations' (2009) 21 IJRL 1. See also Laurie Berg and Jenni Millbank, 'Developing a Jurisprudence of Transgender Particular Social Group' in Thomas Spijkerboer (ed), *Fleeing Homophobia: Sexual Orientation, Gender Identity and Asylum* (Routledge 2013).

[49] See Dauvergne (n 31). This is the preferred approach in the Dutch Guidelines (n 47) art C.2.3.2.

explanation is that there is still widespread reluctance to view women's resistance to social and religious mores as political acts.

The grounds of race, religion, and nationality have not attracted sustained or high-profile gendered analyses. This is curious given that punishment for refusal to follow religious norms could certainly be interpreted as a risk of being persecuted on the basis of religion within the established jurisprudence. This evinces that decision-makers have worked to confine women's refugee claims to the particular social group category, which has been highly problematic for precisely those claims.[50]

5. Nexus

The issue of nexus within the refugee definition merits particular attention because many of the persistent issues in this jurisprudence have particular relevance to women's claims. The textual anchor for the nexus requirement is the 'for reasons of' clause within the definition, and this has led some decision-makers down the path of a complicated causation analysis, with all the attendant potential to draw on complex causation principles from other areas of the law. At its core, nexus in refugee law functions as a limiting principle: it ensures that not all those at risk of being persecuted fall within the definition, only those whose risk is discriminatory in a way that links directly to human rights principles.

The logic of limitation is, as we have seen above, central to refugee jurisprudence about women under both the categories of persecution and particular social group. In the analysis of nexus, where the limiting principle is most directly situated within the definition, this impetus has had its most extensive effects.

A straightforward recitation of the major struggles over the meaning of 'for reasons of' illustrates this well.[51] These include: the question of whether the risk is related to a single ground, or instead to two or more grounds that are interrelated; the question of whether the perpetrator and the victim share a common protected characteristic; the question of whether a person may be at risk on the basis of a defined ground even if not all persons sharing that ground are at risk; the question of whether a protected category needs to be a minority numerically; and the question of whether the persecutor must have a nefarious motive. Each of these issues has resonated through the jurisprudence spurred by women's claims. To understand how this is so, it is vital to keep in mind that while convoluted causation analyses do recur in lower level decision-making, the high-

[50] Foster asserts that the problem of importing other aspects of the refugee definition analysis into the parameters of particular social group is unique to gender claims. Foster 2014 (n 42) 28.

[51] I am borrowing from Hathaway and Foster's summary of these points to organize this overview, see Hathaway and Foster (n 9) 363–90. The topics they identify, which I do not consider to have had a special impact on women's cases, are the question of whether the individual has correctly identified the ground and the question of whether the claimant must actually possess the characteristic that a potential persecutor attributes to her.

est common law courts, UNHCR handbook, and some of the guidelines in the civil law sphere, have settled the question that the 'for reasons of' clause should be understood as a requirement that the protected characteristic (in this case, being a woman) explains (at least in part) the risk of being persecuted.[52] Also, the risk of being persecuted may be either because of State action or because of an absence of State protection, and thus the nexus requirement will be satisfied by a connection to either factor. With all this in mind, the ways in which women's claims have animated the sites of contestation become evident. The matter of one or many grounds of risk finds a home in assessments where women face risks because of their gender as well as their place within their family or their religious group. The 'common protected characteristic' issue has arisen again and again in FGM cases, where the practice in many locales is carried out by women. The lack of uniform risk criterion arises in analyses of State protection in questions of domestic violence and sexual violence. The floodgates problem appears endemic to women's claims.

The question of whether a perpetrator must have a nefarious and specific motivation deserves some distinct attention because the United States has taken a different direction than the rest of the world on this matter and does require proof of a potential persecutor's intention.[53] This is especially problematic for women who are, for example, at risk because of a State's inability to provide effective protection in matters of domestic violence or sexual assault. When specific motivation is required, inability or unwillingness often fails women when the analysis can focus on the ostensibly protective laws on the books.

Finally, the nexus criterion directly troubles the thorny question of defining a particular social group. The idea that the protected ground must somehow include only those who face a uniform risk appears to account for at least some of the very convoluted groups that recur in this jurisprudence. With nexus in the picture, interrelationships of the various aspects of the refugee definition come fully into focus. In order for a claimant to be successful, each aspect of the definition must be satisfied. The capacity for decision-making concerns (for example, a floodgates concern) to slip from risk of being persecuted, to State protection, to a group definition, to nexus, sometimes creates an ever-receding horizon for those seeking protection.

6. Exclusion

A brief note about exclusion under the provisions of article 1F is worthwhile because refugee exclusion is starkly gendered. The twenty-first century has seen a sharp uptick in the

[52] UNHCR (n 9) paras 66–7. *Ex parte Shah* (n 34) 652–4; *AC (Russia)* [2012] NZIPT 800151, para 77. Dutch Guidelines (n 47) art 2.1.

[53] Following the US Supreme Court's decision in *Immigration and Naturalization Service v Elias-Zacarias*, 502 US 478 (1992).

use of the Convention's exclusion clauses.[54] Although, yet again, a clear statistical portrayal is not available; the evidence that is available shows that these clauses are applied overwhelmingly to men.[55] The scant evidence is bolstered by the fact that this trend aligns with our stereotypical imagery of who is likely to be a terrorist, a serious criminal, or a war criminal. In other words, it is likely *both* that more men than women fit within the exclusion clauses *and* that, as is the case with well-founded fear, women are beneficiaries, in this aspect of refugee law, of stereotypes which portray them as victims lacking agency.

When Lindy and I began our research project in 2016, we could not locate a single article looking specifically at how women have fared under article 1F.[56] Our own conclusions called for serious attention to how these clauses are being applied to women, but it is fair to say that our work was not able to do more than call attention to the issue, and to substantiate that there were a number of important concerns apparent even on the surface.[57] Looking only at the Canadian jurisprudence, we found that gender appeared to account for some aspect of almost every single one of the 51 cases we were able to locate. Our two most astonishing findings were also sharply gendered. The first of these was that the single largest category of excluded women was those who were barred from refugee protection because they had taken their own children with them when fleeing. The second mind-boggling finding was that, of the five claims that were accepted despite an exclusion argument being raised, three of those claimants had committed some of the most serious crimes in the entire dataset: manslaughter, robbery, and sexual interference.[58]

While guidelines on gender-related persecution, or even on women in a more general sense, have little or nothing to say about article 1F, exclusion jurisprudence confirms that refugee law is problematically gendered even in areas where stereotyping generally serves women's claims.

7. Conclusions

Explaining why progress in refugee status jurisprudence about women has stalled is complex and important. In broad brushstrokes, there are three factors that have contributed.

[54] See Asha Kaushal and Catherine Dauvergne, 'The Growing Culture of Exclusion: Trends in Canadian Refugee Exclusions' (2011) 23 IJRL 54. See also James Simeon, 'Complicity and Culpability and the Exclusion of Terrorists From Convention Refugee Status Post-9/11' (2010) 29(4) RSQ 104; Obi Okafor, *Refugee Law After 9/11: Sanctuary and Security in Canada and the United States* (University of British Columbia Press 2020). See also Molly Joeck, 'Refugee Protection at the Edges: Exclusion for Serious Criminality in Canada Since Febles' (LLM thesis, University of British Columbia 2018).

[55] Catherine Dauvergne and Hannah Lindy, 'Excluding Women' (2019) 31 IJRL 1.

[56] Since that time, see Katherine Shelley, 'The Exclusion Trap for Women Refugee Claimants Who Escape Domestic Violence with Children' (2019) 55 Osgoode Hall Law Journal 756.

[57] Dauvergne and Lindy (n 55)26–9.

[58] ibid 9–11, 18, 28.

Certainly, one part of the explanation lies in the fact that refugee determinations are made every single day somewhere in the world. The majority of these first instance decisions are made by decision-makers who do not have legal training, who have comparatively little refugee law-specific training (two weeks is considered utterly extravagant), and who work in pressure-filled situations facing high volumes and short timelines. A further factor is that oversight of first instance decisions is scant and decision-makers have independence. These two factors tend to have an inverse relationship: in prosperous Western countries where more extensive oversight of first instance decision-makers is possible, those on the frontlines tend to have more institutionally protected independence; in cases where decision-makers have less training and less role-based protection, the situations are often much more overwhelming, and oversight is simply impossible. This constellation of factors means that while apex courts and government policy makers have resolved a significant number of the problematic issues in ways that are supportive of women's protection needs, these directions often do not 'trickle down' to where they matter most. A crystalline example of this is provided by Arbaoui's analysis of claims based on risk of forced marriage.[59] Even though forced marriage claims ought to be among the simplest facts to analyse because of the myriad human rights instruments that address the topic, and because State protection is almost universally ineffective, these claims continue to be routinely rejected, very often by decision-makers who seem not to understand the facts.

A second aspect of the explanation is found in key features of the jurisprudence. The two most important of these are the acceptance early on of a variety of fragmented and incoherent 'particular social groups' and the effects that stereotyping has had, especially in the areas of 'well-founded fear' and exclusion. Early advocacy efforts about women in refugee law did devote considerable time to asserting that a ground such as 'gender' or even 'sex' ought to be added to the refugee definition itself. This pursuit was countered by those who felt, quite likely correctly, that asking States to open up the Refugee Convention was simply not worth the risk that it might cause a serious erosion in protection.

Accepting convoluted particular social groups, and failing to challenge the serious gendered stereotypes imbedded in the law, were not bad ideas. Indeed, they were approaches that provided protection to women all over the world. And a successful challenge to either of these ideas may not have been possible. Still, with hindsight we can observe how these directions have created a problematic legacy. The failure to firmly and fully settle the idea that 'women' are a particular social group has not only kept this question perpetually alive, it has also engendered jurisprudential gymnastics that continue to overflow into analyses of State protection and nexus. If gender were a category like religion or political opinion, much of this could be curtailed. It may also have limited the need to make the most of the protective umbrella that is created by stereotyping women as victims. A clear statement that women are in fact recognized *ab initio* as a category of potential victims, would have created a space in which it would not have posed so many

[59] Arbaoui (n 21).

jurisprudential risks to argue overtly against discursive victimization. It would have been ever so slightly more possible to advocate for women on the basis of equality.

The idea of a jurisprudential difference of this sort is, of course, a complete fantasy. Not least because refugee jurisprudence relies very heavily on inequality at its core. But reflecting on what this dream might look like is useful because it provides the basis for understanding what is going on in this jurisprudence, as well as what is at stake in pursuing a change.

The third factor that helps to understand the stagnancy is found in the overlapping terrain of advocacy and scholarship. For those of us who have been working, and arguing, in this space since the outset, it is not insignificant that the scholarly terrain has changed very little. This is empirically observable, with the exception of some wholly new topics like witchcraft and exclusions (which have in common that they deal with very small numbers of cases), the topics that scholars are writing about in the second decade of the twenty-first century are largely not new. In the corridors of the ivory tower, this work, therefore, risks being labelled unoriginal and therefore not publishable or, if publishable, not important, and not career advancing. It is no wonder that scholars move on to other things. A further and more intangible factor is that scholars have the privilege of pursuing intellectual challenges. The challenge here is significant, but no longer intellectually novel.

The advocacy side of the equation is more nuanced and more dire. Advocates (or scholars with their advocacy hats on), are much less likely to put aside an important issue because there are no new ideas left. But advocates are faced with a vastly altered terrain for refugee law over the past quarter-century. There are so many battles to be fought. Refugee law is surrounded by securitization and populism, both of which are growing unchecked. These forces have brought myriad challenges to refugee law, and it has required renewed and sustained advocacy in most Western liberal democracies simply to preserve the core commitments of refugee law. These commitments have lost ground in Western States. Any number of issues have rivalled protecting women as priorities for refugee advocates, even before 2015 arrived and the crisis in global asylum seeking increased so dramatically that the word crisis fails to capture it.

Lastly, the alchemy of the liminal space deserves comment. It is not a case of ancient magic to remark that the most generative growth in refugee jurisprudence occurs at its edges; this phenomenon is both logical and easy to see. When the challenge of bringing women within refugee jurisprudence was new, changes occurred at a steady pace. Where alchemy comes in is when we try to understand how to preserve the edgy-ness. The newer challenge of protecting LGBTIQ+ claimants—women and men and non-binary persons—has generated much more that is new in the past decade than any work about women. It is instructive in this regard that most countries have not refreshed their guidelines on women or on gender-related persecution in the past 10 years, and that notable exceptions (Norway in 2012 and Australia in 2015) appear to have been undertaken in part to address specifics related to LGBTIQ+ claims. But similar expansion has not taken place with regard to transgendered individuals, or to tackle issues like witchcraft. Furthermore, neither of these two areas seems to be just around the corner for policymakers or decision-makers. Most would assume that transgendered people are 'taken care of' (isn't that what T means?) by precedents addressed to sexual orientation. And witchcraft, surely that's infinitesimally irrelevant?

I would argue that both of these responses amount to failure of imagination. They also mirror very closely the response of anonymous reviewers to the first research grant application that Millbank and I submitted to develop a database study of refugee claims by lesbians and gay men in the late 1990s. Predicting where the next generative liminal space will emerge requires alchemy.

Attempting to explain why progress for women within refugee jurisprudence has stalled produces some useful insights. It is less clear whether any of these could constitute steps towards renewing the promising trajectory of the 1990s. Rather, I hope that there is some value in stating clearly and at some length that the work here is not yet done.

CHAPTER 41

REFUGEE CHILDREN

JASON POBJOY*

1. Introduction

In 2019, the recorded global refugee population was 26 million people,[1] of whom approximately half were children.[2] This included more than 150,000 unaccompanied and separated refugee children.[3] These are chilling statistics. There are approximately 13 million children who have been compelled to flee their home country, search for protection, and navigate administrative and legal processes that are oriented towards adults. Most children who flee will spend most, if not all, of their childhood away from their original home. Once they have fled, they face further rights violations.[4] In the past two years, refugee children have been separated from their families at the United States border,[5] and arbitrarily detained and deprived of medical care in Australia's offshore processing facilities.[6] It is estimated that more than half of the world's school-age refugee children do not get an education,[7] and millions are exposed to preventable and

* The author thanks the editors for their helpful comments on earlier drafts, and Sarah Dobbie for her research assistance.

[1] UNHCR, 'Global Trends: Forced Displacement in 2019 (2020) 2. [2] ibid 19. [3] ibid 46.

[4] For an excellent discussion, see Jacqueline Bhabha, *Child Migration and Human Rights in a Global Age* (Princeton University Press 2014).

[5] See eg Amnesty International, 'USA: Policy of Separating Children from Parents is Nothing Short of Torture' (19 June 2018) <https://www.amnesty.org.au/usa-policy-of-separating-children-from-parents-is-nothing-short-of-torture/> accessed 22 May 2020.

[6] See eg Human Rights Law Centre, 'Statement at the 39th Session of the UN Human Rights Council' (18 September 2018).

[7] UNHCR, 'Refugee Education in Crisis: More Than Half of the World's School-Age Refugee Children Do Not Get an Education' (30 August 2019) <https://www.unhcr.org/en-au/news/press/2019/8/5d67b2f47/refugee-education-crisis-half-worlds-school-age-refugee-children-education.html> accessed 22 May 2020.

infectious diseases in overcrowded camps, reception centres, and poor quality accommodation.[8]

International law affords all refugee children special protection, under both the Refugee Convention and, of particular significance, the Convention on the Rights of the Child (CRC). The CRC recognizes children as independent rights-bearers, entitled to a comprehensive set of civil, political, social, economic, and cultural rights that are designed to cater for their specific needs. The rights set out under the CRC apply to all children, wherever they find themselves, without discrimination. Evidently there is a significant protection gap. This chapter briefly traces the development of international law relating to refugees and to children, before addressing six key issues: first, the notion of childhood and the difficulties in proving age; secondly, the application of the refugee definition to children; thirdly, the extent to which the CRC is capable of affording independent and more appropriate forms of protection status for children; fourthly, a refugee child's entitlement to appropriate protection and humanitarian assistance (article 22 of the CRC); fifthly, the availability of durable solutions; and finally, family reunification. The chapter concludes with some brief observations on the need for future research and scholarship.

2. The International Legal Framework

A refugee child's entitlement to special care and protection has long been a feature of international law. It has been repeatedly affirmed by the UN General Assembly, the UN Committee on the Rights of the Child (UNCRC), and UNHCR.[9]

The Refugee Convention is age-neutral, and remarkably contains no express reference to, or provision for, refugee children.[10] However, the need to prioritize the special protection needs of children is reflected in the summary of conference proceedings appended to the Refugee Convention, which provides for '[t]he protection of refugees who are minors, in particular unaccompanied children and girls, with special reference to guardianship and adoption'.[11]

The CRC was the first international instrument to set out the full range of civil, political, social, economic, and cultural rights specifically applicable to children. It is the

[8] See eg Save the Children, 'Millions of Refugee and Displaced Children in Overcrowded Camps as Coronavirus Spreads Globally' (18 March 2020) <https://www.savethechildren.net/news/save-children-millions-refugee-and-displaced-children-overcrowded-camps-coronavirus-spreads> accessed 22 May 2020.

[9] For details, see Jason Pobjoy, *The Child in International Refugee Law* (CUP 2017) 14–15.

[10] The only specific references to children in the Refugee Convention are in article 4 (which accords to refugees 'freedom as regards the religious education of their children') and article 17(2)(c) (which concerns the effect on an adult refugee's right to employment where he or she 'has one or more children possessing the nationality of the country of residence').

[11] Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons (25 July 1951) UN doc A/CONF.2/108/Rev.1, Pt IV.

most widely ratified human rights treaty, with the US being the only country not to have ratified it (although it has signed it). It applies to 'each child within [a States party's] jurisdiction' and prohibits any discrimination 'irrespective of the child's or his or her parent's or legal guardian's . . . birth or other status.'[12] During its drafting, the drafters repeatedly acknowledged the special protection needs of children. Although the first draft contained no express provision relating to refugee children, in 1981 the Danish delegate proposed such a provision, resulting in the inclusion of what is now article 22. Article 22(1) provides that refugee children and children seeking refugee status, whether accompanied or unaccompanied, must 'receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.'

UNHCR has consistently drawn on the CRC as a guide for its policies and practices. Its 1993 policy on refugee children characterized the CRC as 'a comprehensive framework' both for its States parties and as 'a normative frame of reference to UNHCR's action.'[13] UNHCR's Executive Committee has repeatedly affirmed its 'fundamental importance', calling upon UNHCR 'to continue to integrate fully the rights of the child into its policies and programmes'.[14] UNHCR's 2009 guidelines on child asylum claims emphasize that the substantive and procedural aspects of the assessment of a child's application for refugee status should be informed by the CRC.[15] The UNCRC has also issued a relevant General Comment which makes similar points.[16]

3. A Threshold Question: Who Is a 'Child'?

Prior to considering the issues relating to refugee children, there is a threshold question as to who is to be treated as a 'child'. Article 1 of the CRC defines a child as 'every human being below the age of eighteen years unless under the law applicable to the child, major-

[12] CRC, art 2(1).

[13] UNHCR, 'UNHCR Policy on Refugee Children', EC/SCP/82 (6 August 1993) para 17. This was followed by a revised set of operational guidelines on refugee children in 1994: UNHCR, *Refugee Children: Guidelines on Protection and Care* (UNHCR 1994).

[14] UNHCR Executive Committee (ExCom) Conclusion No 84 (XLVIII), 'Conclusion on Refugee Children and Adolescents' (1997). See also ExCom Conclusion No 107 (LVIII), 'Conclusion on Children at Risk' (2007).

[15] UNHCR, 'Guidelines on International Protection: Child Asylum Claims under Article 1A(2) and 1F of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees', HCR/GIP/09/08 (22 December 2009) para 1 (2009 Guidelines).

[16] UN Committee on the Rights of the Child (UNCRC), 'General Comment No 6 (2005): Treatment of Unaccompanied and Separated Children outside Their Country of Origin', UN doc CRC/GC/2005/6 (2005) para 74 (GC6).

ity is attained earlier.'[17] This explicit age-based definition gives rise to two issues. The first is whether 18 years will always be an appropriate cut-off point. Although there are benefits in having a clear rule, there will be certain circumstances where flexibility is necessary. So, for instance, decision-makers have acknowledged the dangers of drawing inflexible distinctions when defining age-based grounds for a 'particular social group'. As the England and Wales Court of Appeal has observed, 'persecution is not respective of birthdays' and 'there is no temporal bright line across which the risks to and the needs of the child suddenly disappear'.[18] Similarly, an assessment of what is in a child's best interests must consider the long-term effects that a decision may have, beyond the child's 18th birthday. The need for a forward-looking examination is impossible to reconcile with the approach adopted by some States, including the United Kingdom, of granting children temporary protection solely for the duration of childhood. Such an approach gives rise to an enforced state of limbo, requiring children to live with a constant fear that they will be removed as soon as they reach adulthood.

A second issue relates to the well-documented 'culture of disbelief' that has developed in the context of assessing a child's age.[19] As a consequence of the additional rights that may apply to children, a number of States have implemented particularly draconian age-assessment practices and have made attempts to delay the child's application processes, such that they attain the age of 18 prior to any protection decision being taken (referred to as 'ageing out'). Although an age assessment may be appropriate in certain circumstances, it is imperative that any such assessment is compatible with the rights set out under the CRC, including, in particular, articles 3 and 22. As UNHCR has observed, an age assessment must: be conducted in a safe, child- and gender-sensitive manner with due respect for human dignity;[20] form part of a comprehensive assessment that considers both physical and psychological maturity;[21] and take into account the child's ethnic and cultural background.[22] Children must be given clear information about the purpose and process of the age assessment procedure in a language they understand, and a qualified independent guardian must be appointed to advise the child.[23] In addition, age assessments should never be used as a matter of routine,[24] and individuals claiming to be under the age of 18 should be regarded as children and benefit from the rights of a child 'unless this would be clearly unreasonable.'[25] Where doubt remains regarding a child's age, an applicant must always be given a liberal benefit of the doubt

[17] See generally David Archard and John Tobin, 'Article 1: The Definition of a Child' in John Tobin, *The UN Convention on the Rights of the Child: A Commentary* (OUP 2019) 21–40.

[18] *KA (Afghanistan) v Secretary of State for the Home Department* [2013] 1 WLR 615, para 18.

[19] See eg Gregor Noll, 'Junk Science? Four Arguments against the Radiological Age Assessment of Unaccompanied Minors Seeking Asylum' (2016) 28 International Journal of Refugee Law 234.

[20] 2009 Guidelines (n 15) para 75. See also GC6 (n 16) para 31(a).

[21] ibid. See also GC6 (n 16) para 31(a); UNHCR, 'Observations on the Use of Age Assessments in the Identification of Separated or Unaccompanied Children Seeking Asylum' (1 June 2015) para 9(i).

[22] UNHCR (n 21) para 9(v).

[23] 2009 Guidelines (n 15) para 75.

[24] UNHCR (n 21) para 9(ix). Indeed, age assessments should 'only be used in cases when a child's age is in doubt'. See 2009 Guidelines (n 15) para 75; GC6 (n 16) para (31)(i).

[25] UNHCR (n 21) para (9)(vi).

and assumed to be a child.[26] Any policy or practice which allows for and/or encourages 'ageing out' will infringe articles 3 and 22 of the CRC.

4. The Application of the Refugee Definition to Children

In order to be a refugee for the purposes of the Refugee Convention, a child must satisfy each element of the refugee definition set out in article 1A(2). There are no exceptions or qualifications that apply to children. Like adults, children must demonstrate that they are outside their country of origin, and have a well-founded fear of being persecuted which is causally connected to one of the five enumerated forms of civil or political status: race, religion, political opinion, nationality, or membership of a particular social group. Refugee status will not be available if they can re-avail themselves of protection in their home State, if they have secured durable protection elsewhere, or if they have committed a crime that excludes them from refugee protection. There is a significant body of jurisprudence addressing each of these elements, particularly in the Global North.[27]

The refugee definition has traditionally been interpreted in an adult-focused way. More recently, and in part because of the arrival of increasing numbers of unaccompanied refugee children in host States, decision-makers have started to focus greater attention on the specific needs and vulnerabilities of children. The discussion that follows is a very brief overview of some of the key issues that may arise in determining a child's claim for refugee status under the Refugee Convention, or under the comparable regional regimes that adopt similar definitions.[28]

An important limit in the Refugee Convention is that a child must be outside his or her country of origin in order to be considered a refugee. This excludes internally displaced children. This is to be contrasted to article 23(4) of the African Charter on the Rights and Welfare of the Child, which provides that the protections afforded to refugee children or children seeking refugee status apply 'mutatis mutandis to internally displaced children whether through natural disaster, internal armed conflicts, civil strife, breakdown of economic and social order or howsoever caused'.[29]

In order to satisfy the well-founded fear requirement, an applicant must demonstrate both subjective fear and an objective forward-looking risk of being persecuted. The requirement to prove subjective fear can be particularly problematic for children, who

[26] GC6 (n 16) para (31)(i).

[27] For a comprehensive overview, see James C Hathaway and Michelle Foster, *The Law of Refugee Status* (2nd edn, CUP 2014); and Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, OUP 2007).

[28] The summary that follows is based in part on Jason Pobjoy, 'Article 22: Refugee Children' in Tobin (n 17) 825–32.

[29] African Charter on the Rights and Welfare of the Child (adopted 11 July 1990, entered into force 29 November 1999) OAU doc CAB/LEG/24.9.49, art 23(4).

may be unable to articulate or even apprehend a future risk of harm. If the child is unable to do so, a strict insistence on the demonstration of subjective fear may mean that a child's refugee claim will be rejected even though there is an objective risk of harm. In order to avoid this, decision-makers have developed a variety of strategies to circumvent the Refugee Convention's purported insistence on evidence of subjective fear. The first is to impute fear from the child's parent: '[w]hen the parent or caregiver of a child has a well-founded fear of persecution for their child, it may be assumed that the child has such a fear, even if s/he does not express or feel that fear.'[30] The second is to dispense with the subjective requirement altogether in cases involving children: where 'a child is unable to express fear when this would be expected or, conversely, exaggerates the fear . . . decision makers must make an objective assessment of the risk that the child would face'.[31]

A child will be a refugee only if he or she is at risk of a form of harm that satisfies the 'being persecuted' threshold. The phrase 'being persecuted' is undefined in the Refugee Convention, but it is widely understood as requiring evidence of the 'sustained or systemic violation of basic human rights demonstrative of a failure of State protection'.[32] Many children will be threatened with a form of persecutory harm that is similar or identical to that faced by adults: for instance, a risk of death, torture, cruel, inhuman or degrading treatment, kidnapping, rape, or other forms of sexual assault. However, there are cases where the individual's status as a child will be critical. First, there are cases where the nature of the persecutory harm is such that it can only be inflicted on children, such as infanticide, underage military recruitment, forced child labour, forced underage marriage, child pornography, domestic child abuse, child prostitution, corporal punishment, deprivation of a primary education, and separation from a parent. Secondly, there are cases where the objective underlying risk is similar or identical for an adult and a child, but by reason of a child's heightened sensitivity and developmental needs, the child will suffer a greater degree of harm. In such cases, the applicable standard remains the same ('being persecuted'), but that standard may be more easily satisfied in claims involving children.

The CRC has a particularly important role to play in identifying those forms of harm that satisfy the persecutory threshold in claims involving children.[33] The rights protected under the CRC are tailored to take into account the reality that children experience harms in different ways from adults. The CRC thus provides a principled means for adapting the persecutory threshold to take into account a child's heightened sensitivities and distinct developmental needs. As the Federal Court of Canada has stated:

> If the CRC recognizes that children have human rights and that 'persecution' amounts to the denial of basic human rights, then if a child's rights under the CRC are violated in a sustained or systemic manner demonstrative of a failure of state protection, that child may qualify for refugee status.[34]

[30] 2009 Guidelines (n 15) para 11. See eg *Chen Shi Hai v MIMA* (2000) 201 CLR 293, para 4.

[31] 2009 Guidelines (n 15) para 11. See also GC6 (n 16) para 66.

[32] James C Hathaway, *The Law of Refugee Status* (Butterworths 1991) 104–5. For an overview of the widespread endorsement of this definition, see Hathaway and Foster (n 27) 185, 196–7.

[33] See generally Pobjoy (n 9) 101–56.

[34] *Kim v Canada (Minister of Citizenship and Immigration)* [2011] 2 FCR 448, paras 51, 74.

Both the UNCRC and UNHCR have also issued guidance that promotes interaction between the 'being persecuted' element of the refugee definition and the CRC. In its 2009 Guidelines, UNHCR made clear that '[i]n determining the persecutory character of an act inflicted against a child, it is essential to analyse the standards of the CRC and other relevant international human rights instruments applicable to children.'[35]

In assessing whether the 'being persecuted' standard has been met, it is also necessary to consider the availability of State protection. It is well-established in the case law that there can be a failure of State protection even where the risk emanates from a private actor, provided that there is evidence that the State will not or cannot respond to the risk. This is particularly important in claims involving children, where the agent of persecution will frequently be a non-State actor.[36] It will generally be inappropriate for a decision-maker to draw an inference about the availability of State protection from the fact that a child has not previously sought protection from State authorities.[37] A child cannot be expected to approach the State for protection if it would be impractical, futile, or otherwise unreasonable for them to do so.[38] Finally, in assessing whether a child has an internal protection alternative in her country of origin, a decision-maker must have regard to the child's age, and, in particular, to whether relocation would be in the child's best interests.[39]

A child must also demonstrate that the risk of 'being persecuted' arises 'for reasons of' at least one of the five enumerated grounds in the Refugee Convention. Three of the grounds have given rise to particular issues for children: political opinion, religion, and membership of a particular social group. While there has been a tendency for decision-makers to treat children as incapable of expressing political views or engaging in political activity,[40] the reality is that children can be politically active and targeted because of that activity.[41] An interesting recent development in the US has been the increased reliance on the 'political opinion' ground in claims brought by children who have resisted gang recruitment in their home country.[42] Regarding religion, a child may be at risk of being persecuted not only because of what the child believes, but also because of what the child does *not* believe. So, for instance, a child may be at risk because he or she has refused to engage in mandated religious education, undergo traditional religious prac-

[35] 2009 Guidelines (n 15) para 13. See also GC6 (n 16) paras 74, 59.

[36] A child at risk of domestic violence may therefore satisfy the refugee definition if the country of origin has failed to satisfy its protective obligations required under article 19 of the CRC.

[37] 2009 Guidelines (n 15) para 39.

[38] *Zhu v Canada (Minister of Citizenship and Immigration)* 2001 FCT 884, para 28.

[39] 2009 Guidelines (n 15) para 53–7; *RA (AP) v Secretary of State for the Home Department* [2011] CSOH 68, para 25.

[40] Heaven Crawley, '"Asexual, Apolitical Beings": The Interpretation of Children's Identities and Experiences in the UK Asylum System' (2011) 37 Journal of Ethnic and Migration Studies 1171.

[41] 2009 Guidelines (n 15) para 11. See eg *Salaam v INS*, 229 F 3d 1234, 1238 (9th Cir, 2000).

[42] See eg Harvard Immigration Refugee Clinic Program, 'Brief of *Amici Curiae* Harvard Immigration and Refugee Clinical Program and Other Immigration Rights Advocates in Support of Petitioner', filed in *Fuentes-Colocho v United States Attorney General* (19 November 2013).

tice, or submit to other religion-inspired restrictions or demands.[43] Membership of a particular social group has proven the most significant, but also the most challenging, ground for children.[44] Decision-makers have recognized particular social groups defined in whole or in part by a child's age. The most straightforward route is to define the group exclusively by reference to a child's age. In Canada, for instance, decision-makers have recognized 'children',[45] 'minors',[46] and 'minor children'[47] as particular social groups. The second, more common method is to define the group by reference to the child's age plus some other characteristic (such as 'unaccompanied children', 'orphaned children', 'abandoned children', 'girl children', 'children with a disability', 'hei haizi',[48] 'gay, bisexual, and transgender children', and 'children resistant to gang-recruitment'). This approach is appropriate where it is an intersection of factors, including the child's age, that explains the reasons why the child will be exposed to a risk of being persecuted if returned to his or her country of origin.[49]

The exclusion clauses in article 1F of the Refugee Convention also apply to children, but can only do so where a child has reached the age of criminal responsibility.[50] For children over the minimum age, 'the emotional, mental and intellectual maturity of any child ... would need to be evaluated to determine whether s/he had the mental capacity to be held responsible for a crime within the scope of Article 1F.'[51]

Article 12 of the CRC has a particularly important role to play in the refugee status determination process, mandating that children have a right to be heard in 'any judicial and administrative proceedings affecting [them]'.[52] This provides a principled basis for enhancing the visibility of children in the refugee status determination process, particularly for accompanied children who are very often subsumed into a parent's claim without any independent assessment of their particular circumstances. UNHCR guidelines

[43] See generally 2009 Guidelines (n 15) paras 42–4; *Refugee Appeal Nos 76083, 76084 and 76085* [2008] NZRSAA 58.

[44] 2009 Guidelines (n 15) paras 48–52; Hathaway and Foster (n 27) 449–51.

[45] See eg *X v Canada (Immigration and Refugee Board)*, 2001 CanLII 26988 (CA IRB) 25, noting that '[t]here is considerable case law to the effect that "children" can be considered a particular social group.'

[46] See eg *X (Re)*, 2003 CanLII 55285 (CA IRB) 6; *Khadra Hassan Farah* (IRB, 10 May 1994).

[47] See eg *T93-09636, T93-09638 and T93-09639* (IRB, 26 January 1994) 9. A similar approach can be seen in New Zealand: *Refugee Appeal Nos 76494 and 76495* (RSAA, 23 November 2010) para 76.

[48] This means 'black child' and refers to children born outside of China's former One Child policy, or more generally to children who are not registered in the national household registration system.

[49] A child may also be at risk because of his or her family membership; for instance, because his or her family is at risk of being targeted by external forces because of the status or activities of a family member, or, increasingly, where the risk derives from inside the family itself (eg cases of domestic violence). Decision-makers have had no difficulty in finding that the family constitutes a particular social group: Hathaway and Foster (n 27) 445–9.

[50] Article 40 of the CRC requires States to set a minimum age of criminal responsibility, although there is no universal minimum age.

[51] 2009 Guidelines (n 15) para 61; UNHCR, 'Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees' (4 September 2003) para 91. See also *R (on the Application of) ABC (A Minor) (Afghanistan) v Secretary of State for the Home Department* [2011] EWHC 2937, para 33.

[52] CRC, art 12(2).

state that in any decision regarding refugee status, children should be afforded a *liberal* benefit of the doubt.[53] What does this mean in practical terms? If a child presents a claim that is, taking into account the child's age and developmental capacities, 'on balance, capable of being believed',[54] this should be sufficient for the purposes of establishing refugee status.

5. The CRC as a Source of Protection Status

There have been calls in recent years to rethink the way that one assesses whether a child is entitled to protection in a host country. Goodwin-Gill has convincingly argued that no 'useful purpose is served by forcing the child asylum seeker through the process of refugee status determination, or by requiring the child... to show that he or she has a well-founded fear of persecution', arguing instead that the best interests principle codified in article 3 of the CRC provides a more appropriate basis for assessing the protection needs of children.[55] This section examines two such child-specific forms of protection. The first is the child-specific *non-refoulement* obligation that is implicit in (at least) articles 6, 37, and 38 of the CRC. The second is article 3 of the CRC, which requires that 'in all actions concerning children... the best interests of the child shall be a primary consideration.'

The UNCRC has stated that a child must not be returned to his or her country of origin where there are 'substantial grounds for believing that there is a real risk of irreparable harm to the child'.[56] Although the Committee has not provided an exhaustive definition of what constitutes 'irreparable harm', it has stated that the concept includes the harms contemplated under articles 6 (right to life, survival, and development), 37 (right to liberty and freedom from torture and cruel, inhuman or degrading treatment), and 38 (underage military recruitment) of the CRC.[57] These child-specific *non-refoulement* obligations cast a wider net than the *non-refoulement* provisions under other general human rights treaties, such as the ICCPR and CAT.[58] In the same way that

[53] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/1P/4/ENG/REV.4 (1979, reissued 2019) para 219. See also GC6 (n 16) para 71.

[54] UNHCR, 'Note on Burden and Standard of Proof in Refugee Claims' (16 December 1998) para 11.

[55] Guy S Goodwin-Gill, 'Expert Roundtable Discussion on "The United Nations Convention on the Rights of the Child and Its Application to Child Refugee Status Determination and Asylum Processes": Introduction' (2012) 26 Journal of Immigration, Asylum and Nationality Law 226.

[56] GC6 (n 16) para 27. Similar to the ICCPR, this derives from a State's obligation to 'respect and ensure the rights set forth in the [CRC]': CRC, art 2(1).

[57] GC6 (n 16) paras 27–8.

[58] See Chapter 36 in this volume; Başak Çali, Cathryn Costello, and Stewart Cunningham, 'Hard Protection through Soft Courts? *Non-Refoulement* before the United Nations Treaty Bodies' (2020) 21 German Law Journal 355.

the Refugee Convention must be interpreted and applied to take into account the specific circumstances of refugee children, so, too, must the *non-refoulement* obligations take into account the reality that children may be at risk of irreparable harm in a wider range of circumstances than adults.

There is also a compelling argument that the best interests principle enshrined in article 3 of the CRC may preclude the removal of a child to her country of origin, notwithstanding the fact that the child is not eligible for protection under the Refugee Convention or any of the more traditional *non-refoulement* obligations, including those noted above.[59] In this regard, article 3 has the potential to create a new category of protected children whose claims will need to be assessed and evaluated by domestic decision-makers. The starting point for the inquiry is whether the removal of a child is in the child's best interests. If removal is contrary to the child's best interests, there will be a strong presumption against removing the child, subject only to a tightly circumscribed range of considerations.[60] The argument that article 3 provides an independent basis for international protection has both academic[61] and institutional[62] support, and the provision is playing an increasingly central role in domestic jurisprudence concerning the removal of children and/or their parents.[63]

The best interests principle has had a key role in UNHCR's operations for well over a decade, particularly in countries in the Global South. In 2008, UNHCR published its first guidelines on determining the best interests of the child, which were subsequently revised in 2018.[64] The guidelines set out processes designed to identify what is in the best interests of refugee children and other at-risk children, including a 'Best Interests Determination', which, according to the 2018 guidelines, will be required in 'situations where a decision is likely to have far-reaching implications for the child', and is 'based on standards and procedural safeguards that include the child's meaningful participation, involvement of persons with different backgrounds and relevant expertise, the system-

[59] See generally Jason Pobjoy, 'The Best Interests of the Child Principle as an Independent Source of International Protection' (2015) 64 ICLQ 327; Pobjoy (n 9) ch 6.

[60] GC6 (n 16) para 86. The UNCRC has suggested that, in exceptional circumstances, other considerations may override the best interests of the child; it stresses, however, that '[n]on-rights-based arguments such as those relating to general migration control, cannot override best interests considerations' (para 86). However, as this writer has argued elsewhere, such a strict interpretation does not sit comfortably with the language of article 3, which places no limitation on the range of interests that may be taken into account and balanced against the best interests of a child. For full discussion see Pobjoy (n 59).

[61] See in particular Jane McAdam, *Complementary Protection in International Refugee Law* (OUP 2007) 173–96; Guy S Goodwin-Gill, 'Unaccompanied Refugee Minors: The Role and Place of International Law in the Pursuit of Durable Solutions' (1995) 3 International Journal of Children's Rights 405; Goodwin-Gill (n 55).

[62] See in particular GC6 (n 16) para 84, which states that '[r]eturn to the country of origin shall in principle only be arranged if such return is in the best interests of the child'. See also paras 85–8.

[63] For a summary of the case law see Pobjoy (n 59).

[64] UNHCR, Guidelines on Determining the Best Interests of the Child (2008); UNHCR, Guidelines on Assessing and Determining the Best Interests of the Child (2018) (2018 Guidelines).

atic documentation of the case, and a collaborative follow-up process that is underpinned by child protection principles.'[65]

The best interests principle is, however, not without controversy. A key concern relates to the potential indeterminacy of the concept. In this regard, it has been suggested that such imprecision gives rise to a risk that the principle will be used as 'an alibi for individual arbitrariness'[66] or may become 'an empty rhetorical vessel into which subjective preferences or political agendas may be poured.'[67] This criticism is premised on an interpretation of article 3 that fails to take into account the balance of the treaty. As the international rules of treaty interpretation make clear, article 3 must be read within the context of the CRC as a whole, including each of the rights protected therein.[68] These rights inject substantive content into article 3, and provide a critical bulwark against the risk of such arbitrariness and/or subjectivity.[69] Moreover, to the extent that there is flexibility in the concept, this is a virtue rather than a vice. A best interests assessment must take place on a case-by-case-basis, taking into account the specific circumstances of the individual child.[70] As noted by Justice McLachlin of the Supreme Court of Canada, '[a] more precise test would risk sacrificing the child's best interests to expediency and certainty.'[71]

The role of the CRC in the refugee context is likely to increase in light of the introduction of an individual complaints mechanism.[72] A significant number of the communications to date have concerned child migration issues. By way of illustration, the case of *DD v Spain*[73] concerned a child who had fled Mali because of the armed conflict, and had attempted to cross the border fence between Morocco and the Spanish enclave of Melilla. He was apprehended and immediately sent back to Morocco. The child alleged that his return violated his rights under the CRC because Spain had failed to provide him with the special protection and assistance to which he was entitled as an unaccompanied minor (article 20), failed to respect the principle of *non-refoulement* (article 37), and failed to consider his best interests (article 3). All of these complaints were upheld by the UNCRC. The Committee noted that before returning the child to Morocco, Spain 'did not ascertain his identity, did not ask about his personal circumstances and did not conduct a prior assessment of risk, if any, of persecution and/or irreparable harm in the

[65] UNHCR, 2018 Guidelines (n 64) 96.

[66] Irène Thèry, '"The Interests of the Child" and the Regulation of the Post-Divorce Family' in Carol Smart and Selma Sevenhuijsen (eds), *Child Custody and the Politics of Gender* (Routledge 1989) 82.

[67] John Tobin, 'Justifying Children's Rights' (2013) 21 International Journal of Children's Rights 395, 398.

[68] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 31(1)–(2).

[69] For full discussion, see Pobjoy (n 9) 228–9.

[70] UNCRC, 'General Comment No 14: The Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration' (29 May 2013) UN doc CRC/C/GC/14, para 48.

[71] *Gordon v Goertz* [1996] 2 SCR 27, para 20.

[72] Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (adopted 19 December 2011, entered into force 14 April 2014) UN doc A/RES/66/138.

[73] *DD v Spain*, UN doc CRC/C/80/D/4/2016 (1 February 2019).

country to which he was returned.'[74] It considered that 'the failure to assess the risk of irreparable harm to the author prior to his deportation or to take into account his best interests constitutes a violation of Articles 3 and 37 of the Convention.'[75]

6. Appropriate Protection and Humanitarian Assistance

The entitlement to refugee status or some other independent form of protection status is a critical issue for children seeking international protection. However, equally important is the treatment of the child in the host State, both during and after any assessment process. A child is entitled to the full range of rights afforded under the CRC while he or she remains in the host State. This includes children who are ineligible for refugee status and/or a complementary or independent form of international protection. In this scenario, the child remains entitled to the protections afforded under the CRC, and those rights must also be protected throughout the process of return.[76]

Although a displaced child is entitled to all of the rights in the CRC, article 22 of the CRC is particularly relevant.[77] It is the only provision in any international human rights treaty that deals expressly with the situation of refugee children.[78] Article 22 is often mischaracterized as limited to guaranteeing refugee children and children seeking refugee status access to CRC rights on a non-discriminatory basis. In fact, article 22 extends beyond this (which is, in any event, guaranteed by CRC, article 2), and imposes an obligation on States to take into account any additional protection and humanitarian assistance that a refugee child or a child seeking refugee status may require in order to effectively enjoy those rights. This 'rights-plus framework' gives expression to the longstanding recognition, addressed above, that refugee children are entitled to special protection. So, for instance, additional measures may be required in order to secure a refugee child's access to education, including, for example, the allocation of 'the necessary financial, technical and human resources to provide special language programmes for refugee or asylum-seeking children to prepare them for full-entry into the general educational system of the country.'[79] In addition, it may require the provision of 'supplementary assistance to refugee children according to Individual Education Plans, in order to prevent early dropout and meet specific education needs.'[80]

[74] ibid para 14.6.

[75] ibid. For a further example, see eg *IAM (on behalf of KYM) v Denmark*, UN doc CRC/C/77/D/3/2016 (25 January 2018) (return of child to Somalia where return would expose her to a risk of subjection to female genital cutting in violation of articles 3 and 19 of the CRC).

[76] GC6 (n 16) para 87.

[77] See generally Pobjoy (n 28) 818.

[78] At a regional level, the African Charter on the Rights and Welfare of the Child contains a similar provision: see text to (n 29).

[79] UNCRC, 'Concluding Observations: Czech Republic' (17 June 2011) UN doc CRC/C/CZE/CO/3–4, para 66.

[80] ibid. See also UNHCR, *Refugee Children* (n 13) 190–9.

All rights under the CRC are pertinent to refugee children and children seeking refugee status, but for reasons of space, this chapter focuses on the four general principles embodied in the CRC: non-discrimination (article 2); participation (article 12); the best interests principle (article 3); and the right to life, survival, and development (article 6).[81] Although by no means comprehensive, it provides an illustration of the significance of the rights-based framework provided for under the CRC to the refugee child's experience.

Article 2 of the CRC contains an obligation on States to respect and ensure the rights protected under the CRC to each child within their jurisdiction without discrimination of any kind.[82] The application of non-discrimination norms does not mean that everyone should be treated equally: there may be specific groups of children who, because of their specific needs or circumstances, require special measures to be taken in order to ensure that they can effectively exercise their rights.[83] Article 22 of the CRC identifies refugee children as one of these groups.

Article 12 of the CRC provides that States 'shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.' In order to determine the 'appropriate measures' to be adopted for beneficiaries of article 22, and the content of any 'appropriate protection and humanitarian assistance', States must elicit and take into account the views of the child.

Article 3 of the CRC mandates that the best interests of the child shall be a primary consideration in all actions concerning children. The UNCRC has emphasized that it is critical 'during all stages of the displacement cycle.'[84] It will inform both the 'appropriate measures' required of a State, as well as the content of the 'appropriate protection and humanitarian assistance' to which a refugee child or child seeking refugee status is entitled. There are three factors that must be taken into account in assessing the best interests of the child: first, the views of the child; secondly, the specific situation and circumstances of the child, including the child's age, level of maturity, and any particular vulnerabilities or special needs the child may have (including whether the child is unaccompanied or separated from their parents); and thirdly, the extensive catalogue of rights protected under the CRC.

Article 6 protects a child's inherent right to life and places an obligation on States to ensure to the maximum extent possible the survival and development of the child. Importantly, article 6(2) extends the right beyond traditional conceptions of the right to life, and incorporates a positive duty to ensure the survival and development of the child. In defining the scope of article 6(2), reference should be had to other rights in the

[81] See UNCRC, 'General Comment No 5 (2003): General Measures of Implementation of the Convention on the Rights of the Child (Articles 4, 42 and 44(5))', UN doc CRC/GC/2003/5 (2003) para 12 (GC5).

[82] See also GC6 (n 16) para 18.

[83] In addition to the discussion on article 22, see more generally GC5 (n 81) para 12.

[84] GC6 (n 16) para 19.

CRC, including the rights to education (article 28), the highest attainable standard of health (article 24), and an adequate standard of living (article 27). All of these rights are particularly relevant to refugee children and children seeking refugee status, who are often susceptible to heightened risks to their rights to life, survival, and development. This is particularly so for children who find themselves in refugee camps, or children living in urban environments without a parent or guardian.

7. Durable Solutions

The identification and implementation of a durable solution is particularly important in the context of refugee children. Children only get one opportunity to experience their childhood: there are no second chances. The search for a durable solution must therefore commence immediately. There is no single point in time when a displaced child 'suddenly becomes ready for a durable solution'; to the contrary, 'as the child will not postpone his or her growth or development . . . the need to implement elements of a durable solution is immediate'.[85] The absence of a timely and durable solution 'can result in increased protection risks for children and youth'.[86] As a result, the identification of a durable solution should be pursued '*whilst* subject to or going through immigration and asylum procedures'.[87]

The durable solution itself should address all of a child's protection needs (including the full range of rights protected under the CRC, both at present and into the future), having regard to the child's best interests, and taking into account the child's views.[88] A child should, to the greatest extent possible, have 'accurate information concerning their present situation, rights and responsibilities and possibilities'.[89] The solution must take into account a child's shorter- and long-term developmental needs, including those effects that may be felt after a child has reached his or her 18th birthday.[90] Where a child is unaccompanied or separated, the UNCRC has made clear that a rights-based approach requires that the search for a durable solution commence with 'analysing the possibility of family reunification.'[91] In the majority of cases involving unaccompanied or separated children, if the child's family can be located, then the child's best interests will generally be best served by reuniting the child with his or her family. However, the principle of family unity is not absolute, and family reunification will not provide a trump card where removal is contrary to the child's best interests. A consideration of

[85] Goodwin-Gill (n 61) 415.

[86] UNHCR, 'Field Handbook for the Implementation of UNHCR BID Guidelines' (November 2011) 51.

[87] UNHCR, 'Putting the Child at the Centre: An Analysis of the Application of the Best Interests Principle for Unaccompanied and Separated Children in the UK' (June 2019) 18 (emphasis added).

[88] GC6 (n 16) para 79–80.

[89] UNHCR, *Refugee Children* (n 13) 40.

[90] UNHCR (n 87) 18.

[91] GC6 (n 16) para 79.

durable solutions will generally be more complex in cases involving children accompanied by their parents. In this context, it is imperative that individual consideration is given to the independent needs of the child.

8. Family Reunification

The separation of a child from his or her family can have debilitating effects on the child's physical and emotional well-being and may seriously impede the child's development.[92] Family reunification is thus a key issue for refugee children who have been separated from their family in the course of displacement. There are various international and regional instruments relevant to the issue,[93] but the most significant is article 10(1) of the CRC, the first provision in an international human rights treaty to deal expressly with family reunification.[94]

Article 10(1) imposes an obligation on States to deal with applications to enter or leave their territories for the purpose of family reunification, and requires that these applications be dealt with in a 'positive, humane and expeditious manner'. While the rights to leave any country and to enter one's own country were already guaranteed under international human rights law, article 10(1) went a step further, conferring an express right to apply to enter a country other than one's own for the purpose of family reunification. Article 10(1) contains an unqualified right to make an application; hence, jurisdictions which have a blanket prohibition on family reunification for refugee children will infringe the provision.[95] Although article 10(1) does not mandate that a State must approve applications for family reunification, it does require that any application must be dealt with in a positive, humane, and expeditious manner, and must be determined in accordance with the obligations contained under articles 3 and 9(1) of the CRC. In these circumstances, it has been suggested that article 10(1) gives rise to a presumption in favour of approval, with a State that wishes to refuse an application bearing the burden of demonstrating why the refusal is justified, having regard, in particular, to the best interests principle under article 3, and the principle of non-separation under article 9(1).[96]

[92] UNCRC, 'General Comment No 7 (2005): Implementing Child Rights in Early Childhood', UN doc CRC/C/GC/7/Rev.I (2005) para 18.

[93] For an excellent and comprehensive discussion, see Frances Nicholson, 'The "Essential Right" to Family Unity of Refugees and Others in Need of International Protection in the Context of Family Reunification', UNHCR Legal and Protection Policy Series, PPLA/2018/02 (2019).

[94] See generally Jason Pobjoy and John Tobin, 'Article 10: The Right to Family Reunification' in Tobin (n 17).

[95] See discussion in Nicholson (n 93) 190–5.

[96] See eg Eliahu Frank Abram, 'The Child's Right to Family Unity in International Immigration Law' (1995) 17 Law and Policy 397, 423.

9. Conclusions

The CRC was a critical milestone in securing rights for children generally, and refugee children specifically. Since then, there has been recognition at the international and domestic levels that refugee children are entitled to the full protection afforded by both the CRC and the Refugee Convention. The influence of the CRC is evident from the Global Compact on Refugees, which embraces the concept of children's rights, including, in particular, the concept of the best interests of the child.[97] The role and influence of the CRC in this area is only likely to increase as a result of the introduction of a complaint mechanism for violations of the CRC.

In circumstances where there is now widespread acceptance that the CRC has an important role to play in securing the protection needs of refugee children, further research is required to better understand the scope of that protection, and, in particular, the interaction between international refugee law and international law on the rights of the child. Does the Refugee Convention remain the appropriate starting point for addressing the protection needs of refugee children, or does the CRC provide a more appropriate framework for protection? To what extent, and in what circumstances, might the best interests principle provide an independent source of protection for children seeking international protection? What is the scope of a State's obligation to ensure appropriate protection and humanitarian assistance under article 22 of the CRC? What is the scope and content of a State's obligation to deal with family reunification claims in a positive, humane, and expeditious manner? What role does international law have to play in the identification and implementation of durable solutions for refugee children? Although international law does not provide a complete answer to the many and varied challenges faced by refugee children, the international legal framework – applicable to both refugees and to children – has a vital role to play in providing advocates and decision-makers with an important tool to assist in securing an appropriate level of protection and assistance.

[97] For instance, the Global Compact supports the establishment of mechanisms for the identification and referral of children to best interests assessment and/or determination (para 65), and makes specific reference to the need for integrated and age-sensitive services, and child-sensitive determination procedures (para 76).

CHAPTER 42

SEXUAL ORIENTATION AND GENDER IDENTITY IN REFUGEE CLAIMS

JENNI MILLBANK

1. Introduction

This chapter explores two key themes in modern refugee jurisprudence concerning sexual orientation and gender identity (SOGI) claims over the past 35 years. First, there is a persistent, indeed widening, gap between the formal acceptance of SOGI claims in refugee *law* (broadly taken to include authoritative international guidance, interpretative norms, and binding domestic precedent) and the implementation of such law through the low-level administrative practice that comprises the vast bulk of refugee status determination (RSD). Secondly, although SOGI claims are often considered as marginal or exceptional cases, I argue that they should be seen as a key axis from which to understand major developments and failings of refugee law across the board. Relatedly, I suggest that SOGI claims are a paradigm example of the ontological challenges at the heart of RSD, including the enduring challenges posed by fact-finding and evidentiary practices such as future-focused risk analysis, credibility assessment, and the interpretation of claims across culture.

2. Overview

Despite the fact that lesbians, gay men, transgender and other gender and sexuality non-conforming people have suffered, and continue to suffer, widespread persecution globally,[1] refugee law has been slow, and arguably reluctant, to accept them as valid subjects of protection under the Refugee Convention.[2]

The Netherlands was the first country to accept sexuality as a particular social group (PSG) in 1981;[3] others followed haltingly. It was more than a decade later that sexual orientation was accepted in principle as an eligible formulation of the PSG ground by courts in countries such as Canada, Australia, and the UK, and it was notable that these moves were initially made through obiter observations,[4] rather than in the successful claims of gay men or lesbians themselves. In practice, lower-level administrative decision-makers continued to dismiss sexuality-based claims on the reasoning that no Convention ground had been engaged.[5] Unequivocal high-level precedential determination of sexual orientation and gender identity as falling squarely within the purview of protected grounds under the Refugee Convention was not clearly established in a number of key Anglophone receiving nations until the 2000s.[6] This trend was reflected globally through influential international guidance, such as the reference to sexual orientation in Gender Guidelines produced by UNHCR, then more overtly through the

[1] See eg International Lesbian, Gay, Bisexual, Trans, and Intersex Association (ILGA), 'State Sponsored Homophobia: 2020 Global Legislation Overview Update (2020); Human Rights Watch, *Audacity in Adversity: LGBT Activism in Middle East and North Africa* (2018); Human Rights Watch, *'I Have to Leave to Be Me': Discriminatory Laws against LGBT People in the Eastern Caribbean* (2018); Amnesty International, 'Less Equal: LGBTI Human Rights Defenders in Armenia, Belarus, Kazakhstan, and Kyrgyzstan' (2017); Human Dignity Trust, 'Injustice Exposed: the Criminalisation of Transgender People and its Impacts' (2019); Human Rights Watch, 'Lebanon: Police Shutter Pride Events' (18 May 2018) <https://www.hrw.org/news/2018/05/18/lebanon-police-shutter-pride-events> accessed 11 November 2019; Human Rights Watch, 'Bangladesh: Transgender Men Fear for Their Safety' (19 January 2018) <https://www.hrw.org/news/2018/01/19/bangladesh-transgender-men-fear-their-safety> accessed 11 November 2019.

[2] For a recent collection of works examining both domestic refugee status determination (RSD) regimes and resettlement experiences, see Arzu Guler, Maryna Shevtsova, and Denise Venturi (eds), *LGBTI Asylum Seekers and Refugees from a Legal and Political Perspective* (Springer 2018).

[3] *Afdeling Rechtspraak Raad van State* (ARRvS) no A-21113, Rechtspraak Vreemdelingenrecht 1981, see discussion in Sabine Jansen, 'Introduction' in Thomas Spijkerboer (ed), *Fleeing Homophobia: Sexual Orientation, Gender Identity and Asylum* (Routledge 2013) 1; Sabine Jansen, 'Pride or Shame? Assessing LGBTI Asylum Applications in the Netherlands following the XYZ and ABC Judgments' (COC Netherlands 2018).

[4] Notably, *Ward v Canada Minister of Employment & Immigration* [1993] 2 SCR 689; *Applicant A v MIEA* (1997) 190 CLR 225; *R v Immigration Appeal Tribunal, ex parte Shah* [1999] UKHL 20, [1999] 2 AC 629.

[5] Discussed in Jenni Millbank, 'The Role of Rights in Asylum Claims on the Basis of Sexual Orientation' (2004) 4 Human Rights Law Review 193. See also notable reluctance to explicitly address gender identity as a ground of claim in US jurisprudence; discussed in Joseph Landau, 'Soft Immutability and Imputed Gay Identity: Recent Developments in Transgendered Sexual-Orientation Based Asylum Law' (2005) 32 Fordham Urban Law Journal 237; Laurie Berg and Jenni Millbank 'Developing a Jurisprudence of Transgender Particular Social Group' in Spijkerboer (n 3).

[6] See eg *Hernandez-Montiel v INS*, 225 F 3d I084 (9th Cir, 2000), in which a claim by an applicant who actually identified as a trans woman was the basis for the jurisprudential finding that gay men were a PSG, discussed in Landau (n 5); *HJ (Iran) and HT (Cameroon) v SSHD* [2010] UKSC 31, [2011] 1 AC 596; see discussion in Jenni Millbank, 'Sexual Orientation and Refugee Status Determination over the Past 20 Years: Unsteady Progress through Standard Sequences?' in Spijkerboer (n 3).

initial UNHCR guidance note and later authoritative Guidelines on sexual orientation and gender identity claims.[7]

A significant turning point in terms of settling formal eligibility was the European Union Council Directive on minimum standards for the qualification of refugees, which stated in its first iteration in 2004 that sexual orientation is covered by the PSG Convention ground, and in the revised 2011 version expanded this to include gender identity.[8]

Notably there have been only a small minority of SOGI refugee claims made, and even fewer accepted, on other ostensibly applicable Convention grounds, in particular political opinion and religion. This is despite the fact that many SOGI claims concern applicants fleeing countries where non-conforming sexuality is widely seen as a challenge to the dominant political or religious order, and even directly to the government of the day, such that a claim based on the religion or political opinion ground would seem logical.[9] In the very few countries where policy guidelines exist concerning the assessment of SOGI claims in RSD, the PSG ground is assumed as the basis of claims, even if passing reference is made to the possibility of 'interaction' with other Convention grounds.[10] The limitation of SOGI claims to the PSG ground—while credited, along with gender-based claims with the contemporary expansion and revitalization of the PSG category[11]—has not been entirely benign. I suggest that the focus upon, indeed restriction to, the PSG category has led to a number of profound ripple effects over the ensuing decades in how SOGI claims are framed and understood in RSD.

The early characterization of SOGI claims as 'social' and the concomitant framing of sexuality rights in human rights terms as a right to private life rather than equal treat-

[7] UNHCR, 'Guidelines on International Protection No 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees', HCR/GIP/02/01 (7 May 2002) paras 5, 16; UNHCR, 'Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity' (21 November 2008); UNHCR, 'Guidelines on International Protection No 9: Claims to Refugee Status Based on Sexual Orientation and/or Gender Identity within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees', HCR/GIP/12/09 (23 October 2012). See Nicole LaViolette, '"UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity": A Critical Commentary' (2010) 22 IJRL 173.

[8] EU Qualification Directive (original), art 10(1)(d); EU Qualification Directive (recast).

[9] See eg Nicole LaViolette, 'Gender-Related Refugee Claims: Expanding the Scope of the Canadian Guidelines' (2007) 19 IJRL 1; Tim Sahliu Braimah, 'Divorcing Sexual Orientation from Religion and Politics: Utilizing the Convention Grounds of Religion and Political Opinion in Same-Sex Oriented Asylum Claims' (2015) 27 IJRL 481.

[10] See eg UK Home Office, 'Asylum Policy Instructions, Sexual Orientation in Asylum Claims' (version 6.0, 2016) 10–11; UK Home Office, 'Asylum Policy Instructions, Gender Identity in the Asylum Claim' (version 1.0, 2011) 10–11; Immigration and Refugee Board of Canada, 'Chairperson's Guideline 9: Proceedings before the IRB involving Sexual Orientation and Gender Identity and Expression' (2017) paras 8.2–8.4; Migration Board Sweden, 'Guidelines for Investigation and Evaluation of Asylum Cases in which Persecution based on Given Sexual Orientations is Cited as a Ground' (2002) 14 IJRL 471.

[11] See Michelle Foster, '"The Ground with the Least Clarity": A Comparative Study of Jurisprudential Developments Relating to "Membership of a Particular Social Group"', UNHCR Legal and Protection Policy Research Series, PPLA/2012/02 (2012).

ment of freedom of communication and assembly (logical corollaries of the religion and political grounds) meant that claimants were caught in an enduring Catch 22 in terms of the group analysis and risk assessment and nexus. Reasoning under each of the two limbs of the PSG definition (immutable/protected characteristics and social perception) circumscribed and denied sexuality-based claims by reference to a public/private divide shaped by the widespread criminalization of gay sex (including colonial legacy laws in a number of countries of origin and 'modernized', partially repealed, or little enforced statutes in many receiving countries). In countries such as France, and to a lesser extent Australia, where the 'social perception' approach to PSG prevails, lesbian and gay claimants who had not outwardly manifested their identity were excluded from the social group ground altogether on the basis that there was no perception of them as members. This approach persisted in France until the late 2000s.[12] Conversely under the immutable/protected characteristics approach, bisexual and cross-dressing claimants were at times excluded as not falling within an immutable group, but rather as simply engaging in unprotected 'conduct'.[13]

Through the 1990s and 2000s applicants who had been sufficiently public in the expression of their sexual or gender identity and had come to the attention of State persecutors (whereupon they were described as 'flaunting', or 'provoking') were often viewed as 'criminals' who had breached criminal prohibitions on gay sex, public sex, and other modes of public order legislation and who were therefore legitimately prosecuted rather than unlawfully persecuted.[14] Over time, as criminal prohibitions on gay sex were progressively repealed in receiving nations and equality provisions took their place (through, for example, legislated anti-discrimination protections and various forms of same-sex relationship recognition), it became broadly accepted in RSD that the enforcement of criminal proscriptions on gay sex and discriminatory application of public order offences are in fact persecutory. More slowly, there was acceptance that criminal laws could be persecutory even if notionally 'unenforced', because of the way that such laws drive and enable other persecutory conduct, such as blackmail of gay men by police and others, and the structural unavailability of State protection when gay and trans

[12] See Janna Weßels, 'Publicly Manifested—Fatefully Determined—Invariably "Discreet": The Assessment of Sexuality-Based Asylum Claims in Germany and France' (2017) 29 Canadian Journal of Women and the Law 343.

[13] ibid. See Fatma Marouf, 'The Emerging Importance of "Social Visibility" in Defining a "Particular Social Group" and Its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender' (2008) 27 Yale Law & Policy Review 47; Berg and Millbank (n 5); concerning analysis of more recent cases from the UK and Germany, see Moira Dustin and Nina Held, 'In or Out? A Queer Intersectional Approach to "Particular Social Group" Membership and Credibility in SOGI Asylum Claims in Germany and the UK' [2018] Sussex Research Online <http://sro.sussex.ac.uk/id/eprint/80393/2/In%20or%20Out_NH%20and%20MD_31%20Aug%202,018%20%281%29.pdf> accessed 26 February 2020.

[14] Jenni Millbank, 'Imagining Otherness: Refugee Claims on the Basis of Sexuality in Canada and Australia' (2002) 26 Melbourne University Law Review 144; Jenni Millbank, 'A Preoccupation with Perversion: The British Response to Refugee Claims on the Basis of Sexual Orientation 1989–2003' (2005) 14 Social and Legal Studies 115.

people are persecuted by non-State actors.[15] Note, however, that to date the European Court of Justice (CJEU) has reflected State practice in baulking at the notion that discriminatory criminal laws targeting gay sex are persecutory *per se*.[16]

Applicants who had not previously come to the attention of persecutors because they were afraid to express their sexual or gender identity openly were commonly understood in RSD to be acting 'discretely' and therefore not to be at risk either now or in the future. Lesbian applicants have been particularly disadvantaged by such reasoning, as their claims often involve domestic settings and risk at the hands of family members, and decision-makers have understood them to belong to the private realm such that there is neither risk nor nexus.[17] Relatedly, the claims of lesbians, and to a lesser extent gay men, to refugee protection when the persecution they suffer is embedded in widespread and hegemonic social norms continues to remain largely imperceptible to decision-makers, such as in forced marriage claims.[18] Taken together, the implicit expectations of States and societies that gay people should conceal themselves, conform wherever possible, and avoid confronting heterosexual norms and institutions, has pervasively informed RSD. The near exclusive use of the PSG category has contributed to that paradigm through shaping and playing into accepted notions of what the 'group' is and how its members engage in public space and civil society.[19]

3. The Yawning Divide: Law Says versus Admin Does

The sustained attention of human rights organizations to abuses perpetrated against lesbians, gay men, and transgender people[20] has contributed to considerable advances over the past 30 years in refugee law's treatment of SOGI claims. However, as formal eligibility barriers and doctrinal obstacles are dismantled, significant and enduring informal resistance has sprung up at the level of local practice, undermining the effect of such advances.

Lack of access to written reasons for low-level decisions (for example, by UNHCR adjudicators, immigration courts and administrative tribunals, and internal govern-

[15] See eg Sabine Jansen and Thomas Spijkerboer, *Fleeing Homophobia, Asylum Claims Related to Sexual Orientation and Gender Identity in Europe* (COC Netherlands, VU University Amsterdam 2011) 21–6; Millbank 2005 (n 14).

[16] See *Minister voor Immigratie en Asiel v XYZ* (Joined Cases C-199/12 to 201/12) (CJEU, 7 November 2013), discussed in Jansen 2018 (n 3).

[17] Millbank 2002 (n 14).

[18] See eg Catherine Dauvergne and Jenni Millbank, 'Forced Marriage as a Harm in Domestic and International Law' (2010) 73 Modern Law Review 57.

[19] See Millbank (n 5).

[20] See n 1; see also UNHCR, 'Protecting Persons with Diverse Sexual Orientations and Gender Identities' (2015).

ment departmental decision-makers) makes it extraordinarily difficult to gain an understanding of how the law is being developed and applied at the level where it has the greatest impact. While there are now many thousands of written decisions on SOGI refugee claims available worldwide, there remains very little reliable, large-scale or longitudinal data on trends in applications, outcomes, or reasoning in most receiving nations. Most countries do not collect or collate data on the Convention grounds of claim (ie PSG), and certainly not on 'subsets' within a ground of claim (such as sexual orientation), nor on a gender disaggregated basis. On the rare occasions that information on SOGI claims has been made available, it is usually made in a piecemeal fashion as a response to freedom of information requests from researchers, for instance in Canada and Norway.[21] Even under the common framework of the EU, as at 2016 most member countries still did not gather data on sexual orientation asylum applications (Belgium being a long-standing exception), nor did they have any specific policy guidance in place for their assessment.[22]

In 2017, initially in response to freedom of information requests, the UK began releasing 'experimental statistics' on sexual orientation claims annually from 2015, with a commitment to continued annual release.[23] While not gender disaggregated and not covering gender identity claims, this publicly available data is important in demonstrating where claimants are coming from, the proportion of overall claims that are lesbian, gay, bisexual or transgender (LGBT), overall success rates, and initial trends in terms of whether the numbers of such claims, and their viability, are increasing over time. The evidence is that they are not—in the sense that both the overall proportion of LGBT claims *and* their success rate declined over the four years of figures. The fact that LGBT claims have lower success rates than average in the UK generated significant media attention and criticism in response.[24]

Ongoing transparency about outcomes allows attention, and critical reform efforts, without which flawed processes—in which the bulk of applications are determined in

[21] See eg Sean Rehaag, 'Patrolling the Borders of Sexual Orientation: Bisexual Refugee Claims in Canada' (2008) 53 McGill Law Journal 59; Deniz Akin, 'Queer Challenges to the Norwegian Policies and Practices of Immigration Asylum Seeking in Norway on the Grounds of Sexual Orientation-Based Persecution' (DPhil thesis, Norwegian University of Science and Technology 2017).

[22] For detailed responses see European Migration Network, 'EMN Ad-Hoc Query on NL AHQ on National Asylum Policies regarding LGBT-Asylum Seekers' (2 May 2016) <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/ad-hoc-queries/ad-hoc-queries-2016.1061_-_nl_ahq_on_national_asylum_policies_regarding_lgbt-asylum_seekers.pdf> accessed 26 February 2020.

[23] UK Home Office, 'National Statistics, Experimental Statistics: Asylum Claims on the Basis of Sexual Orientation' (22 August 2019) <https://www.gov.uk/government/publications/immigration-statistics-year-ending-june-2019/experimental-statistics-asylum-claims-on-the-basis-of-sexual-orientation> accessed 26 February 2020.

[24] See eg Nick Duffy, 'The UK has Rejected Thousands of Gay Asylum Seekers', *Pink News* (London, 30 November 2017); Jamie Grierson, 'Home Office Refused Thousands of LGBT Asylum Claims, Figures Reveal', *The Guardian* (London, 3 September 2019).

private (often under a 'fast-track'[25] and in combination with detention)[26] and never reviewed—will continue unchecked. It is striking that when field research has been done into lower-level practices—through, for example, interviewing applicants, lawyers, and support and advocacy personnel, and collecting and analysing rejection letters sent to applicants—findings are remarkably consistent over the past decade in documenting ongoing misapplication and misunderstanding of SOGI and gender-related jurisprudence at the level of initial determination.[27]

Nowhere is the divide between refugee law and refugee practice more clearly manifested than in the invidious and enduring operation of so-called 'discretion' reasoning. In discretion reasoning SOGI claimants are assumed, or expected, to avoid the risk of harm by conducting themselves 'discretely'. Discretion reasoning has been associated with very high failure rates for lesbian, gay, and bisexual refugee claimants for over 25 years.[28] While variously expressed, the universalized assumption of natural 'closetedness' for gay men, lesbians, and especially bisexuals,[29] led to requirements in RSD that SOGI claimants be expected or assumed to be capable of (re)concealing, or relocating and thereby reconcealing, their identity in their home country in order to avoid persecution. In earlier decisions this was baldly expressed as a 'reasonable expectation that persons should, to the extent that it is possible, cooperate in their own protection'[30] but in later years has been more commonly embedded as an assumption or factual finding that behavioural 'modification', 'restraint', or 'adaptation' will simply 'happen' or be 'chosen'.[31] It has also been expressed, particularly in the UK, as a finding that 'core rights' are not infringed by minor behavioural modifications that can be reasonably tolerated. In the words of Pill LJ, at Court of Appeal level in *HJ (Iran) v Secretary of State for the Home Department*,

[25] And see on the particular adverse impact of such processes on a lesbian claimant struggling to produce corroborative evidence of her membership of the group: *PN v Secretary of State of the Home Department* [2019] EWHC 1616.

[26] See International Detention Coalition, 'LGBTI Persons in Immigration Detention, Position Paper' (2016).

[27] See eg UK Lesbian and Gay Immigration Group (UKLGIG), *Failing the Grade* (2010); UKLGIG, *Missing the Mark* (2013); UKLGIG, *Still Falling Short* (2018); UKLGIG, *Lessons not Learnt* (2019); Jansen and Spijkerboer (n 15); UNHCR, 'Beyond Proof, Credibility Assessment in EU Asylum Systems' (2013).

[28] See eg discussion in Jenni Millbank 'From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom' (2009) 13 International Journal of Human Rights 391; see also IDC (n 26); Catherine Dauvergne and Jenni Millbank, 'Before the High Court Applicants S396/2002 and S395/2002, a Gay Refugee Couple from Bangladesh' (2003) 25 Sydney Law Review 97.

[29] See eg Sean Rehaag, 'Bisexuals Need Not Apply: A Comparative Appraisal of Refugee Law and Policy in Canada, the United States and Australia' (2009) 13 International Journal of Human Rights 420.

[30] See *V95/03527* [1996] RRTA 246.

[31] So a gay applicant from Uganda was found as a question of fact to be 'mindful of his society's concepts of good manners and the general social mores' such that he would continue concealing his sexuality: *JM v Secretary of State for the Home Department* [2008] UKIAT 00065, para 149. See discussion of more recent examples in Dustin and Held (n 13).

> according . . . a degree of respect for social norms and religious beliefs in other states is in my view appropriate. Both in Muslim Iran and Roman Catholic Cameroon, strong views are genuinely held about homosexual practices. In considering what is reasonably tolerable in a particular society, the fact-finding Tribunal is in my view entitled to have regard to the beliefs held there.[32]

Elsewhere I have argued that, '[d]iscretion logic is a particularly invidious form of victim-blaming because it affirms the perspective, if not the conduct, of the persecutor', which has generated a plethora of legal errors, including: reversing the onus of Convention protection, treating the scope of protection offered by the Convention grounds inequitably, failing to undertake a future-focused analysis of the risk of harm, construing internal flight alternatives as opportunities for re-concealment rather than safety, and misleading risk analysis for the fundamental reason that there is no such thing as a complete and lifelong closet.[33]

The 2000s saw increasingly authoritative rejections of discretion approaches in both judicial and policy spheres across multiple jurisdictions. Over a 10-year period beginning in 2003, the Australian High Court, the UK Supreme Court and the ECJ all declared, with increasing confidence, that discretion reasoning in sexual orientation refugee claims is bad law. In a slim majority decision of four to three judges, the High Court of Australia held that, '[i]t would undermine the object of the Convention if the signatory countries required them to modify their beliefs or to hide', holding it was incorrect in law to require or expect someone to 'take reasonable steps to avoid persecutory harm'.[34] In 2010, the Supreme Court of the United Kingdom issued a unanimous five opinion judgment approving the majority approach in *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* and condemning discretion reasoning in much stronger terms as 'wrong in principle, unworkable and inconsistent' with article 1A(2) of the Convention.[35] The Supreme Court also emphatically propounded the right of lesbians and gay men to live freely, openly, and on equal terms, with heterosexuals.[36]

[32] *HJ (Iran) v Secretary of State for the Home Department* [2009] EWCA Civ 172, [2009] Imm AR 600, para 32.

[33] See discussion in Jenni Millbank, 'The Right of Lesbians and Gay Men to Live Freely, Openly and on Equal Terms is not Bad Law: A Reply to Hathaway and Pobjoy' (2012) 44 New York Journal of International Law and Politics 497.

[34] *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473, paras 41, 50 (Kirby and McHugh JJ) see also paras 82–3 (Gummow and Hayne JJ).

[35] *HJ (Iran) v SSHD* [2010] UKSC 31, [2011] 1 AC 596, para 81 (Lord Rodger).

[36] Prompting, somewhat ironically, a backlash from notable refugee scholars Hathaway and Pobjoy who argued that the decision had 'gone too far' in protecting trivial conduct: see special issue 'Online Symposium' (2013) 44 (2) New York Journal of International Law and Politics, and Opinio Juris <http://opiniojuris.org/2012/03/07/new-york-university-journal-of-international-law-and-politics-vol-442-opinio-juris-online-symposium/> accessed 26 February 2020. I won't re-engage with that debate further, except to say that I hope very much to live to see the day that courts and tribunals of receiving nations offer excessively generous protections to lesbians, gay men, and trans peoples.

The 2011 Fleeing Homophobia report, based on a survey of practitioners and advocates across 25 European Union countries, found discretion reasoning still occurring in Austria, Belgium, Bulgaria, Cyprus, Denmark, Finland, France, Germany, Hungary, Ireland, the Netherlands, Malta, Poland, Romania, Spain, Norway, and Switzerland.[37] This was despite the fact that in the Netherlands, for example, a formal policy directive had been in place since 2007 providing that '[p]ersons with a homosexual orientation are not required to conceal that preference on their return'.[38] Such ongoing contention led the Netherlands to refer an interpretive question on the Minimum Standards Directive to the CJEU, asking the question '[m]ay homosexuals be expected to conceal their sexual orientation or to exercise restraint in expressing their sexual orientation?'. The court was clear in its 2013 judgment that neither concealment nor restraint can be required or assumed.[39]

Yet discretion continues to creep back into RSD through the mask of choice and an unreflexive dismissal of 'social and family pressures', such that the very concealment that cannot be 'required' or 'expected' by decision-makers is still seen as a state that is elected, commonplace and natural, and thereby viewed as a complete defence to persecution rather than *prima facie* evidence of its real risk. Two of the Supreme Court opinions in *HJ (Iran)* reference a *naturally* secretive gay person who is exercising free choice in no way related to persecutory conditions by never disclosing their sexuality. Lord Hope imagines the possibility of someone who is '*naturally* reticent' and who conceals their sexuality 'in reaction to family and social pressure' 'or for cultural or religious reasons *of his own choosing*' and states that such person would not have a well-founded fear of persecution. Likewise, Lord Rodger hypothesizes a 'perfectly *natural* wish to avoid harming his relationships with his family, friends and colleagues' as a reason for concealment and repeatedly uses the word 'choice' in contrasting persecution with 'social pressures'.[40]

Janna Weßels notes that, in addition to being an untenable distinction in any persecutory environment, this provokes decision-makers to place the burden on applicants to demonstrate that the 'material reason' for their concealment is fear (this was also a distinctive feature of the UK discretion approach prior to *HJ (Iran)* and a feature of the dissenting judgments in *S395/2002*).[41] Sabine Jansen has noted that the Netherlands asylum authorities implemented the CJEU decision in *X, Y, Z*[42] by asking applicants how they intended to express themselves on return, and then finding that there was no risk if the applicant indicated an intention to remain concealed. Jansen contends that this displays a poor understanding of the complex and interlocking dimensions of minority sexuality experience that may lead to concealment.[43] Jansen states,

[37] Jansen and Spijkerboer 2011 (n 15) 34.

[38] See Jansen 2018 (n 3) para 2.3.2.

[39] *XYZ* (n 16); ABRvS 18 December 2013, ECLI:NL:RVS:2013:2423. See discussion Jansen 2018 (n 3).

[40] See *HJ (Iran)* (n 35) paras 22, 35, 61–2 respectively (emphasis added).

[41] Janna Weßels, 'HJ (Iran) and Another: Reflections on a New Test for Sexuality Based Claims in Britain' (2012) 24 IJRL 815; see also Millbank (n 28) 397; Toni Johnson, 'Flamers, Flaunters and Permissible Persecution' (2007) 15 Feminist Legal Studies 99.

[42] *XYZ* (n 16).

[43] See also Arzu Guler, 'Refugee Status Determination Process for LGBTI Asylum Seekers: (In) Consistencies of States' Implementations with UNHCR's Authoritative Guidance' in Guler Shevtsova, and Venturi (n 2).

> This interpretation by the Council of State might be based on the idea that since the XYZ judgment, the normative variant of 'discretion' (Get (back) into the closet!) is no longer allowed but that the factual form of 'discretion' (Stay in the closet!) is acceptable. In other words: people are no longer returned to the closet, but if they are or were in the closet of their own accord they might just as well be returned to that situation. In British asylum law, this variant of living in the closet is also called 'natural discretion'.[44]

That is, it is not enough that one concealed one's sexuality or gender identity while living under a persecutory regime; the applicant must bear the brunt of distinctly proving that it was the fear of persecution that motivated their concealment. This requirement is now specifically included in the UK sexual orientation guidance as something which 'the claimant must establish':

> If someone has hidden their sexual orientation in response to social pressures or *for cultural or religious reasons of their own choosing*...then they may not have a well-founded fear of persecution.[45]

In the UK gender identity guideline this is expressed even more disingenuously,

> If a transgender individual chooses to live discreetly because s/he wants to avoid embarrassment or distress to his or her family or friends s/he will not be deemed to have a well-founded fear of persecution and will not qualify for asylum. This is because s/he has *adopted a lifestyle to cope with social pressures* and not because s/he fears persecution due to his or her gender identity.[46]

In such a framework, the ongoing concealment of sexual and gender identity are undertaken for entirely personal reasons, quite divorced from fear, to the extent that 'coping' with social 'pressure' or reflecting cultural and religious condemnation can be understood as purely individual *choices*.[47]

In a different vein, Heimer argues that naturalized discretion reasoning, which she traces through more recent UK cases, reflects and reinforces 'orientalist discourses

[44] Jansen (n 3). See also Moira Dustin, 'Many Rivers to Cross: The Recognition of LGBTQI Asylum in the UK' (2019) 30 IJRL 104.

[45] UK Home Office 2016 (n 10) 38 (emphasis added).

[46] UK Home Office 2011 (n 10) 15 (emphasis added).

[47] So for example in a 2011 refusal letter the UK Home Office reasoned,

> The country evidence shows Malawi to be a dangerous country for practising homosexuals. What would she do if removed there? Homosexuality is not a crime in the United Kingdom and there is no bar to anybody who is gay to be open about their sexual orientation. The appellant has chosen to hide it. That is her prerogative, her free choice. If she can hide it in the United Kingdom, where tolerance rules (very effectively it would seem), then she can hide it in Malawi.

referenced in UKLGIG 2013 (n 27) 24; see more recently, UKLGIG 2018 (n 27) 33–5.

allowing for racialised sexual others to be problematically portrayed as "discreet" as opposed to Western liberated queers'.[48] She argues that this involves a

> displacement of the idea of repression which transfers the responsibility for the allegedly sexual repression of non-Western queers from British refugee jurisprudence to asylum seekers themselves. In other words, repression passes from being seen as something that the UK forces upon asylum seekers ... to being something that is produced by their inherent nature or by the family values, supposedly inherited from the very same culture they flee from.[49]

This insight connects to one of the other major challenges of SOGI claims, which is often addressed as a procedural issue, within the umbrella of 'credibility assessment'; that is, the cultural gulf involved in the determination of whether the applicant is a member of the group at all. Refusal rates of SOGI claims on the basis that the claimant is falsely claiming to be lesbian, gay, or bisexual appear to be at a record high.[50] Indeed, credibility assessment, centred on group membership rather than persecution, occupies a major place in most of the existing policy guidance on SOGI in RSD.[51] From the outset, but with increasing frequency, RSD processes have been plagued by sexualized and intrusive questioning of SOGI applicants, as well as the pervasive use of stereotypes, assumptions, and false dichotomies used to determine group membership. Case examples abound of LGBT applicants being asked in detail about explicit sexual acts during hearings, asked to provide 'proof' through explicit sexual imagery or intrusive psychical testing, and being found non-credible because their understanding or experience of their identity does not conform to the decision-maker's expectation of (what one assessor tellingly called) the 'gay reality'.[52]

In 2015, the CJEU held that no conclusions are to be drawn solely on the basis of stereotyped notions associated with (what it still calls) homosexuals, questions about the details of sexual practices are not allowed, and the court prohibited any 'proof' such as the performance of homosexual acts, the submission to 'tests' to proof homosexuality, or video recordings of intimate acts, as this would infringe human dignity.[53] As with

[48] Rosa dos Ventos Lopes Heimer, 'Homonationalist/Orientalist Negotiations: The UK Approach to Queer Asylum Claims' (2020) 24 Sexuality & Culture 174, 184.

[49] ibid 192.

[50] Jansen 2018 (n 3) para 3.1; UKLGIG 2019 (n 27); Millbank (n 28). See also UNHCR (n 27).

[51] See Jansen 2018 (n 3) para 2.5.2; see also Jenni Millbank, 'The "Ring of Truth": A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations' (2009) 21 IJRL 1; Nick Mule, 'Safe Haven Questioned: Proof of Identity Over Persecution of SOGIE Asylum Seekers and Refugee Claimants in Canada' [2019] Journal of Immigrant and Refugee Studies 1.

[52] See eg discussion in Millbank (n 51). More recent cases referenced in Jansen and Spijkerboer (n 15); Dustin and Held (n 13); Erin Gomez, 'The Post ABC Situation of LBG Refugees in Europe' (2016) 30 Emory International Law Journal 475.

[53] *A, B and C v Staatssecretaris van Veiligheid en Justitie* (Joined Cases C-148/13, C-149/13 and C-150/13) (CJEU, 2 December 2014); see Jansen 2018 (n 3).

discretion reasoning, repeated high-level jurisprudential pronouncements[54] and detailed guidance[55] on identity questioning, 'testing' and credibility assessment have largely fallen on deaf ears and been heavily undermined in practice.[56]

Canada was a world leader in engaging regular external training of its decision-makers from the 1990s to try to develop a more sensitive and appropriate adjudicative framework for SOGI claims. Refugee scholar Nicole LaViolette pioneered training in the 1990s, which she delivered for many years to the Canadian tribunal.[57] LaViolette proposed a structured series of topics for decision-makers to question applicants that did not focus on sexual acts; rather it comprised a series of areas (self-identity, experiences of societal discrimination, same-sex relationships, responses of family and friends) to elicit from SOGI claimants a narrative of the realization and experience of 'difference'.[58] In the 2000s, UK barrister S Chelvan built on this work to develop what he called the 'DSSH Model' of questioning (based on the topic areas of difference, stigma, shame, and harm).[59] The DSSH model has been utilized extensively in training for adjudicators and advocates by UNHCR, and by refugee advocacy groups in Europe, and is incorporated into the UNHCR SOGI Guidelines.[60] Both LaViolette's and Chelvan's interview tools were thoughtfully created and, in the right hands, have been incredibly useful to elicit, explore, and understand many SOGI claims. However, Berg and Millbank have argued that, regardless of the nuance or appropriateness of such question guides, they are limited in effect when decision-makers interpret and apply them in a rigid form of interrogation that is based upon assumptions about sexual identity that are

[54] See also C-473/16 *F v Bevándorlási és Állampolgársági Hivatal* (ECJ, 25 January 2018); Andrea Mrazova, 'Legal Requirements to Prove Asylum Claims Based on Sexual Orientation: A Comparison Between the CJEU and ECtHR Case Law' in Guler, Shevtsova, and Venturi (n 2).

[55] See UNHCR 2012 (n 7); Immigration and Refugee Board of Canada (n 10); see also Sabine Jansen, 'Good Practices Related to LGBTI Asylum Applications in Europe' (ILGA Europe 2014); International Commission of Jurists, *Refugee Status Claims Based on Sexual Orientation and Gender Identity: A Practitioner's Guide* (2016). See also 2016 internal training materials used by the relevant Australian government department, released under information request: Department of Immigration and Border Protection, 'Training for Decision Makers: Assessment of LGBT+ Asylum Seekers' (2016) <https://www.homeaffairs.gov.au/foi/files/2017/FA170301116-documents-released.pdf> accessed 4 March 2020; see Jasmine Dawson and Paula Gerber, 'Assessing the Refugee Claims of LGBTI People: Is the DSSH Model Useful for Determining Claims by Women for Asylum Based on Sexual Orientation?' (2017) 29 IJRL 292.

[56] See Jansen 2018 (n 3); UKLGIG 2016 (n 27); Siobhan McGuirk, '(In)credible Subjects: NGOs, Attorneys, and Permissible "LGBT Asylum Seeker" Identities' (2018) 41 PoLAR: Political and Legal Anthropology Review 4. See earlier examples discussed in Rachel Lewis, ' "Gay? Prove it": The Politics of Queer Anti-Deportation Activism' (2014) 17 Sexualities 958; Millbank (n 51) 8–11.

[57] Nicole LaViolette, 'Overcoming Problems with Sexual Minority Refugee Claims: Is LGBT Cultural Competency Training the Solution?' in Spijkerboer (n 3).

[58] Nicole LaViolette, 'Sexual Orientation and the Refugee Determination Process: Questioning a Claimant About Their Membership in the Particular Social Group' (May 2004) <http://dx.doi.org/10.2139/ssrn.2294763> accessed 4 March 2020.

[59] Reproduced in Dawson and Gerber (n 55) 295.

[60] ibid. See also Gomez (n 52).

fixed, linear and universalized.[61] More recently, Middelkoop, and Dawson and Gerber, have expressed similar concerns, which Dawson and Gerber argue are even more acute for female applicants.[62]

There is now an established and voluminous body of scholarship on the 'performance' of sexuality in RSD.[63] Indeed it could be argued that the principal focus of both legal and non-legal queer interventions in refugee law over the past decade has been on the misunderstanding of non-Western SOGI expressions, and consequent failures in translation—both literal[64] and figurative—of SOGI life experiences in refugee adjudication.[65] Yet these extensive critical interventions, like the highest-level legal and policy guidance, appear to have made little impact on everyday administrative practice, which continues to be riddled with intrusive questioning and simplistic and inappropriate assumptions about how gay identity is experienced and expressed.[66] Take, for example, a decision in 2016 in which the Administrative Appeals Tribunal in Australia made an adverse credibility finding and rejected as fabricated the claim of an applicant from Nepal based on reasoning as follows:

> The Tribunal had expressed its concerns that it may find that the applicant is not a homosexual, and is not in a homosexual relationship, at the first hearing. In the applicant's post first hearing statement, he claimed that as a couple they took photos while engaging in sex for their personal satisfaction which he offered to provide to the Tribunal to confirm that he and his partner are in a same sex relationship. The Tribunal wrote to the applicant, inviting him to a second hearing and giving him an opportunity to produce such photos but he did not. When this was noted at the second hearing, his evidence was evasive, finally he claimed he had been uncomfortable to produce the photos, however he suggested he wanted to do so now. The Tribunal did not find this explanation persuasive, noting that it had been his offer to provide them to the Tribunal in his statutory declaration; such photos had not been requested by the Tribunal. However, after the second

[61] Laurie Berg and Jenni Millbank, 'Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants' (2009) 22 JRS 195, 206.

[62] Louis Middelkoop, 'Normativity and Credibility of Sexual Orientation in Asylum Decision Making' in Spijkerboer (n 3); Dawson and Gerber (n 55).

[63] See eg Berg and Millbank (n 61); 'Special Issue: Queer Migration, Asylum, and Displacement' (2014) 17 (8) Sexualities 911.

[64] See Organization for Refuge, Asylum & Migration (ORAM), 'Sexual Orientation, Gender Identity and Gender Expression: Essential Terminology for the Humanitarian Sector' (2016).

[65] For excellent recent examples, drawing upon empirical research into applicant experiences and adjudicator cultures, see David Murray, *Real Queer? Sexual Orientation and Gender Identity Refugees in the Canadian Refugee Apparatus* (Rowman and Littlefield 2015); Deniz Akin, 'Queer Asylum Seekers: Translating Sexuality in Norway' (2017) 43 Journal of Ethnic and Migration Studies 458; Alexander Dhoest, 'Learning to be Gay: LGBTQ Forced Migrant Identities and Narratives in Belgium' (2019) 45 Journal of Ethnic and Migration Studies 1075; Olga Jubany, 'Constructing Truths in a Culture of Disbelief: Understanding Asylum Screening from Within' (2011) 26 International Sociology 74.

[66] See eg Jansen 2018 (n 3) ch 3; UKLGIG 2010 (n 27), UKLGIG 2013 (n 27), UKLGIG 2016 (n 27). See also UN OHCHR, 'UN Rights Experts Urge More Protection for LGBTI Refugees' (1 July 2019) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24,764&LangID=E> accessed 26 February 2020.

> hearing, the applicant produced a number of photos . . . The Tribunal notes that there are two identical photos which appear to show the applicant and his claimed partner kissing. One photo shows the applicant naked and entwined with another unidentified male person's limbs (face not visible). There are a further three photos of two unidentified bodies (not faces) of two men: two photos show a penis being held by a hand, and another photo is suggestive of (without evidencing) intercourse (perhaps between two males but this is unclear). Having regard to the Tribunal's credibility concerns, it is not prepared to accept that these photos are genuine, non-staged photos of the applicant and his claimed partner engaged in sexual activity.[67]

Every academic and press article on lesbian, gay, and bisexual refugee claims around the world has an example like the one above, in which an applicant was rejected for not having corroborative evidence of their gay sex, or having such evidence which seemed staged; not knowing the names of the receiving country's current gay bars, or the works of their own country's gay poets of antiquity; or having a religious affiliation, or children, or a past opposite sex partner; or expressing no sense of shame in their identity, or too much; and so on.

The pervasive endurance of such decisions about the 'gay reality', like the adaptive nature of discretion reasoning, indicates that this is not a failure of law, but of adjudicative cultures. In one of her last publications before her untimely death, LaViolette suggested that a comprehensive reassessment of SOGI 'cultural competency training' models be considered as a response. However, she noted that even in Canada, which is better resourced and more committed than many comparable receiving nations, SOGI training is only undertaken for a half-day or day every few years.[68]

It is important to acknowledge that issues such as discretion reasoning and disbelief of group membership pose distinct and enduring challenges for lesbians, gay men, and trans and gender-diverse peoples fleeing persecution. However it is also important to recognize that those specific challenges in many ways also exemplify the paradoxes at the heart of refugee status adjudication. The next section argues that, while often seen as an 'outer edge' or exceptional form of claim, sexuality and gender identity refugee claims encapsulate issues that speak to the troubled core of RSD and refugee jurisprudence.

[67] *1416486 (Refugee)* [2016] AATA 4994, para 60. This was despite the relevant gender guidelines (which themselves refer to the UNHCR SOGI guidance) stating, 'When conducting a hearing based on sexual orientation or gender identity, a Member should ask questions in relation to the applicant's realisation and experience of sexual orientation or gender identity rather than questions that focus on sexual acts': Administrative Appeal Tribunal, 'Migration and Refugee Division: Guidelines on Gender' (July 2015) para 21. That Tribunal finding was characterized as 'troubling' in a recent Federal Court decision allowing an extension of time for a judicial review application: *BHC16 v Minister for Immigration and Border Protection* [2019] FCA 1326.

[68] LaViolette (n 57).

4. Sexuality and Gender Identity Claims as Paradigm

Gender-related persecution jurisprudence is best understood as a 'mosaic' in which disparate and highly specific pieces fit together to form a global picture of asylum systems' responses to violence; that is, that recognition of the particularities of specific kinds of claims, such as forced marriage, or claims from certain places, should be examined as both unique and connected phenomenon.[69]

Both of the examples explored above, 'discretion' and credibility, are issues that continue to impact upon lesbians, gay men, and trans and gender-diverse peoples in an acute and specific manner. Yet they also exemplify key challenges in refugee jurisprudence and determination processes worldwide.

'Discretion' or potential concealment is an issue that arises, albeit under different discourses, in almost all political, religious, and many PSG claims.[70] There is frequently an act/identity distinction that flows from such categories because unless the identity is generally visible (eg women) it must be manifested through some form of conduct (political protest, religious gatherings) in order for the persecutor to identify the member and for the persecution to have a nexus.[71] Jana Weßels has argued compellingly that these claims also share the problem of 'future behaviour', that is, whether and why such acts will occur in the applicant's future if they are returned.[72] Through that process of manifestation, and assessment of futurity, a porousness opens up in which refugee decision-makers evaluate, either overtly or implicitly, whether a future life encompassing such conduct is reasonable, required, or sufficiently and intrinsically connected to the protected identity (proselytizing through doorknocking instead of worshipping in church and so on). In this sense refugee law is in an 'eternal dilemma',[73] perpetually both expanding and contracting the realm of international human rights as it determines what (lesser) scope of surrogate protection it should offer.

Similarly, the acute problem of credibility assessment in sexual orientation claims, in which self-disclosure will often be the primary if not exclusive evidence of group membership, is a stark exemplar of the profound challenges of credibility assessment and

[69] Sara Dehm and Jenni Millbank 'Witchcraft Accusations as Gendered Persecution in Refugee Law' (2019) 28 Social and Legal Studies 202, 204, drawing on Efrat Arbel, Catherine Dauvergne, and Jenni Millbank, 'Introduction' in Efrat Arbel, Catherine Dauvergne, and Jenni Millbank (eds), *Gender in Refugee Law: From the Margins to the Centre* (Routledge 2014).

[70] Janna Weßels, '"Discretion", Persecution and the Act/Identity Dichotomy' (VU Migration Law Series No 12, VU University Amsterdam 2016).

[71] Weßels notes that the issue of discretion is considered in almost every chapter of one of the leading texts by James C Hathaway and Michelle Foster: Jana Weßels, 'The Art of Drawing Lines: Future Behaviour and Refugee Status' in Satvinder Juss (ed), *The Research Handbook on International Refugee Law* (Edward Elgar 2019) 275.

[72] ibid. [73] ibid 280.

evidentiary and fact-finding processes within RSD more broadly.[74] Many researchers have documented 'cultures of disbelief' in domestic RSD processes,[75] and have argued that the gulf of culture, language, and expectations[76] between applicants and Western decision-makers renders applicant experiences into, at best, a flattened and consumable simulacra and, at worst, an unintelligible otherness.[77] The more unknowable or untranslatable a person's experience of harm, the more likely it is to be distilled, adapted, and distorted to 'fit' within the framework of an intelligible claim. Thus, witchcraft and forced marriage are reformulated into 'gender' claims, domestic violence or trafficking into FGM, and so on.[78] Thus asylum claims are reshaped into not just the parlance but the paradigms of Western understanding.

These cultural gulfs and ontological challenges lie at the heart of all refugee adjudication processes, which grapple with the unknowability of the other, and of the future self. They also sit within a largely, and increasingly, hostile political context among refugee receiving nations, within which ever-sharpening bureaucratic imperatives drive RSD processes towards speed, exclusion, and non-reviewability—rather than towards critical reflection, complexity, or nuance. Thus, the crude proxies for group membership and credibility that have been so thoroughly and carefully critiqued in the past decade by researchers, activities, and advocates look set to become blunter, not better.

[74] See Hilary Evans Cameron, *Refugee Law's Fact Finding Crisis: Truth, Risk and the Wrong Mistake* (CUP 2018); UNHCR (n 27).

[75] See eg Cécile Rousseau, François Crépeau, Patricia Foxen, and Francé Houle, 'The Complexity of Determining Refugeehood: A Multidisciplinary Analysis of the Decision-Making Process of the Canadian Immigration and Refugee Board' (2005) 15 JRS 43; Michael Kagan, 'Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination' (2003) 17 Georgetown Immigration Law Journal 367. See also Bridget Haas and Amy Shuman (eds), *Technologies of Suspicion and the Ethics of Obligation in Political Asylum* (Ohio University Press 2018).

[76] See Laura Smith-Khan, 'Different in the Same Way? Language, Diversity, and Refugee Credibility' (2017) 29 IJRL 389; Jane Herlihy, Kate Gleeson, and Stuart Turner, 'What Assumptions about Human Behaviour Underlie Asylum Judgments?' (2010) 22 IJRL 351.

[77] See eg Amy Shuman and Carol Bohmer, 'Gender and Cultural Silences in the Political Asylum Process' (2014) 17 Sexualities 939.

[78] See Benjamin Lawrance, 'Country of Origin Information, Technologies of Suspicion, and the Erasure of the Supernatural in African Refugee Claims' in Haas and Shuman (n 75); Benjamin N Lawrance and Charlotte Walker-Said, 'Resisting Patriarchy, Contesting Homophobia: Expert Testimony and the Construction of Forced Marriage in Africa Asylum Claims' in Annie Bunting, Benjamin N Lawrance, and Richard L Roberts (eds), *Marriage by Force: Contestation over Consent and Coercion in Africa* (Ohio University Press 2016); Jenni Millbank and Anthea Vogl, 'Adjudicating Fear of Witchcraft Claims in Refugee Law' (2018) 45 Journal of Law and Society 370; Dauvergne and Millbank (n 18); Efrat Arbel, 'The Culture of Rights Protection in Canadian Refugee Law: Examining the Domestic Violence Cases' (2013) 58 McGill Law Journal 519.

5. Conclusion

In the Canadian RSD context, Masoumi has argued that the expansion of refugee law to 'accommodate feminist readings of harm and violence' that took place in the 1990s occurred simultaneously with a systematic and severe restriction of access to refugee status, including through exclusions to entry.[79] Masoumi concludes that 'bureaucratic and administrative forces may capably undermine the potentially expansive effects of progressive legal change'.[80] In a similar vein, and somewhat pessimistically, this chapter has outlined how the dismantling of formal barriers and exclusions to refugee protection claims on sexual orientation and gender identity grounds has been undermined in RSD through the prolonged misapplication and misunderstanding of such law at the level of administrative practice and implementation.

Issues such as the act/identity distinction, which underlies the manifestation of protected grounds under the Convention, the problem of futurity in determining well-founded fear, and the cultural gulf at the heart of credibility assessment, and indeed much problematic evidentiary practice in RSD, are all starkly displayed in SOGI claims. The distinct aspects of SOGI claims should not be lost sight of, but neither should the ways in which the difficulties and controversies of such claims exemplify the founding paradoxes and contemporary challenges facing refugee law and refugee adjudication processes more broadly. Not least of all, one such paradox is the manner in which refugee jurisprudence, which continues to advance in its reach and sophistication, is so often rendered into a blunt instrument of exclusion at the point of impact.

[79] Azar Masoumi, 'The Politics of "Doing Exactly Nothing": Feminist Legal Change and Bureaucratic Administration of Refugee Protection' (2019) 27 Feminist Legal Studies 243, 245.

[80] ibid 258.

CHAPTER 43

PROTECTING REFUGEES WITH DISABILITIES

MARY CROCK*

1. Refugees, Disabilities, and Displacement

It is accepted as axiomatic that events producing refugees—including armed conflict, civil unrest, and (for good measure) natural disasters—are a major cause of death and disability in vulnerable human populations.[1] Counterintuitively, however, statistical data collected by both national and United Nations agencies, including UNHCR, has traditionally identified only very small numbers of refugees as having disabilities.[2] The supposition seems to have been that persons with disabilities are not able to travel and that these individuals are most likely to be left behind to perish or otherwise suffer the slings and arrows of fate and misfortune. Research in more recent times has revealed such assumptions about the mobility of refugees with disabilities to be patently false.[3]

* I gratefully acknowledge the assistance provided by Laura Smith-Khan in the research for this chapter. Thanks also to Ron McCallum AO and the editors for comments on the chapter in its formative phase.

[1] See Eric Neumayer and Thomas Plümper, 'The Gendered Nature of Natural Disasters: The Impact of Catastrophic Events on the Gender Gap in Life Expectancy' (2007) 97(3) Annals of the Association of American Geographers 551.

[2] See Janet E Lord, 'Disability-Inclusive Disaster Preparedness and Response' (2010) 104 Proceedings of the Annual Meeting (American Society of International Law) 118, 119–20; UN Department of Economic and Social Affairs, 'Disability-Inclusive Disaster Risk Reduction and Emergency Situations' <https://www.un.org/development/desa/disabilities/issues/disability-inclusive-disaster-risk-reduction-and-emergency-situations.html> accessed 1 April 2020; Mary Crock, Laura Smith-Khan, Ron McCallum, and Ben Saul, *The Legal Protection of Refugees with Disabilities: Forgotten and Invisible?* (Elgar Publishing 2017) ch 1, ch 4.

[3] See Crock, Smith-Khan, McCallum, and Saul (n 2) ch 4; Laura Smith-Khan, Mary Crock, Ben Saul, and Ron McCallum, 'To "Promote, Protect and Ensure": Overcoming Obstacles to Identifying Disability in Forced Migration' (2014) 27 JRS 38.

In 2011, the World Health Organization's global survey found that it is to be expected that 2.9 per cent of any population is comprised of persons with severe disabilities, while a further 12.4 per cent have moderate, long-term disabilities.[4] If the World Health Organization (WHO) findings were to be applied to the 79.5 million persons of concern identified by UNHCR in December 2019,[5] over 10 million of the world's refugees at that date are likely to be persons with a disability. Indeed, when HelpAge and Handicap International surveyed persons fleeing the conflict in Syria in 2014, almost twice the WHO global average were found to have 'special needs' and/or disabilities.[6] Sydney University researchers made similar findings in a project examining the experiences of refugees across six countries.[7]

This chapter explores the law and policy concerning persons with disabilities displaced as refugees, beginning in Section 2 with a broad survey of international legal and policy frameworks. Intersections between refugee law and human rights laws are explored in Section 3, examining how key elements of the definition of refugee should apply to persons with disabilities.Section 4 addresses the procedural implications of requirements that 'reasonable accommodations' be made in status determinations and treatment of refugees with disabilities. The chapter concludes with comments on durable solutions for refugees with disabilities and the future impact of the UN Convention on the Rights of Persons with Disabilities (CRPD) on international refugee law and policy.

2. Refugees with Disabilities as Rights Bearers

The change in attitude to refugees with disabilities is a ripple effect of the coming into force of the UN CRPD in 2008.[8] Within 10 years, 177 countries had signed or ratified this Convention and Protocol. The concurrent establishment of a Committee in 2008

[4] WHO, *The Global Burden of Disease: 2004 Update* (2008) 34. See also WHO and the World Bank, *World Report on Disability* (2011) ch 2.

[5] UNHCR, 'Figures at a Glance' <http://www.unhcr.org/en-au/figures-at-a-glance.html> accessed 1 December 2020.

[6] Researchers found 30 per cent of the Syrians interviewed had special needs, with 77 per cent amongst the 'aged'. See HelpAge International and Handicap International, *Hidden Victims of the Syrian Crisis: Disabled, Injured and Older Refugees* (2014) <https://humanity-inclusion.org.uk/sn_uploads/document/2014-report-hidden-victims-of-the-syrian-crisis-disabled-injured-older-refugees-handicap-international.pdf> accessed 4 November 2019.

[7] See Crock, Smith-Khan, McCallum, and Saul (n 2); Smith-Khan, Crock, Saul, and McCallum (n 3).

[8] Convention on the Rights of Persons with Disabilities (adopted 30 March 2007, entered into force 3 May 2008) 2515 UNTS 3 (CRPD). See also Optional Protocol to the Convention on the Rights of Persons with Disabilities (adopted 30 March 2007, entered into force 3 May 2008) 2518 UNTS 283 (CRPD Optional Protocol).

provided a new voice and international forum for persons with disabilities that reflected and recognized the efforts of disability advocates around the world.[9]

The CRPD is a revolutionary instrument because it demands a move away from a medical or charity approach to disability that focuses on a person's 'problems' and on how they can be treated or cured.[10] Article 1 defines disability not just as impairment, but also as a product of context and societal attitudes that operate to deny an individual their rights to participate in society. It states:

> Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments, *which in interaction with various barriers* may hinder their full and effective participation in society on an equal basis with others (emphasis added).

The Convention acknowledges that environmental factors can make participation a challenge for virtually everyone in developing countries experiencing conflict or disaster. Article 2 requires States parties to make 'reasonable accommodations' for persons with disabilities, defined as:

> ... necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms ...

While the concept of reasonable accommodation recognizes practical and financial constraints faced by States, the Convention does not allow States to retreat from their obligations in difficult times. The CRPD is the first instrument to refer to both international humanitarian law and international human rights law[11] so as to articulate the rights of persons with disabilities in situations of emergency and displacement. Article 11 of the CRPD requires that States parties:

> [t]ake, in accordance with their obligations under international law, including international humanitarian law and international human rights law, all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters.

[9] The Committee on the Rights of Persons with Disabilities (CRPD Committee). See Rosemary Kayess and Phillip French, 'Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities' (2008) 8 Human Rights Law Review 1; Arlene S Kanter, 'The Promise and challenge of the United Nations Convention on the Rights of Persons with Disabilities' (2007) 34(2) Syracuse Journal of International Law and Commerce 287; Anna Lawson, 'The United Nations Convention on the Rights of Persons with Disabilities: New Era or False Dawn?' (2007) 34(2) Syracuse Journal of International Law and Commerce 563.

[10] See Louise Arbour, UN High Commission for Human Rights, 'Statement on the Ad Hoc Committee's adoption of the International Convention on the Rights of Persons with Disabilities' (5 December 2006) para 11. See also Tom Shakespeare, 'The Social Model of Disability' in Lennard J Davis (ed), *The Disability Studies Reader* (3rd edn, Routledge 2010) 266–73.

[11] The CRPD goes further than the CRC, art 38.

This provision is of critical significance to refugees with disabilities because it affirms their right to equal treatment in all circumstances. Second, the provision makes no attempt to qualify access to Convention rights according to a person's citizenship or immigration status. States parties must respect the rights and dignity of all persons with disabilities on their territory or in their care and control—including refugees.[12]

From the outset, the CRPD Committee ensured that the plight of refugees and forced migrants with disabilities was embraced as an issue of concern. It took a direct interest in the UNHCR Executive Committee Conclusion in 2010 on refugees with disabilities,[13] itself a reflection of an institutional desire to ensure that those with disabilities cease to be the 'forgotten and invisible' refugees.[14] The CRPD Committee includes questions on article 11 of the Convention in its country reviews and has offered criticisms of State practice and made recommendations for reform of law and policies.[15]

UNHCR followed in 2011 by producing its 'Need to Know Guidance' for field workers.[16] As explored in Section 5, the 'Resettlement Handbook' was revised in the same year so as to remove instructions that assumed certain refugees with disabilities to be inappropriate candidates for resettlement programmes.[17]

As natural disasters and global conflagrations spawned migratory flows (including across Europe) not seen since the Second World War, disability issues in recent decades have been given prominence in policy initiatives to re-draw the rules governing transnational human displacement. The ensuing documents may not bind States as a matter of law. However, persons with disabilities have certainly begun to be included in the policy discourse on human displacement.

The second decade of the new Millennium seems to have marked a turning point for both refugees and migrants with disabilities. The 2012 Nansen Initiative on Disaster-Induced Cross-Border Displacement made little reference to disabilities in its 'Protection Agenda'[18] but this is not true of the subsequent Platform on Disaster

[12] See Mary Crock, Christine Ernst, and Ron McCallum, 'Where Disability and Displacement Intersect: Asylum Seekers and Refugees with Disabilities' (2013) 24(4) IJRL 735, 738–40.

[13] UNHCR Executive Committee, Conclusion No. 110 (LXI) 'On Refugees with Disabilities and other Persons with Disabilities Protected and Assisted by UNHCR' (2010); see CRPD Committeee, 'Report of the Committee on the Rights of Persons with Disabilities on its Fourth Session, 4–8 October 2010', UN doc CRPD/C/4/3 (7 March 2012) para 16 regarding decisions adopted by the CRPD Committee at its Fourth Session.

[14] António Guterres, 'Foreword' in Women's Refugee Commission, Disabilities Among Refugees and Conflict-Affected Populations (2010) 1 <https://www.womensrefugeecommission.org/resources/document/609-disabilities-among-refugees-and-conflict-affected-populations> accessed 29 January 2020.

[15] The committee reviews States parties' compliance with the CRPD, see CRPD Committee <https://www.ohchr.org/en/hrbodies/crpd/pages/crpdindex.aspx> accessed 29 January 2020. See further Section 4.

[16] UNHCR, 'Need to Know Guidance: Working with Persons with Disabilities in Forced Displacement' (2011).

[17] See discussion in Section 5 (n 100ff).

[18] See the Nansen Initiative, 'Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change: Final Draft' (6 October 2015) para 11 <https://www.nanseninitiative.org/wp-content/uploads/2015/10/Agenda-Final-Draft.pdf> accessed 29 January 2020.

Displacement.[19] This pattern is matched in the agencies responsible for general migration issues. The International Organization for Migration (IOM) has acquired the status of a UN body and has been called upon with increasing frequency to assist in the management of mass migration flows.[20] In 2012, IOM's *Migration Crisis Operational Framework* made no mention of people with disabilities. However, its *Migrants in Countries in Crisis Initiative*, launched in 2015, acknowledged that planning should address the needs of 'particularly vulnerable populations'. The related Guidelines acknowledge the needs of migrants with physical, visual, or auditory impairments in disaster contexts.[21] Within the UN system, the rights of persons with disabilities gained express recognition in the Sustainable Development Goals in 2014.[22]

The 'Sendai Framework for Disaster Risk Reduction 2015–2030' was adopted by UN Member States in response to the earthquake and tsunami in Japan that killed 16,000 people and caused the melt-down of the Fukushima nuclear power plant.[23] The Sendai *Guiding Principles* identify persons with disabilities and Disabled Peoples' Organizations as 'critical in the assessment of disaster risk and in designing and implementing plans tailored to specific requirements, taking into consideration, inter alia, the principles of universal design'.[24] The principles stress 'empowerment and inclusive, accessible and non-discriminatory participation' and require that a 'gender, age, disability and cultural perspective should be integrated in all policies and practices'.[25]

Mass migrations across Europe and the Middle East in these years prompted the World Humanitarian Summit in Istanbul, Turkey, in May 2016, which produced the Charter on Inclusion of Persons with Disabilities.[26] The Charter saw stakeholders, including UNHCR, commit to non-discrimination, and inclusive policy and practice in services and inter-agency operations. It was an important precursor to the UN summit in New York in September 2016, again focusing on mass migration. The New York Declaration for Refugees and Migrants calls on States to recognize and address 'the

[19] See Platform on Disaster Displacement Follow-up to the Nansen Initiative, Our Response <https://disasterdisplacement.org/the-platform/our-response> accessed 29 January 2020. The Protection Agenda was concluded in October 2015.

[20] See UNGA, *Making Migration Work for All: Report of the Secretary General*, UN doc A/72/643 (12 December 2017) 16–17. See further Vincent Chetail, *International Migration Law* (OUP 2019) 345, ch 7.3.

[21] See Migrants in Countries in Crisis Initiatve (MICIC), 'About MICIC' <https://micicinitiative.iom.int/about-micic> accessed 29 January 2020; MICIC, 'Guidelines to Protect Migrants in Countries Experiencing Conflict or Natural Disaster' (June 2016) <https://micicinitiative.iom.int/sites/default/files/document/micic_guidelines_english_web_13_09_2016.pdf> accessed 29 January 2020.

[22] UNGA, *Report of the Open Working Group of the General Assembly on Sustainable Development Goals*, UN doc A/68/970 (12 August 2014). See David le Blanc, 'Towards Integration at Last? The Sustainable Development Goals as a Network of Targets' (2015) 23(3) Sustainable Development 176.

[23] UN, 'Sendai Framework for Disaster Risk Reduction 2015–2030', UN doc A/CONF.224/CRP.1 (18 March 2015) (Sendai Framework) <https://reliefweb.int/sites/reliefweb.int/files/resources/Sendai_Framework_for_Disaster_Risk_Reduction_2015-2030.pdf> accessed 29 January 2020.

[24] ibid para 36(a)(iii). [25] ibid para 19(d). See in particular Priority 4 para 32.

[26] See 'Charter on Inclusion of Persons with Disabilities in Humanitarian Action' (2016) para 1.8 <http://humanitariandisabilitycharter.org/> accessed 29 January 2020.

special needs of all people in vulnerable situations who are travelling within large movements of refugees and migrants' including persons with disabilities.[27]

This summit led to the Global Compacts on Migration and Refugees that dominated the Secretary-General's 2018 agenda. Persons with disabilities are referenced no less than 15 times in the Global Compact on Refugees and five times in the Global Compact for Safe, Orderly and Regular Migration. While a 'work-in-progress', the situation of persons with disabilities on the move as migrants or refugees has finally gained 'mainstream' attention.[28]

Key humanitarian actors have created tools for collecting data on disability. In 2018, the Age and Disability Capacity Programme (ADCAP) consortium (which includes UNHCR) released its *Minimum Standards for Age and Disability Inclusion in Humanitarian Action*.[29] Revised Sphere Standards followed.[30] The UN Inter-Agency Standing Committee (IASC)[31] established a Task Team to draft Guidelines on Inclusion of Persons with Disabilities in Humanitarian Action. The IASC calls for the creation of 'cluster teams' to deal with areas such as Food Security, WASH, Health, Nutrition, Protection, and Logistics led by designated agencies and involving other operational actors. The IASC is working on the identification of preferred data collection tools for 'rapid needs assessment', known as the Multi-cluster/sector Initial Rapid Needs Assessment.[32] These processes have potential to achieve consensus in approach and actions between States and across international and domestic non-government organizations operating in humanitarian contexts.

The UN Office for the Coordination of Humanitarian Action responded by creating a 'Common Operational Dataset' (COD) to improve approaches to disaster preparedness.[33] Using demographic and geographic data collected by participating States and made available to key responders in crisis situations, the COD extended disaggregated demographic data to include disabilities. Another humanitarian reform

[27] New York Declaration for Refugees and Migrants, para 23, 58.

[28] For a discussion of the two compacts, see Chetail (n 20) ch 6, 299ff.

[29] See ADCAP, *Minimum Standards for Age and Disability Inclusion in Humanitarian Action: Pilot Version* (2016)<http://www.helpage.org/download/56421daeb4eff> accessed 29 January 2020.

[30] See MICIC 2016 (n 21). The Sphere Project, now known as Sphere, was created in 1997 by a group of humanitarian non-governmental organizations and the Red Cross and Red Crescent Movement. Its aim was to improve the quality of their humanitarian responses and to be accountable for their actions. See https://handbook.spherestandards.org/en/sphere/

[31] The IASC was established in June 1992 in response to UNGA res 46/182 (19 December 1991) on the strengthening of humanitarian assistance. See IASC <https://interagencystandingcommittee.org/> accessed 29 January 2020.

[32] IASC, 'Multi-sector Initial Rapid Assessment Guidance' (2015) <https://www.humanitarianresponse.info/en/programme-cycle/space/document/multi-sector-initial-rapid-assessment-guidance-revision-july-2015> accessed 29 January 2020.

[33] See Humanitarian Response, 'Data: Humanitarian Data Exchange' <https://www.humanitarianresponse.info/applications/data/country-region> accessed 29 January 2020. For the UNHCR involvement in this initiative see UNHCR, 'Common Operational Dataset (COD) and Fundamental Operational Dataset (FOD) <https://emergency.unhcr.org/entry/50306/common-operational-datasets-cods-and-fundamental-operational-datasets-fods> accessed 29 January 2020.

improving resource usage and cooperation between humanitarian actors is the 'Grand Bargain' process emanating from the 2016 Summit in Istanbul. One work stream in this process is devoted to improving the integration of needs assessment techniques.[34] Overall, the post-CRPD environment has seen a marked increase in the nature and quality of soft law and guidance documents relative to refugees (and migrants) with disabilities. In the field, it is to be hoped that this will eventually effect real change.

3. Disability and the Refugee Convention

a. Refugees with Disabilities and *Non-refoulement*

While persons with disabilities face acute challenges in displacement, impairment does not automatically make an individual a 'refugee' at law. Rather, he or she must meet the definition of refugee in article 1A(2) of the Refugee Convention. Where the CRC extends the protective reach of human rights and refugee law to children *because* they are children,[35] the CRPD does not contain an express *non-refoulement* provision for persons with disabilities tied to refugee law. Article 11 obliges States to take 'all necessary measures to ensure the protection and safety' of persons with disabilities in disaster contexts that clearly encompass refugee-producing events. The reference to international humanitarian law and international human rights law may not expand the operation of relevant areas of law, including refugee law. However, the provision should foreground consideration of disabilities in any context that could involve *refoulement*.[36]

Importantly, article 15 of the CRPD embraces article 3 of the CAT, enshrining the right to be free from torture or cruel, inhuman, or degrading treatment or punishment. This provision arguably creates a regime for the complementary protection of persons with disabilities who cannot meet the Convention definition of refugee.[37]

[34] See Agenda for Humanity, 'Initiative: Grand Bargain' <https://www.agendaforhumanity.org/initiatives/3861> accessed 29 January 2020. See Molly Anders, 'The UK's Stake in the "Grand Bargain"', *Devex* (23 May 2016) <https://www.devex.com/news/the-uk-s-stake-in-the-grand-bargain-88194> accessed 29 January 2020.

[35] See CRC, art 22; UN Committee on the Rights of the Child, 'General Comment No. 6: Treatment of Unaccompanied and Separated Children outside their Country of Origin', UN doc CRC/GC/2005/6 (1 September 2005). See Jason M Pobjoy, *The Child in International Refugee Law* (CUP 2017); Jason M Pobjoy, 'Article 22', in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (OUP 2019).

[36] On the CRPD and *refoulement* as mandatory relevant considerations in criminal deportation contexts, see *Omar v Minister for Home Affairs* [2019] FCA 279.

[37] Whether and how the CRPD establishes *non-refoulement* obligations is untested. It is beyond the scope of this chapter to consider the matter in the depth that it deserves.

In mass migration contexts, UNHCR can declare whole populations to be 'mandate' refugees or persons of concern to whom assistance is extended. UNHCR and other relief agencies may see displaced persons with disabilities as a vulnerable cohort worthy of special protection regardless of their formal status as refugees. However, for individuals seeking asylum, or attempting to access resettlement programmes, meeting the elements of the Convention definition of refugee remains critical.

'Disability' is a broad concept, including physical impairments affecting gross motor through to fine motor functioning; varying degrees of cognitive impairments; and can encompass chronic illnesses and conditions that affect both physical and cognitive functioning.[38] The CRPD's central message is that context should always be considered. Persons afforded necessary supports may not be 'disabled' by their impairment. In the absence or impossibility of compensatory measures, however, some impairments produce serious functional deficits. Some refugees with disability may face no special impediments in demonstrating that they are Convention refugees. Conversely, others with certain psycho-social disabilities can find meeting even the most basic elements of the definition a challenge.

If article 11 of the CRPD does not create a stand-alone *non-refoulement* obligation, a core tenet of the convention is the obligation to make 'reasonable accommodations' for persons with disability. This will be used to frame three aspects of article 1A(2) of the Refugee Convention: the requirement that a person show a 'well-founded fear'; the meaning of 'persecution'; and challenges in establishing causative links to the five Convention grounds.

b. The Duty of 'Reasonable Accommodation'

Article 2 of the CRPD, extracted above, categorizes denial of 'reasonable accommodation' as discrimination. 'Reasonable accommodation' is established as an overarching duty,[39] not qualified by the Convention's reference in article 4(2) to the 'progressive realization' of rights, which acknowledges challenges facing developing countries. Yet, while the prohibition of discrimination is immediate and absolute,[40] the duty to accommodate is qualified. States must only make adjustments that are *reasonable*, having regard to matters such as resource constraints and other circumstances. The CRPD Committee notes that the duty can be divided into two parts. The first is a posi-

[38] See Barbara M Altman (ed), *International Measurement of Disability—Purpose, Method and Application* (Springer 2017).

[39] See CRPD, art 5(3), as well as art 13,14, 24, and 27. See CRPD Committee, General Comment No 6, n 36, para 14ff; See also the discussion in Stephanie A Motz, 'The Persecution of Disabled Persons and the Duty of Reasonable Accommodation: An Analysis under International Refugee Law, the EU Recast Qualification Directive and the ECHR' in Céline Bauloz, Meltem Ineli-Ciger, Sarah Singer, and Vladislava Stoyanova (eds), *Seeking Asylum in the European Union: Selected Protection Issues Raised by the Second Phase of the Common European Asylum System* (Brill 2015) 146ff.

[40] See art 5(2) and the discussion in Motz (n 39) 148. See also Stephanie A Motz, *The Refugee Status of Persons with Disabilities* (Brill 2020).

tive obligation to provide modifications necessary or appropriate to ensure the enjoyment of rights. The second ensures that this obligation does not impose an undue burden on the duty bearer.[41]

The 'disproportionate burden' qualification could limit the ability of refugees with disabilities to use the CRPD in asserting rights to medical and other benefits in host countries where deprivation is pervasive.[42] General Comment No 6 of the CRPD Committee does not address this conundrum; it focuses on the increased risk for persons with disabilities in displacement contexts, including women and girls facing violence (especially sexual violence), exploitation, and abuse.[43]

The 'reasonable accommodation' principle arguably creates a positive duty on States to acknowledge and address the unequal position of persons with disabilities. This is of critical importance as it demands change in both process and interpretation of refugee law.

c. Well-founded Fear

The starting point for most asylum claims is that a person must fear persecution if returned to their country of origin. The requirement that fear be 'well-founded' imports subjective and objective elements. Theoretically, an asylum seeker should be able to articulate their apprehension—and available evidence should demonstrate that the fear has a rational and factual basis.[44] For persons with intellectual or cognitive disabilities these requirements can pose problems. They may lack the capacity to appreciate danger or be unable to express a sense of fear. Explaining the relationship between feelings and relevant persecutory events can pose challenges.

Hathaway and Foster cite instances where judges have opined that the absence of actual trepidation will be fatal to a refugee claim.[45] While often *obiter dicta* or made in the context of adverse credibility findings,[46] rigid adherence by adjudicators to the 'bipartite standard' of subjective and objective fear is problematic for persons with disabilities. Formal processes can overwhelm applicants to the point where determining their state of mind becomes almost impossible.[47] Where courts have had to deal with claimants lacking capacity to articulate a claim, for example in the case of child applicants, some judges have glossed over the requirement for subjective fear, finding that the parents' fear was sufficient.[48] The situation of an adult with limited capacities is arguably

[41] See CRPD Committee (n 36) para 25. On process, see Section 4.b.

[42] Motz argues that it should not, see (n 39) 149.

[43] See CRPD Committee (n 36) paras 43–6.

[44] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/1P/4/ENG/REV.4 (1979, reissued 2019) paras 38–41.

[45] James C Hathaway and Michelle Foster, *The Law of Refugee Status* (2nd edn, CUP 2014) 95–7.

[46] See ibid 94 referencing *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 and *Minister for Immigration and Citizenship v SZJGV* (2009) 238 CLR 642, para 54.

[47] Hathaway and Foster (n 45) 95–7.

[48] See eg *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) 201 CLR 293, 297.

more complex in the absence of a person legally able to speak for the claimant. In *Patel*, Canadian Justice Maurice Lagacé DJ found it unconscionable that 'all persons who are incompetent will, by reason of that incompetence, be unable to qualify as Convention refugees'.[49] His Honour preferred to focus on the objective evidence that the applicant was in danger, allowing subjective fear to be assumed or imputed.

Many commentators favour this approach,[50] although practices at decisional level across countries vary widely. As explored in Section 4, the absence of obvious trepidation can be conflated with general considerations of an individual's credibility. Yet the significance of the requirement that apprehension has a rational basis cannot be overemphasized. However great a person's fear, the Convention definition will not apply unless the fear can be justified: 'fear on the part of a claimant does not turn non-persecution into persecution'.[51] UNHCR says of 'mentally disturbed persons':[52]

> It will . . . be necessary to lighten the burden of proof normally incumbent upon the applicant, and information that cannot easily be obtained from the applicant may have to be sought elsewhere, e.g. from friends, relatives and other persons closely acquainted with the applicant, or from his guardian . . . It may also be necessary to draw certain conclusions from the surrounding circumstance . . . It may not be possible to attach the same importance as is normally attached to the subjective element of 'fear', which may be less reliable, and it may be necessary to place greater emphasis on the objective situation.[53]

This statement recognizes the problems that persons with intellectual and cognitive disabilities may have in articulating a coherent narrative of harm. The CRPD's 'reasonable accommodation' requirements[54] should operate to reinforce UNHCR's exhortation that allowances be made for disability in applying the Convention definition.

d. 'Persecution'

Although not defined in the Refugee Convention, the term 'persecution' has been the subject of much academic, legislative, and juridical consideration. The broad statement of the US Court of Appeal describing persecution as 'the infliction of suffering or

[49] *Canada (Minister of Citizenship & Immigration) v Patel* (2008) 2 FCR 196, FC 747, para 28.

[50] See Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, OUP 2007) 64; Crock, Ernst, and McCallum (n 12) 744.

[51] *Prahastono v Minister for Immigration and Multicultural Affairs* (1997) 77 FCR 260, 271 (Hill J). See also *SZALZ v Minister for Immigration and Indigenous Affairs* [2004] FMCA 275, para 8 (Raphael FM).

[52] See UNHCR (n 44) paras 210–11.

[53] ibid paras 210–11; see further ibid paras 217–19; *Yusuf v Canada (Minister of Employment and Immigration)* 1991 CarswellNat 368, [1992] 1 FC 629.

[54] See generally Motz (n 39) 151ff.

harm … in a way regarded as offensive'[55] is often used as a point of departure. In 1991, Hathaway sought to give structure to the concept by using the various forms of harm referenced in key human rights instruments.[56] More recently, Hathaway and Foster have used the language of 'serious harm',[57] qualified always by the proviso that mistreatment be associated with a breakdown of national protection. To adopt the formulation of Lord Hoffman, persecution has two elements: 'Serious Harm + Failure of State Protection'.[58] They argue against a subjective[59] or literalist[60] approach to interpreting 'persecution', using international human rights law as a benchmark. This field of law gives structure to an otherwise inchoate principle. It allows calibration of harms from most to least serious so as to allow nations to create distinguishing levels of harms attracting protection obligations.[61] The evolutionary nature of human rights law favours attention to 'individuated vulnerabilities'.[62] This can be critically important for persons with disabilities.

In some regions the language of human rights has been adopted into the legal discourse on persecution: article 9 of the EU Qualification Directive is an example in point. In contrast, Australia has opted for a descriptive definition that focuses on personal liberty and physical harms at one extreme and at the other, social and economic privations that 'threaten [a] person's ability to subsist'.[63] Both formulations of 'persecution' invite consideration of the particular circumstances of an asylum seeker, recognizing that harms can be disproportionately severe for those with personal characteristics such as 'age and frailty'.[64]

Arguments around the need for a nuanced interpretation of persecution developed first around children.[65] Persons with disabilities are another subset of asylum seekers who can experience harms in different ways because of their personal attributes; they can be particularly susceptible to injury, either because of their inherently precarious health status or because of their inability to take evasive or remedial action in the face of threatened harm. Persons with disabilities can also experience harms inflicted *because* they are identified as disabled. Research suggests that persons with both physical and intellectual disabilities can be targeted for sexual assault and exploitation[66]—just as

[55] See *Kovac v Immigration and Naturalization Service*, 407 F 2d 102, 107 (9th Cir, 1969).

[56] See James C Hathaway, *The Law of Refugee Status* (Butterworths 1991) 104–8.

[57] Hathaway and Foster (n 45) ch 3.

[58] See *R v Immigration Appeal Tribunal, ex parte Shah* [1999] 2 AC 629, 653.

[59] Hathaway and Foster (n 45) 186–90. [60] ibid 190–3. [61] ibid 200–2.

[62] ibid 198ff.

[63] Migration Act 1958 (Cth) s 5J(5)—with the added proviso in s 5J(4)(c) that persecution must involve systematic and discriminatory conduct.

[64] Hathaway and Foster (n 45) 198, citing *SZBBP v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FMCA 143, para 35. See also *SZBQJ v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 143, para 21.

[65] See Jacqueline Bhabha and Mary Crock, *Seeking Asylum Alone: Unaccompanied and Separated Children and Refugee Protection in Australia, the UK and the US* (Themis Press 2007) ch 7.

[66] See eg Handicap International and Save the Children, 'Out of the Shadows: Sexual Violence against Children with Disabilities' (Save the Children 2011) <https://www.ohchr.org/Documents/HRBodies/CEDAW/HarmfulPractices/HandicapInternationalandSavetheChildren.pdf> accessed 29 January 2020.

sexual abuse can cause disabilities.[67] National policies favouring the institutionalization of persons with disabilities can lead to situations where these people are incarcerated against their will and subjected to cruel and degrading treatment that could amount to torture.[68]

While the abuse of persons with disabilities may be common in many countries, it does not follow that all mistreatment will amount to persecution. First, the experience of discrimination alone may not be sufficient to amount to persecution if the consequences of discriminatory acts do not seriously affect a person's health and well-being. UNHCR's Handbook states that for discrimination to amount to persecution it must produce 'consequences of a substantially prejudicial nature'.[69] Contrast the case of a Chilean woman with visual impairments (who claimed she faced discrimination because she used a guide dog) with that of a disabled man from Burkino Faso whose experiences effectively denied him access to a livelihood, healthcare, and the basics for survival. The second was recognized as a refugee while the first was not.[70] Both cases illustrate that persecution is a question of fact—but also a matter of the extent and nature of harms suffered or feared.

With so many nations adopting the CRPD, national jurisprudence is evolving, particularly around the question of *when* a failure to provide 'reasonable accommodation' for disabilities will amount to persecution.[71] This represents an area of potential growth of refugee law and scholarship.

e. 'For Reasons of' and the Convention Grounds

Where asylum seekers with disabilities face persecution not obviously linked to nationality, race, religion, or political opinion, problems may arise in demonstrating the required nexus with a convention ground. As Hathaway and Foster document,[72] a range of problems can arise in identifying a *subjective intention* to persecute. For persons with disabilities (as with women), there is always a risk that persecutory behaviour can be dismissed as just something that happens to such people because of their vulnerabilities.[73] These problems are not universally overcome by acknowledging the significance of a State's failure to protect against discriminatory actions. Although Hathaway and

[67] See Laura Smith-Khan, Mary Crock, Ben Saul, and Ron McCallum, ' "Up to Now I am Suffering": Justice, Sexual Violence and Disability amongst Refugees in Uganda' (2015) 1(4) International Journal of Migration and Border Studies 348.

[68] See CRPD, art 15; UNGA, 'Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Note by the Secretary-General', UN doc A/63/175 (28 July 2008) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N08/440/75/PDF/N0844075.pdf?OpenElement> accessed 29 January 2020; Theresia Degener, 'Recommendations to the Special Rapporteur on Torture and Treaty Bodies in Protecting Persons with Disabilities from Torture and Ill Treatment' (2007) <www2.ohchr.org/english/issues/disability/docs/torture/AnnexVI.doc> accessed 29 January 2020.

[69] UNHCR (n) para 54.

[70] Crock, Ernst, and McCallum (n 12) 748–9.

[71] See discussion in ibid 749–50 and Section 3.e.

[72] Hathaway and Foster (n 45) ch 5.

[73] See discussion at ibid 372–3.

Foster demonstrate the merit of adopting a 'predicament' approach to the nexus requirement, they acknowledge that legislation in many countries adheres to the language of intent to persecute.[74] Persons with disabilities may be able to show the virtual certainty of harm, but not that the harm is intentional. Harm may be the product not of acts but of omissions—including a failure to provide reasonable accommodation—and dismissed as the product of pervasive poverty or resource limitations.[75]

If asylum seekers with disabilities can find it difficult to demonstrate that their experiences are 'by reason of' one of the five Convention grounds, characterizing such people as members of a 'particular social group' should pose fewer problems. Decision-makers have accepted that social groups may be constituted by both physical and intellectual impairments as well as chronic illness and conditions such as autism and albinism. In the words of a US judge, '[w]hile not all disabilities are "innate" or "inherent" . . . they are usually, unfortunately, "immutable" '.[76]

In many cases, decision-makers have no difficulty in identifying asylum seekers with obvious disabilities as a cognizable group.[77] Where claims are accepted, these cases often demonstrate that refugees with disabilities suffer discrimination that compounds and magnifies the general resource limitations that may beset the society from which they have fled. This discrimination may be visited on the refugee by private individuals—non-State actors. Refugee status does not require the State to be the persecutor: inability or unwillingness to protect will suffice.[78]

4. Refugee Status Determination Processes

a. Capacity and Credibility

Asylum seekers with disabilities have a legal entitlement to process adjustments. However, they will still be expected to produce a *credible* account of why they might face persecution if returned to the country from which they have fled. Kagan identifies the credibility requirement as 'the single biggest hurdle before applicants beginning the refugee status determination process'.[79]

[74] ibid 380 fn 102.

[75] See eg *0907687* [2010] RRTA 45, involving a young child from Jordan with severe disabilities.

[76] *Tchoukhrova v Gonzales*, 404 F 3d 1181, 1189 (3rd Cir, 2005) (cited in Hathaway and Foster (n 45) 452, fn 613).

[77] For an example in Australia, see *1419893 (Refugee)* [2016] AATA 4338; *1728413 (Refugee)* [2018] AATA 4665; *1511708 (Refugee)* [2019] AATA 2220.

[78] See eg *Minister for Immigration and Multicultural Affairs v Sarrazola (No 2)* (2001) 107 FCR 184, 196–7.

[79] Michael Kagan, 'Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination' (2003) 17 Georgetown Immigration Law Journal 367, 368.

Disabilities can be of such severity that a person's very capacity to articulate a protection claim is compromised. 'Capacity' is a legal concept that describes a person's ability to understand the nature and effect of decisions and legal processes.[80] Some countries have codified mechanisms to determine capacity in legislation.[81] In general terms, deciding whether a person is capable of making a protection claim will be a question of fact. The modern approach, reflected in article 12 of the CRPD, is one that favours 'functioning' over labelling. Decision-makers are enjoined to consider the cognitive functioning of a claimant rather than relying on the simple identification of a particular condition or disease.[82] Where an individual is found to lack capacity, consideration should be given to the appointment of a guardian who can offer assistance or act on the person's behalf.

In asylum processes, disability and lack of capacity can merge into a grey area that plays out in an asylum seeker's inability to articulate a credible claim.[83] As noted earlier, disability can compromise a person's ability to concentrate, to recall details and to construct a logical narrative. Disability can be both exacerbated by experiences of trauma and be the product of trauma. All too often, asylum seekers carrying all manner of physical and psychological difficulties engage in processes with no legal counsel or other assistance.[84]

Some judges have adopted an all-or-nothing approach. Unless they perceive an individual to completely lack capacity, they have been unwilling to make allowances for psycho-social disabilities.[85] This is arguably dissonant with the requirement to make 'reasonable accommodations' for persons with disabilities.[86]

b. 'Reasonable Accommodation' of Disability in Status Determination Processes

As noted earlier, reasonable accommodation is defined as 'necessary and appropriate modification and adjustments', where needed, 'to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental

[80] See discussion of the principle of 'Gillick competence' in *Gillick v West Norfolk and Wisbech Area Health Authority* [1985] UKHL 7, [1986] AC 112; *Secretary, Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218.

[81] See eg Children and Young Persons Act 1933 (UK); Youth Justice and Criminal Evidence Act 1999 (UK); and Mental Capacity Act 2005 (UK).

[82] See CRPD Committee, 'General Comment No. 1 on Article 12 of the CRPD: Equal Recognition Before the Law', UN doc CRPD/C/GC/1 (19 May 2014) para 5. See also Bernadette McSherry, 'Legal Capacity Under the Convention on the Rights of Persons with Disabilities' (2012) 22 Legal Issues 23.

[83] See Kagan (n 79) 370–1.

[84] See Rosemary Byrne, 'Assessing Testimonial Evidence in Asylum Proceedings: Guiding Standards from the International Criminal Tribunals' (2007) 19 IJRL 609, 631.

[85] See *Minister for Immigration and Citizenship v SZNCR* [2011] FCA 369, para 30 (Tracey J); *Minister for Immigration and Citizenship v SZNVW* (2010) 183 FCR 575, para 22 (Keane CJ). For examples of the treatment of asylum seekers on Nauru with psycho-social impairments see *ROD122 v Republic* [2017] NRSC 39 and *TTY167 v Republic of Nauru* (2018) 93 ALJR 111.

[86] See CRPD, art 3.

freedoms'.[87] CRPD General Comment No 6 sets out guiding elements in determining reasonable accommodation, with consultation with the person affected being an important requirement. These include identifying and removing barriers to enjoying human rights, assessing whether accommodation is legally or practically feasible, and assessing whether the accommodation is necessary, appropriate, and suitable to achieve the human rights objective. An assessment should also be made of whether the modification imposes a disproportionate or undue burden on the duty holder.[88]

Article 2 and good faith obligations[89] mean that identifying the nature and effect of a person's disabilities should be a first order priority for States parties to the CRPD. Disabilities such as blindness, deafness, and gross motor impairments may be obvious, but impairments that affect cognition and mood may not be easily detected. Failure to inquire can mean disabilities remain hidden—leading to false assumptions and/or the absence of accommodation.[90]

Accommodating an asylum seeker with a disability should not be a gesture of charity. Where the CRPD operates, people with disabilities have legal entitlements. Failure to adjust process can mean failure to recognize refugee status and thus a failure to protect, including against *refoulement*. Following are examples of accommodations that may need to be made.

Blindness and vision impairment can affect a refugee's mobility, their ability to read and absorb written material, and thus their capacity to participate in legal processes. Hearing loss and deafness can restrict a person's ability to understand and respond and can lead to frustration and confusion on all sides of an interview. A pervasive problem for the deaf and hard of hearing is that their behaviour can be misinterpreted as rudeness or as indicative of mental impairment. Cognitive impairments can produce similar process failures. Mobility constraints can compromise a person's ability to attend appointments, access buildings, or use public transport. Concomitant with physical and cognitive impairments, as well as chronic illness, is heightened fatigue and the inability to tolerate protracted and stressful processes.

In some developed countries a great deal of thought has been given to the precise adjustments that need to be made for individuals affected by particular impairments. In the United Kingdom, for example, the 'Equal Treatment Bench Book' includes an appendix that describes common disabilities and ways in which adjudicators can adapt their practice so as to improve the mood and performance of litigants with disabilities.[91]

[87] See CRPD, art 2. See also arts 5(3), 14(2), 18(2)(c), 18(5), and 27(1)(i).

[88] See General Comment 6 (n 39) para 26.

[89] See Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) art 26.

[90] See discussion in Marianne Schulze, *A Handbook on the Human Rights of Persons with Disabilities: Understanding the UN Convention on the Rights of Persons With Disabilities* (Handicap International September 2010) 34–9. See also Crock, Smith-Khan, McCallum, and Saul (n 2) especially ch 4.

[91] See 'Disability Glossary: Impairments and Reasonable Adjustments' in Judicial College, 'Equal Treatment Bench Book' (2018, revised 2019) appendix B <https://www.judiciary.uk/wp-content/uploads/2018/02/ETBB-February-2018-edition-September-2019-revision.pdf> accessed 29 January 2020.

The ideal is to identify disabilities at the outset of an asylum process. However, this will not always happen—particularly where an individual is reluctant to identify as a person with disability.[92] Adjudicators should be prepared to make adjustments as a hearing progresses when an impairment becomes apparent. Unfortunately, acceptance that an asylum seeker is suffering from a disabling psycho-social condition can prove controversial. The jurisprudence on point is not particularly encouraging in cases where asylum seekers are unable to lead definitive evidence from medical professionals.[93]

5. Durable Solutions for Refugees with Disabilities

Where a person with disabilities gains recognition as a Convention refugee, what happens next can be anything but certain. The three classic 'solution' options—local integration, resettlement in a third country, and repatriation—can all pose problems according to an individual's impairments and the availability of supports. As international law has developed in this area, awareness of the challenges facing refugees with disabilities appears to have grown—though the lived experience of many has not improved.[94] Access to education for young refugees with disabilities is a chronic problem in many displacement contexts.[95]

Whether or not it is formally 'bound' by human rights treaties,[96] UNHCR has been enthusiastic in its efforts to respond to recent human rights treaties—including the CRPD. Reference has been made above to UNHCR's Executive Committee's Conclusion on Refugees with Disabilities in 2010,[97] and UNHCR's policy guidelines to assist officers in the field.[98] These have been supplemented over time, most importantly through changes to registration and verification procedures, policies, and tools.[99] In 2011, the agency also removed text from its 'Resettlement Handbook' that some interpreted as

[92] Smith-Khan, Crock, Saul, and McCallum (n 3).

[93] See *Minister for Immigration, Multicultural and Indigenous Affairs v SGLB* (2004) 207 ALR 12; cf cases at (n 85).

[94] See Crock, Smith-Khan, McCallum, and Saul (n 2) chs 10, 11.

[95] See Human Rights Watch, 'Without Education They Lose Their Future: Denial of Education to Child Asylum Seekers on the Greek Islands' (18 July 2018) <https://www.hrw.org/report/2018/07/18/without-education-they-lose-their-future/denial-education-child-asylum-seekers> accessed 29 January 2020.

[96] See Gudrun Monika Zagel, 'International Organisations and Human Rights: The Role of the UN Covenants in Overcoming the Accountability Gap' (2018) 36 Nordic Journal for Human Rights 74–90.

[97] UNHCR Executive Committee (n 13). See Section 2 above.

[98] See UNHCR, 'Need to Know Guidance: Working with Persons with Disabilities in Forced Displacement' (2011). This document was revised in 2019. See UNHCR, 'Need to Know Guidance: Working with Persons with Disabilities in Forced Displacement' (2019) <https://www.unhcr.org/4ec3c81c9.pdf> accessed 29 January 2020.

[99] See UNHCR, 'Age, Gender and Diversity Policy' (2018) <http://www.unhcr.org/5aa13c0c7.pdf> accessed 29 January 2020; see further the documents collected at UNHCR, 'Persons with Disabilities' <https://emergency.unhcr.org/entry/43587/persons-with-disabilities> accessed 29 January 2020.

suggesting that refugees with disabilities could be inappropriate candidates for resettlement.[100] Paragraph 4.4.4 of the 2004 Handbook read:

> Disabled refugees who are well-adjusted to their disability and are functioning at a satisfactory level are generally not to be considered for resettlement. . . . Only when such disabilities are untreatable locally, and when they seriously threaten the person's safety or quality of life, should resettlement be explored.[101]

Putting to one side its discriminatory tone, this document demonstrated a tendency to see disability in medical terms. UNHCR removed the reference in acknowledgement of its dissonance with the CRPD,[102] providing further guidance for fieldworkers in 2013 with the Resettlement Assessment Tool.[103] Before the dramatic reduction in the US resettlement intake in 2019, disability was included as a 'priority one' factor for identifying refugees in situations of heightened need.[104] The progressive relaxation of the migration health rules in Australia may also have led to the admission of more refugees with disabilities over time, albeit starting from a low base.[105]

If any change is occurring at State level, some credit should be given to the accountability mechanisms established by the CRPD. The CRPD Committee is charged with reviewing the practice of States parties and has begun systematically to question States on laws, policies, and practice relevant to article 11 of the Convention.[106] In April 2018, the Committee expressed concern about Haiti's failure to include a disability perspective in disaster risk reduction strategies and its failure to provide equal access for persons with disabilities to humanitarian and emergency services including the distribution of humanitarian assistance, and shelters, centres, and facilities. Specific concerns about the treatment of refugees with disabilities were expressed in the Concluding Observations of the Initial reports for Armenia,[107] Cyprus,[108] Germany,[109] Italy,[110]

[100] UNHCR, 'Resettlement Handbook' (2011).

[101] UNHCR, 'Resettlement Handbook' (2004) para 4.4.4.

[102] See Crock, Smith-Khan, McCallum, and Saul (n 2) ch 11.

[103] UNHCR, 'Resettlement Assessment Tool: Refugees with Disabilities' (2013). See Manasha Mirza, 'Disability and Cross-Border Mobility: Comparing Resettlement Experiences of Cambodian and Somali Refugees with Disabilities' (2011) 26(5) Disability & Society 521.

[104] For a discussion see Mansha Mirza 'Resettlement for Disabled Refugees' (2010) 35 Forced Migration Review 30.

[105] For a critique of the practice in that country, see Karen Soldatic, Kelly Somers, Amma Buckley, and Caroline Fleay, '"Nowhere to be Found": Disabled Refugees and Asylum Seekers within the Australian Resettlement Landscape' (2015) 2(1) Disability and the Global South 501.

[106] See International Disability Alliance, 'Compilation of the CRPD Committee's Concluding Observations' <http://www.internationaldisabilityalliance.org/resources/compilation-crpd-committee%E2%80%99s-concluding-observations> accessed 10 November 2019.

[107] See CRPD Committee, 'Concluding Observations on the Initial Report of Armenia', UN doc CRPD/C/ARM/CO/1 (8 May 2017).

[108] See CRPD Committee, 'Concluding Observations on the Initial Report of Cyprus', UN doc CRPD/C/CYP/CO/1 (8 May 2017) para 15.

[109] See CRPD Committee, 'Concluding Observations on the Initial Report of Germany', UN doc CRPD/C/DEU/CO/1 (13 May 2015) para 15.

[110] See CRPD Committee, 'Concluding Observations on the Initial Report of Italy', UN doc CRPD/C/ITA/CO/1 (6 October 2016) para 25.

Montenegro,[111] Morocco,[112] Sudan,[113] and Thailand.[114] Portugal was criticized for leaving refugees and migrants with disabilities in situations of 'destitution and extreme poverty'.[115] Failure to provide support and reasonable accommodation to refugees and asylum seekers with disabilities was also raised in relation to Slovakia,[116] while the Committee expressed concern about the precarious situation of persons with disabilities in the current migrant crisis in the European Union as a whole.[117]

Two States that host a disproportionate number of refugees are Jordan and Uganda. The Committee generally commended both, although raised concerns about inclusion in disaster-planning (Jordan)[118] and in Peace, Recovery and Development Plans (Uganda).[119] Turkey was also questioned about its support of refugees with disabilities.[120] The United Kingdom was criticized for failing to support refugees and asylum seekers with psycho-social and intellectual disabilities in 'exercising their legal capacity'.[121]

Although no mention was made of refugees and asylum seekers in its initial observations on Australia,[122] the Committee's review of that country's second and third report, considered in September 2019, included multiple criticisms.[123] In respect of article 7, the Committee expressed concern at the situation of refugee and asylum-seeking children with disabilities kept in detention facilities in Australia and 'offshore'. It called for the removal of these children from detention and for 'the provision of individualized support and [to] recognize the denial of reasonable accommodation as a form of discrimination'.[124] The Committee expressed concern at Australia's discriminatory

[111] See CRPD Committee, 'Concluding Observations on the Initial Report of Montenegro', UN doc CRPD/C/MNE/CO/1 (22 September 2017).

[112] See CRPD Committee, 'Concluding Observations on the Initial Report of Morocco', UN doc CRPD/C/MAR/CO/1 (25 September 2017).

[113] See CRPD Committee, 'Concluding Observations in Relation to the Initial Report of Sudan', UN doc CRPD/C/SDN/CO/1 (2 March 2018) para 22.

[114] See CRPD Committee, 'Concluding Observations on the Initial Report of Thailand', UN doc CRPD/C/THA/CO/1 (12 May 2016) paras 37–8.

[115] See CRPD Committee, 'Concluding Observation on the Initial Report of Portugal', UN doc CRPD/C/PRT/CO/1 (18 April 2016) para 26.

[116] See CRPD Committee, 'Concluding Observation on the Initial Report of Slovakia', UN doc CRPD/C/SVK/CO/1 (17 May 2016) para 36.

[117] See CRPD Committee, 'Concluding Observation on the Initial Report of the European Union', UN doc CRPD/C/EU/CO/1 (2 October 2015) para 34.

[118] See CRPD Committee, 'Concluding Observations on the Initial Report of Jordan', UN doc CRPD/C/JOR/CO/1 (15 May 2017) para 24.

[119] See CRPD Committee, 'Concluding Observations on the Initial Report of Uganda', UN doc CRPD/C/UGA/CO/1 (12 May 2016) paras 21, 60.

[120] See CRPD Committee, 'Concluding Observations on the Initial Report of Turkey', UN doc CRPD/C/TUR/CO/1 (1 October 2019) paras 38–9.

[121] See CRPD Committee, 'Concluding Observations on the Initial Report of the United Kingdom of Great Britain and Northern Ireland', UN doc CRPD/C/GBR/CO/1 (3 October 2017) para 30.

[122] See CRPD Committee, 'Concluding Observations on the Initial Report of Australia, Adopted by the Committee at its Tenth Session', UN doc CRPD/C/AUS/CO/1 (21 October 2013).

[123] See CRPD Committee, 'Concluding Observations on the Combined Second and Third Periodic Report of Australia', UN doc CRPD/C/AUS/CO/2–3 (15 October 2019).

[124] ibid paras 13–14.

immigration health rules (which group disability together with threats to public health), its exemption of migration laws from discrimination law, as well as its laws requiring migrants to wait 10 years before accessing age and disability support pensions. The Committee called on Australia to cease transferring *all* refugees and asylum seekers to Nauru and Papua New Guinea, in recognition that these policies and practices are harming refugees to the point of causing disabilities.[125]

It remains to be seen whether the work of the CRPD Committee will be a force for lasting change for refugees and asylum seekers with disabilities. There are large and significant States that have not acceded to this Convention—the United States being a notable example. What is apparent is that the situation of refugees with disabilities is now squarely on the agenda of international human rights law. In time it may be possible indeed to claim that refugees with disabilities are no longer forgotten and invisible.

[125] ibid paras 35–6 and also para 49 on work and employment of refugees with disabilities.

CHAPTER 44

STATELESS REFUGEES

HÉLÈNE LAMBERT

1. Introduction

The question of 'Who is a refugee?' has preoccupied the international community of States, civil society, and scholars for decades. States have long had a particular duty towards their nationals. However, governments' role towards the stateless (as non-nationals of any State) or towards refugees (as unwanted nationals of another State) has been less dutiful. This chapter focuses on the particular question of 'Who is a *stateless* refugee?'. The 1954 Convention relating to the Status of Stateless Persons (Stateless Convention)[1] and the 1961 Convention on the Reduction of Statelessness[2] together form the foundation of the international legal framework on statelessness and the protection of stateless persons.[3] At the same time, the Refugee Convention clearly encompasses some categories of stateless persons, considering that article 1A(2) defines a refugee as a person who,

> owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, *not having a nationality* and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.[4]

[1] Convention relating to the Status of Stateless Persons (adopted 28 September 1954, entered into force 6 June 1960) 360 UNTS 117.

[2] Convention on the Reduction of Statelessness (adopted 30 August 1961, entered into force 13 December 1975) 989 UNTS 175.

[3] See Chapter 8 in this volume.

[4] Emphasis added.

As this definition makes clear, it has always been assumed that having or not having a nationality is not a determinant element for being recognized as a refugee;[5] in fact UNHCR datasets record *stateless* refugees as refugees.[6] At the same time, considerations of nationality, or lack thereof, can have a strong bearing on the assessment of key elements of the refugee definition. For instance, claims for protection from individuals whose nationality was denied or withdrawn or whose nationality is ineffective may be relevant facts in the assessment of persecution or well-founded fear.

This chapter examines the extent to which the Refugee Convention protects stateless persons *as refugees*. Thus, it scrutinizes all parts of the definition in article 1A(2). It begins with the clause that follows the semi-colon and that is explicitly concerned with persons who do not have a nationality, namely the *de jure* stateless, with Section 2 focusing on the meaning of 'not having a nationality' and Section 3 on its sequels. Section 4 then examines the part of the sentence that precedes the semi-colon and discusses the situation of individuals who despite having a nationality may have a strong case for refugee status on the basis that their nationality is 'ineffective', the so-called *de facto* stateless. It proceeds to discredit the notion that *de facto* statelessness is a relevant concept in international refugee law. The chapter concludes by examining what additional obligations, if any, States might have towards recognized refugees who are stateless with a particular focus on naturalization (Section 5).

2. 'Not Having A Nationality' in the Refugee Definition

Whether an applicant has or does not have a nationality is often one of the first questions a decision-maker has to answer because it is critical to an appreciation of key elements of the refugee definition: the country of reference, the harm feared and the reasons for persecution. Notwithstanding that the Refugee Convention is 'the most frequently applied international treaty in the world',[7] legal scholarship on the application of the refugee definition to persons 'not having a nationality' is limited compared to that on

[5] Guy S Goodwin-Gill, 'Stateless Persons and Protection under the 1951 Convention or Refugees, Beware of Academic Error!' (Les récents développements en droit de l'immigration, Barreau de Québec, 22 January 1993); UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/1P/4/ENG/REV.4 (1979, reissued 2019) paras 101–5.

[6] See Chapter 8 in this volume. The Institute on Statelessness and Inclusion estimates that today 1.5 million of the refugee population is stateless, in addition to an estimated 3.5 million Palestinian stateless refugees and an estimated 1 million stateless Rohingya in Bangladesh, Institute of Statelessness and Inclusion, 'Statelessness in Numbers: 2018' (2018) <https://files.institutesi.org/ISI_statistics_analysis_2018.pdf> accessed 12 October 2020.

[7] Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (CUP 2008) 35.

persons with a nationality;[8] the enquiry has nevertheless received increased attention by courts across the world.[9] This section briefly examines what it means to be stateless in international law prior to considering when a person is without a nationality for the purpose of refugee law.

a. Statelessness in International Refugee Law: A Technical or Humanitarian Issue?

Historically, the general view was that refugees and stateless persons walked hand in hand,[10] as both groups were deemed to share the same plight, namely, lack of State protection and being in need of international protection in the form of a legal status.[11] The Refugee Convention and the Stateless Convention clearly reflect this long-standing view.

The Stateless Convention was originally intended to be a Protocol to the Refugee Convention.[12] When in July 1951 the Conference of Plenipotentiaries considered both the draft Refugee Convention and the draft Protocol relating to the Status of Stateless Persons, it was decided that more time was needed to discuss the issue of statelessness in detail and that the most pressing issue was that of refugees.[13] When the governments' representatives met again to discuss the draft Protocol for stateless persons, it was agreed (not without dissent) that the meaning of stateless person (statelessness being considered at the time to be a technical concept) was sufficiently different from the meaning of refugee (refugees being considered to be a humanitarian issue) to regulate their status in a separate Convention independent from the Refugee Convention. The clear understanding at the time was that stateless refugees would be protected under the Refugee Convention, and that the new Stateless Convention would only apply to stateless persons who were *not* also refugees.[14]

[8] But see Michelle Foster and Hélène Lambert, *International Refugee Law and the Protection of Stateless Persons* (OUP 2019); Eric Fripp, *Nationality and Statelessness in the International Law of Refugee Status* (Hart Publishing 2016); Hélène Lambert, 'Comparative Perspectives on Arbitrary Deprivation of Nationality and Refugee Status' (2015) 64 ICLQ 1; Maryellen Fullerton, 'The Intersection of Statelessness and Refugee Protection in US Asylum Policy' (2014) 2 Journal on Migration and Human Security 144; Guy S Goodwin-Gill, 'Nationality and Statelessness, Residence and Refugee Status: Issues Affecting Palestinians' (Carleton University March 1990).

[9] As comprehensively examined in Foster and Lambert (n 8).

[10] Guy S Goodwin-Gill, 'The Rights of Refugees and Stateless Persons', in KP Saksena (ed), *Human Rights Perspective and Challenges* (Lancers Books 1994) 389.

[11] Ad Hoc Committee on Refugees and Stateless Persons, 'Ad Hoc Committee on Statelessness and Related Problems, Status of Refugees and Stateless Persons: Memorandum by the Secretary-General,' UN doc E/AC.32/2 (3 January 1950) art 2.

[12] Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Final Act (25 July 1951) UN doc A/CONF.2/108/Rev.1, para I.

[13] ibid para III. See also Carol Batchelor, 'Stateless Persons: Some Gaps in International Protection' (1995) 7 IJRL 232, 243 and Foster and Lambert (n 8) ch 2.

[14] A statement to that effect was put in the preamble to the Stateless Convention.

For decades, issues surrounding the protection of stateless persons took a back seat while refugee protection occupied centre stage during the Cold War. UNHCR itself only came to be conferred certain tasks in relation to the 1961 Convention on the Reduction of Statelessness in 1974[15] but its global mandate to identify, prevent, reduce statelessness, *and protect stateless persons* is more recent.[16] Through a more accurate and deeper understanding of international human rights law, which was in its infancy when the Refugee Convention was drafted, it is now recognized that refugees and stateless persons have more than their plight in common; they also often share the source of the problem (ie discriminatory treatment).[17] Kerber for instance highlights gender as 'a key factor in the history of statelessness. Only recently have gender-specific asylum claims… been recognized.'[18]

b. The Significance of Statelessness in the Refugee Definition

The Stateless Convention mirrors the terms of the Refugee Convention in so many respects that one might wonder whether it matters if a person, who is both stateless and refugee, obtains protection under either the Refugee Convention or the Stateless Convention. However, there are significant differences in principle and practice, which render the latter less effective as an instrument of protection than the former. First, there are discrepancies between the rights listed in both Conventions, such as, articles 15 (freedom of association) and 17 (right to work), which are formulated less favourably in the Stateless Convention, and articles 31 (right to non-penalization for unauthorized entry), 33 (*non-refoulement*), and 35 (UNHCR supervision), which are simply absent from the Stateless Convention.[19] Secondly, despite significant increases in State ratification of the Stateless Convention in recent years, it still enjoys fewer ratifications than the Refugee Convention (94 versus 147).[20] Thirdly, even in those States that have

[15] UNGA res 3274(XXIX) (10 December 1974); UNGA res 31/36 (30 November 1976).

[16] UNGA res 50/152 (21 December 1995). See Matthew Seet, 'The Origins of the UNHCR's Global Mandate on Statelessness' (2016) 28 IJRL 7, 11; Mark Manly, 'UNHCR's Mandate and Activities to Address Statelessness' in Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* (CUP 2014) 88.

[17] Foster and Lambert (n 8) 39. See also Michelle Foster and Hélène Lambert, 'Statelessness as a Human Rights Issue: A Concept Whose Time Has Come' (2016) 28 IJRL 564.

[18] Linda K Kerber, 'Toward a History of Statelessness in America' (2005) 57 American Quarterly 727, 729.

[19] Foster and Lambert (n 8) 8–9.

[20] 'Status of Treaties: 3. Convention relating to the Status of Stateless Persons' (*United Nations Treaty Collection*, 12 October 2020) <https://treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-3&chapter=5&Temp=mtdsg2&clang=_en> accessed 12 October 2020. This number is expected to rise following the number of pledges made by States at the High-Level Segment on Statelessness, UNHCR, Executive Committee, Geneva, 11 October 2019, see UNHCR, 'Watershed Moment as Countries Step Forward to Tackle Global Statelessness' (11 October 2019) <https://www.unhcr.org/en-au/news/press/2019/10/5da04b1d4/watershed-moment-countries-step-forward-tackle-global-statelessness.html?mc_cid=4cfa0fa749&mc_eid=3614d1ba26> accessed 12 October 2020. In terms of the Refugee Convention, 147 States have ratified the 1967 Protocol: https://treaties.un.org/pages/ShowMTDSGDetails.aspx?src=UNTSONLINE&tabid=2&mtdsg_no=V-5&chapter=5&lang=en (as at 12 October 2020).

ratified the Stateless Convention, very few have implemented a procedure in domestic law for assessing and according a specific status under that Convention.[21] Finally, even in countries that have a stateless status determination procedure, refugee status may remain crucial, for example, where certain rights are accorded only to refugees.[22]

c. 'Not Having A Nationality' in International Refugee Law: In Search of a Principled Approach

The definition of a refugee in the Refugee Convention contemplates a refugee to be with or without a nationality but it fails to explain what 'not having a nationality' means. While judicial approaches unanimously agree that this expression refers to a 'stateless person',[23] the legal test for assessing whether a refugee applicant is stateless (or not) remains inexact. In the great majority of cases,[24] where the nationality of the applicant is clear and undisputed, this is not so much an issue. However, in those cases where nationality is unclear or disputed, courts and tribunals have adopted different approaches to help them decide whether someone is with or without a nationality for the purpose of article 1A(2) Refugee Convention; some have explicitly adopted the definition of a stateless person in the Stateless Convention, others have done so implicitly, others still have simply made no reference at all to any legal framework.[25] Further discrepancies exist in relation to the burden of proof and evidence of nationality.[26]

Guidance from UNHCR in this respect would help towards greater consistency and a more principled approach to interpreting the phrase 'not having a nationality' in the refugee definition. At present, UNHCR's *Handbook on Procedures and Criteria for Determining Refugee Status* (Refugee Handbook) merely recommends that '[w]here his nationality cannot be clearly established, his refugee status should be determined in a similar manner to that of a stateless person, i.e. instead of the country of his nationality, the country of his former habitual residence will have to be taken into account'.[27]

[21] The UNHCR reported in 2016 that twelve countries then had a stateless status determination procedure (France, Italy, Spain, Hungary, Latvia, Mexico, Switzerland, Georgia, Moldova, the Philippines, the UK, and Kosovo), with the Netherlands and Brazil scheduled to implement a procedure: UNHCR, 'Good Practices Papers, Action 6: Establishing Statelessness Determination Procedures to Protect Stateless Persons' <https://www.refworld.org/pdfid/57836cff4.pdf> accessed 12 October 2020. While more States have and will adopt an SDP, the number is still low relative to ratification of the Stateless Convention.

[22] As in the case of Hungary and Bulgaria, see 'Hungary' and 'Bulgaria' (*Statelessness Index*) <https://index.statelessness.eu/?mc_cid=6b88b29d5c&mc_eid=06c43831f2> accessed 12 October 2020.

[23] Foster and Lambert (n 8) 105.

[24] In 97 per cent of cases, according to Cathryn Costello, 'On Refugeehood and Citizenship', in Ayelet Shachar, Rainer Bauböck, Irene Bloemraad, and Maarten Vink (eds), *The Oxford Handbook of Citizenship* (OUP 2017) 716, 720.

[25] Foster and Lambert (n 8) 107–9.

[26] ibid 113–19.

[27] UNHCR (n 5) para 89.

However, it is silent on the precise meaning of 'not having a nationality', referring to 'stateless refugees' and 'stateless persons' without any allusion to the language or substance of the definition of a stateless person in international law (in article 1(1) Stateless Convention).[28] The UNHCR *Handbook on Protection of Stateless Persons* (Stateless Handbook) nevertheless clearly considers 'stateless refugees' to be stateless within the meaning of article 1(1) Stateless Convention.[29] This position could now be made explicit in the UNHCR Refugee Handbook, in addition to some explicit references to the UNHCR Stateless Handbook concerning issues of evidence.[30]

Noteworthy is UNHCR's recommendation that proof of nationality be required only in relation to States with which the applicant has 'a relevant link', such as 'birth on the territory, descent, marriage, adoption or habitual residence'.[31] This would exclude scenarios of 'virtual citizenship' whereby a putative asylum State attempts 'to stick' a nationality on an unwilling individual (eg Jews from the USSR who, despite never having lived in Israel and not wishing to live there, are nevertheless entitled to Israeli citizenship under the Law of Return) or where an individual is 'stuck' with a nationality that she is unable to reject (eg the nationality of South Korea in the case of North Korean refugees).[32] In both scenarios, asylum States have sought to deny refugee status on that ground.[33]

The reality is that international law is not unequivocal on the issue of individual consent to nationality. Indeed, in most cases nationality is acquired at birth based on parentage (*jus sanguinis*) or territory of birth (*jus soli*) or a combination of the two.[34] Yet, the British Digest of International Law, along with several distinguished scholars, believe that it would be contrary to international law for a State to impose its nationality on an individual against their will in the absence of a real connection with that State.[35] This point was first made in the context of the dispute between France and Great Britain over two French Decrees providing that anyone born in the Regency of Tunis or Morocco (French Zone) 'of parents of whom one, justiciable as a foreigner in the French Courts of the Protectorate, was also born there, is French'.[36] Great Britain objected to British subjects entitled to British nationality being automatically granted French

[28] ibid paras 101–5.

[29] UNHCR, *Handbook on Protection of Stateless Persons* (2014) paras 78–81.

[30] ibid paras 22–56, 95; UNHCR (n 5) para 93.

[31] UNHCR (n 29) para 17. See also the *Nottebohm's* 'genuine link' or 'social fact of attachment' in the international law of diplomatic protection, *Nottebohm (Liechtenstein v Guatemala)* (Second Phase) [1955] ICJ Rep 4.

[32] Audrey Macklin, 'Sticky Citizenship' in Rhoda E Howard-Hassmann and Margaret Walton-Roberts (eds), *The Human Right to Citizenship: A Slippery Concept* (University of Pennsylvania Press 2015) 223.

[33] For instance, Canada denies refugee status to all North Koreans on the ground that they are citizens of South Korea and hence can benefit from protection in South Korea, ibid 230.

[34] Sir Robert Jennings and Sir Arthur Watts (eds), *Oppenheim's International Law: Peace* (9th edn, Longman 1996) vol 1, pts 2, ch 8, 870.

[35] British Digest of International Law Part VI: The Individual in International Law, vol 5 (Stevens & Sons 1965) 25, citing Paul Weis, Nationality and Statelessness in International Law (Steven & Sons 1956) 110.

[36] UN, 'Summary of Judgments, Advisory Opinions and Orders of the Permanent Court of Justice', UN doc ST/LEG/SER.F/1/Add.4 (2012) 7 <http://legal.un.org/PCIJsummaries/documents/english/PCIJ_FinalText.pdf> accessed 12 October 2020.

nationality. The Permanent Court of International Justice, in response to the question put to it, advised the parties that contrary to the arguments put forward by France, the matter at hand was not, by international law, solely within the jurisdiction of France.[37] Following negotiations and exchange of notes between the two countries, it was agreed that a British national born in Tunis of a British national should be entitled to decline French nationality; this right, however, was not to extend to succeeding generations.[38]

The view that a State should not impose its nationality on a person against her will is also reflected in article 8(2) of the Draft Articles on Nationality of Natural Persons in Relation to the Succession of States but with one important caveat concerning individuals who would otherwise be stateless;[39] in such cases, 'a State has the right to attribute its nationality to a person . . . irrespective of that person's will'.[40]

The weaknesses of a refugee protection regime which places nationality at its centre is captured by Costello as follows, '[i]f a person flees her country of residence, even if she has never lived in her country of nationality, her refugee assessment still turns on assessing her fear of persecution vis-à-vis her country of nationality'.[41] The above-mentioned examples of North Koreans and their 'virtual' right to South Korean nationality, and of Jewish refugees from the Soviet Union who are entitled to Israeli citizenship under the Israeli Law of Return even though they have never lived there, are cases in point. In both examples, the consent of the person claiming refugee status in another State is irrelevant; the idea being that a 'virtual citizenship' is better than no nationality. The problem with such reasoning is that refugee decision-makers equate a nationality, any nationality, to protection by the country of nationality and conclude that the individual in question is not in need of refugee protection.

3. The Sequel to 'Not Having A Nationality' in the Refugee Definition

Having established that 'not having a nationality' means being stateless as defined in article 1(1) of the Stateless Convention, this section examines whether stateless persons are protected *per se* under the Refugee Convention or whether they need to meet the requirements of the refugee definition (ie well-founded fear of persecution on Convention grounds). If the latter, what are the particular challenges faced by stateless persons seeking refugee protection in contrast with persons with a nationality?

[37] *Nationality Decrees in Tunis and Morocco Case* (1923) PCIJ Series B, No. 4.

[38] UN (n 36) 9–10. Proceedings regarding Morocco were also abandoned.

[39] International Law Commission, 'Draft Articles on Nationality of Natural Persons in relation to the Succession of States with Commentaries' (1999) II(2) ILC Yearbook 31, article 8(2): 'A successor State shall not attribute its nationality to persons concerned who have their habitual residence in another State against the will of the persons concerned unless they would otherwise become stateless.'

[40] Art 8(2).

[41] Costello (n 24) 722–3.

a. A Single Test for Refugee Status: Well-founded Fear of Being Persecuted

Scholarly debates on whether a stateless person has to meet the same criteria as a refugee in order to qualify for refugee status, or whether statelessness *per se* is sufficient, have been comprehensively examined in the literature.[42] The general view is that *all* persons claiming refugee status by application of article 1A(2) must satisfy the same legal test, namely 'a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion'.[43] This general view is embraced by senior courts, for instance in Australia, Canada, France, Germany, Ireland, New Zealand, the UK, and the US, as well as in EU law; 'not having a nationality' does not lower the threshold for being recognized as a refugee.[44]

However, strong arguments to the contrary have been made over the years,[45] and although in the minority, they do question whether the Refugee Convention, correctly applied, should not clearly distinguish between refugees with a nationality and stateless refugees on the ground that nationality remains largely still a discretionary right of States.

As will be discussed next, 'not having a nationality' can also crucially impact on the interpretation of the country of reference, persecution, and the ability to return to that country.

b. Country of Reference: 'Country of Former Habitual Residence'

Once an individual has been identified as 'not having a nationality', the country of reference for assessing the fear of being persecuted becomes the 'country of former

[42] ibid 92–8.

[43] Carol Batchelor, 'Statelessness and the Problem of Resolving Nationality Status' (1998) 10 IJRL 156. Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, OUP 2007) 69–70. See also James C Hathaway and Michelle Foster, *The Law of Refugee Status* (2nd edn, CUP 2014).

[44] eg *Minister for Immigration and Multicultural Affairs v Savvin* (2000) FCA 478 (Australia); *Thabet v Canada (Minister of Citizenship and Immigration)* [1998] 4 FC 21, CarwellNat 840 (Canada); Cour Nationale du Droit d'Asile, decision no 10,018,108, 16 November 2011 (France); Bundesverwaltungsgerichts, 10 C 50.07, 26 February 2009 (Germany); *AAAAD v Refugee Appeals Tribunal and the Minister for Justice, Equality and Law Reform* [2009] IEHC 326 (17 July 2009) (Ireland); *Refugee Appeal No 72635* [2002] NZRSAA 344 (New Zealand); *Revenko v Secretary of State for the Home Department* [2000] EWCA Civ 500; [2001] QB 601 (UK); *Fedosseeva v Gonzales*, 492 F 3d 840, 845 (7th Cir 2007) (US). See also EU Qualification Directive art 2(d).

[45] Atle Grahl-Madsen, *The Status of Refugees in International Law*, vol 1 (AW Sijthoff 1966) 261; Guy S Goodwin-Gill, *Revenko v Secretary of State for the Home Department* (Report on Behalf of the Appellant, UK Court of Appeal Civil Division, 23 July 2000); Heather Alexander and Jonathan Simon, '"Unable to Return" in the 1951 Refugee Convention: Stateless Refugees and Climate Change' (2014) 26 Florida Journal of International Law 531.

habitual residence'. This was defined by the drafters of the Refugee Convention as 'the country in which he had resided and where he had suffered or fears he would suffer persecution if he returned',[46] with the term 'country' meaning something more than a State, for example, a part of territory or a camp under the control of an authority that is not recognized as a State.[47] Indeed, as pointed out by Gibney, stateless persons 'are not free-floating, deracinated individuals, moving aimlessly around the globe', they are usually settled in a particular country.[48] Generally, *actual* residence is necessary (as opposed to a short stay or visit),[49] but it does not need to be lawful.[50] As a result, it is not unusual for a person to have resided in more than one country prior to seeking asylum. In such cases, it is argued that all that is required by article 1A(2) is that an applicant establishes a well-founded fear in relation to at least one of her countries of former habitual residence,[51] unless article 1E is found to apply.[52]

c. Non-returnability to that Country as an Eligibility Requirement and/or an Act of Persecution

Article 1A(2) of the Refugee Convention differentiates between persons with a nationality and persons without a nationality on the question of return. While persons with a nationality must show that they are unable or unwilling to avail themselves of the protection of their country of nationality, stateless persons must be able to show their inability or unwillingness to return to their country of former habitual residence.

Despite some isolated arguments to the contrary,[53] practical obstacles to a right of return do not prevent a decision-maker from assessing a hypothetical claim for refugee status, if returned.[54] Further investigation is required as to whether an inability to return is being used as a tool of persecution. While the arbitrary refusal to a national to re-enter her country of nationality is generally accepted as amounting to persecution,[55] the same general conclusion cannot be made with respect to stateless persons. For instance, in a series of UK cases concerning stateless Palestinians, senior courts have ruled that, unlike citizens, stateless persons have no right to enter a country, including their country of

[46] UNHCR (n 5) para 103; *Refugee Appeal No 1/92 Re SA* [1992] NZRSAA 5.

[47] French Conseil d'Etat, decision nos 363, 181, 363, 182, 5 November 2014; in Australia, *Koe v Minister for Immigration & Ethnic Affairs* (1997) 78 FCR 289 (Tamberlin J).

[48] Matthew Gibney, 'Statelessness and the Right to Citizenship' (2009) 32 Forced Migration Review 50.

[49] *El Assadi v Holder*, 418 Fed App'x 484 (6th Cir, 2011) 2.

[50] *SZUNZ v Minister for Immigration and Border Protection* (2015) 230 FCR 272 para 107.

[51] Foster and Lambert (n 8) 142. This is consistent with UNHCR (n 5) para 104.

[52] Foster and Lambert (n 8) 142.

[53] James C Hathaway, *The Law of Refugee Status* (Butterworths 1991) 62. Note that Hathaway has since changed his view in Hathaway and Foster (n 43) 69.

[54] *Saad v Secretary of State for the Home Department* [2001] EWCA Civ 2008. See also Goodwin-Gill (n 5); Foster and Lambert (n 8) 99–103; Goodwin-Gill and McAdam (n 43) 31; Grahl-Madsen (n 45) 261.

[55] *Lazarevic v Secretary of State for the Home Department* [1997] EWCA Civ 1007 (Hutchison LJ).

former habitual residence; hence to deny them such a right cannot be persecutory.[56] In the words of Maurice Kay LJ, '[t]he lot of a stateless person is an unhappy one, but to deny him a right that he has never enjoyed is not, in itself, persecution';[57] the assumption being that the right to return is attached to nationality, and that stateless persons are protected by the Stateless Convention.

Such reasoning is puzzling considering article 12(4) ICCPR, which guarantees, in very broad terms, the right to enter and remain in one's own country to everyone irrespective of nationality.[58] Instead of concluding that an inability to return cannot amount to persecution in such cases, questions should be asked about the strength of attachments vis-à-vis one's 'own country' and whether the denial of return is arbitrary.[59]

Outside the context of stateless Palestinians, denial of the right to return for stateless persons (particularly where there is evidence of discrimination) has been found to be capable of constituting persecution for the purposes of refugee protection in a number of jurisdictions.[60]

d. Well-founded Fear of Being Persecuted

Having established in Section 2(a) that a well-founded fear of being persecuted is a prerequisite to refugee protection in *all* applications for refugee status, this section now turns to the meaning of 'being persecuted' for a Convention reason in the context of stateless persons.

i. *Denial of Nationality*

Cases based on denial of nationality involve persons who claim that the failure of their country of origin to afford them nationality constitutes persecution (eg based on discriminatory nationality laws). Several of these cases have been met with scepticism by decision-makers on the ground that States are under no obligation to confer their nationality on an individual because nationality conferral is a sovereign act of States.[61]

While it is true that a *general* human right to a nationality may not yet exist in international law, except perhaps for children, human rights obligations are nevertheless engaged where there is evidence of discrimination on a protected ground in formulating

[56] *MA (Palestinian Territories) v Secretary of State for the Home Department* [2008] EWCA Civ 304 para 26 (Maurice Kay LJ). See further, *HS (Palestinian—return to Gaza)* [2011] UKUT 124 (IAC) para 185 finding that the Tribunal was bound by the previous UK authority in relation to this point.

[57] *MA v SSHD* (n 56) para 26.

[58] Human Rights Committee, 'General Comment No 27: Freedom of Movement (article 12),' CCPR/C/21/Rev.1/Add.9 (2 November 1999) para 20; *Nystrom v Australia*, CCPR/C/102/D/1557/2007 (1 September 2011); *Warsame v Canada*, CCPR/C/102/D/1959/2010 (1 September 2011).

[59] Foster and Lambert (n 8) 168.

[60] *Thabet v Canada* (n 44) para 31; *AAAAD v Refugee Appeals* (n 44) para 86.

[61] eg *BA v Secretary of State for the Home Department* [2004] UKIAT 00256 para 63; *SZTFX v Minister for Immigration and Border Protection* [2015] FCA 402 para 47.

nationality laws.[62] In such cases, the key issue is not one of operation and conflict of nationality laws but rather one of scrutinizing the apparent neutrality of an existing law, by reference to international human rights treaties, such as CEDAW, CERD, ICCPR, ICESCR, CRC, and regional treaties, which may (or may not) lead to a finding of risk of persecution upon return.[63] This is an issue that is ripe for more sophisticated treatment by refugee decision-makers.

ii. *Withdrawal of Nationality*

The jurisprudence on active withdrawal of nationality is slightly more nuanced with distinctions made between cases where denationalization can be lawful in international law (on grounds of fraud or misrepresentation, disloyalty, or treason),[64] cases where individuals have one other (or more) nationality to fall back on, and cases where withdrawal may lead to statelessness, including cases of mass arbitrary deprivation of nationality.

There is now a considerable body of scholarship examining recent legislative changes aiming at withdrawing nationality on national security or public order grounds.[65] This body of scholarship, together with international law, make clear that it is only in the most exceptional circumstances that a State may lawfully denationalize and render an individual stateless. More commonly, withdrawal of nationality is used as a tool for discrimination,[66] often in order to authorize or justify the deportation or detention of entire groups of the population on political, racial, or religious ground.[67] Combatting discrimination is a fundamental purpose of the Refugee Convention and decision-makers have accepted that withdrawal of nationality on a protected ground (eg race, gender, ethnicity) is contrary to international law and cannot be justified for reason of

[62] Foster and Lambert (n 8) 149–50. See also Lambert (n 8).

[63] As was done successfully by the Cour Nationale du Droit d'Asile, decision no.11030207 C+, 22 May 2014. However, for cases to the contrary, see *Refugee Appeal No 72635* (n 44) para 183; *Refugee Appeal No 74449* [2003] NZRSAA 332; *Re X*, 2014 CarswellNat 5790, 5791 (Immigration and Refugee Board of Canada); *BA* (n 61) para 63.

[64] Foster and Lambert (n 8) 74–7.

[65] Matthew Gibney, '"A Very Transcendental Power": Denaturalisation and the Liberalisation of Citizenship in the United Kingdom' (2013) 61 Political Studies 637; Sangeetha Pillai and George Williams, 'Twenty-First Century Banishment: Citizenship Stripping in Common Law Nations' (2017) 66 ICLQ 521. See also Parliamentary Assembly of the Council of Europe, *Resolution 2263 (2019) Withdrawing Nationality as a Measure to Combat Terrorism: A Human Rights-Compatible Approach?* (25 January 2019).

[66] *Haile v Holder*, 591 F 3d 572 (7th Cir, 2010) (agreed in principle). In *Stserba v Holder*, 646 F 3d 964 (6th Cir, 2011) the US Court of Appeals Sixth Circuit held that stripping a person of nationality on a protected ground, rendering them stateless, *could* amount to persecution. Fullerton (n 8); David C Baluarte, 'Life after Limbo: Stateless Persons in the United States and the Role of International Protection in Achieving a Legal Solution' (2015) 29 Georgetown Immigration Law Journal 351.

[67] eg the mass withdrawal of nationality to 1.9 million mostly Bengali Muslims, in Assam, northeast India, following the 2018 National Register of Citizens. See Suhasini Raj and Jeffrey Gettleman, 'A Mass Citizenship Check in India Leaves 2 Million People in Limbo', *The New York Times* (31 August 2019) < https://www.nytimes.com/2019/08/31/world/asia/india-muslim-citizen-list.html> accessed 12 October 2020.

sovereignty.[68] The harm must nevertheless be sufficiently serious to reach the threshold of persecution;[69] that assessment is context specific. Hence, withdrawal of nationality *on its own* may not necessarily reach the level of persecution; more may be required in terms of harm, in particular assessing the consequences of becoming stateless.[70]

iii. *Denial of Civil and Political Rights and/or Socio-economic Rights*

It is widely documented that stateless persons often face harm resulting from their lack of access to essential rights attached to nationality, such as education, birth certificates or other ID documents, work, health care, family unity, freedom of movement, etc in their country of former habitual residence. It is difficult to ascertain easily which denials of rights rise to the level of persecution since very often they are entangled. That said, despite an increased willingness by decision-makers to fully recognize the devastating effects of socio-economic deprivation, reluctance persists in recognizing the denial of these rights as persecution unless there is also evidence of physical injury, arrest, and/or detention.[71] The rationale behind such findings is that a stateless person cannot be found to be persecuted under international law for lacking socio-economic rights, which she is not entitled to under *domestic law*. The problem with such reasoning is that it ignores provisions of *international law* that require States to respect and ensure the rights protected in human rights treaties, including both ICCPR and ICESCR, to all people within their territory and subject to their jurisdiction, regardless of nationality or lack thereof. Similarly questionable is reasoning that rejects the possibility of persecution if a risk of harm exists against whole communities or civilians generally.[72] Nevertheless, *significant* hardship/severe treatment resulting from a denial of both civil and political rights and socio-economic rights taken cumulatively have been found to amount to persecution of stateless persons (eg in cases of undocumented Bidoons).[73]

On the whole, therefore, the particular challenge faced by stateless persons seeking refugee protection seems to be that 'persecution is more about serious human rights violations than a deficit of citizenship per se'.[74]

[68] eg *Haile v Gonzales*, 421 F 3d 493, 494 (7th Cir, 2005).

[69] *MA (Ethiopia) v Secretary of State for the Home Department* [2009] EWCA Civ 289; *Haile v Holder* (n 66).

[70] For a full analysis of the relevant case law, see Foster and Lambert (n 8) 156–64.

[71] Foster and Lambert (n 8) 176.

[72] Such reasoning contradicts UNHCR, 'Guidelines on International Protection No 12,' HCR/GIP/16/12 (2 December 2016) <https://www.unhcr.org/en-au/publications/legal/58359afe7/unhcr-guidelines-international-protection-12-claims-refugee-status-related.html> accessed 12 October 2020.

[73] Foster and Lambert (n 8) 178–85. This would also be the case of those Rohingya able to flee and claim refugee status in a State party to the Refugee Convention (UN Human Rights Council, 'Report of the Special Rapporteur on the Situation of Human Rights in Myanmar', UN doc A/HRC/40/68 (2 May 2019)).

[74] Costello (n 24) 725.

4. Having an 'Ineffective' Nationality: The Discredited Notion of *De Facto* Statelessness

The preceding sections examined the relevance of the refugee definition to persons without a nationality, namely the *de jure* stateless. This section focuses on the part of the refugee definition that precedes the semi-colon and which refers to refugees with a nationality. It examines the notion of 'ineffective' nationality or so-called *de facto* statelessness with a view to assessing its usability in refugee law.[75]

De facto stateless persons have existed long before the definition of statelessness was adopted in 1954. According to article I of the Provisional Arrangement of 4 July 1936 concerning the Status of Refugees coming from Germany:

> [T]he term refugee coming from Germany shall be deemed to apply to any person who was settled in that country, who does not possess any nationality other than German nationality, and in respect of whom it is established that in law or in fact he or she does not enjoy the protection of the Government of the Reich[76]

but the term '*de facto* stateless' did not appear until much later, in 1949.[77]

The distinction between *de jure* and *de facto* statelessness, and the terminology '*de facto* stateless', have long been disputed. In 1952, Hudson (working at the time with Weis) observed that although the distinction introduced in the 1949 Study of Statelessness may have been useful then,

> it has, however, no place in the present paper. *Stateless persons in the legal sense of the term are persons who are not considered as nationals by any State according to its law*. The so-called stateless persons are *de facto* nationals of a State who are outside of its territory and devoid of its protection; they are therefore, not stateless: it might be better to speak of '*unprotected persons*' and to call this group '*de facto unprotected persons*', in distinction to '*de jure unprotected persons*', i.e., stateless persons.[78]

[75] Note that the focus here is on *ineffective* nationality and not on the wider issue of 'effective nationality' in the context of dual or multiple nationalities. Hugo Storey, 'Nationality as an Element of the Refugee Definition and the Unsettled Issues of "Inchoate Nationality" and "Effective Nationality" ', *RefLaw* (2 June 2019) <http://www.reflaw.org/nationality-as-an-element-of-the-refugee-definition-and-the-unsettled-issues-of-inchoate-nationality-and-effective-nationality-2/> accessed 12 October 2020.

[76] Provisional Arrangement concerning the Status of Refugees Coming from Germany (signed 4 July 1936) 3952 LNTS 77 <https://www.refworld.org/docid/3dd8d0ae4.html> accessed 12 October 2020.

[77] Ad Hoc Committee on Refugees and Stateless Persons, 'A Study of Statelessness,' UN doc E/1112; E/1112/Add.1 (August 1949) <https://www.refworld.org/docid/3ae68c2d0.html> accessed 12 October 2020.

[78] International Law Commission, 'Report on Nationality, Including Statelessness by Mr. Manley O. Hudson, Special Rapporteur', UN doc A/CN.4/50 (1952) 17.

Cordova, who succeeded Hudson in the role of Special Rapporteur, saw *de facto* statelessness as a much worse situation than *de jure* statelessness because

> the mere fact that they are not technically deprived of nationality itself renders them incapable of obtaining a legal remedy under the proposed statute for stateless persons unless the Commission has the courage to face the problem and provides the said legal remedy.[79]

In his view, 'a right which cannot be exercised is not a positive one' and article 15 UDHR recognizes that human beings have an entitlement to possess a positive, and effective, right of nationality.[80] Despite Cordova's efforts, *de facto* statelessness was not embraced by the International Law Commission on the ground that 'the term "*de facto* statelessness" had never been clearly defined',[81] that it 'was not an easy concept', and that the problem of *de facto* statelessness 'was not extremely urgent'.[82] Hence, it was not included in the Stateless Convention.[83] Notwithstanding this, scholarly debate continued, with some believing that in the eyes of the drafters of the Refugee Convention '*de facto* stateless persons *were* refugees', with others arguing that this not be the case for *all de facto* stateless.[84]

Although the term *de facto* statelessness has remained undefined in law, in its original meaning it referred to persons who have a nationality that is 'ineffective' in the sense that they were *outside* their country of nationality and their State of nationality would not protect them through the exercise of diplomatic and consular protection ('the unprotected').[85] The requirement that a *de facto* stateless person be outside their country of nationality meant that the overlap between *de facto* stateless and refugees was significant.

The rise and development of international human rights law and corresponding duties on States to protect these rights within their territory or jurisdiction provided an added meaning to 'ineffective': ineffective nationality could manifest itself also inside a country as a result of State repression and discrimination.[86] However, this expansion of the notion of *de facto* statelessness to persons whose general human rights have been

[79] International Law Commission, 'Nationality, Including Statelessness—Third Report on the Elimination or Reduction of Statelessness by Mr. Roberto Cordova, Special Rapporteur', UN doc A/CN.4/81 (1954) 30, para 37.

[80] ibid paras 35, 36.

[81] Mr Lauterpacht in 'Summary Record of the 249th meeting of the International Law Commission', UN doc A/CN.4/SR.249 (1954) para 15.

[82] Mr Lauterpacht in 'Summary Record of the 246th meeting of the International Law Commission', UN doc A/CN.4/SR.246 (1954) para 18.

[83] Lauterpacht (n 81) para 17.

[84] For this debate, refer to Hugh Massey, 'UNHCR and De Facto Statelessness' UNHCR Legal and Protection Policy Research Series LPPR/2010/01 (2010) 22 <https://www.refworld.org/docid/4bbf387d2.html> accessed 12 October 2020.

[85] ibid 24, 26.

[86] David Weissbrodt and Clay Collins, 'The Human Rights of Stateless Persons' (2006) 28 Human Rights Quarterly 245, 263.

violated has not gone without criticism. For instance, Massey has argued that it conflates two conceptually distinct rights—the right to a nationality and the rights attached to nationality—and a violation of the right to a nationality may not necessarily entail a violation of the rights attached to nationality and vice versa.[87] De Chickera and van Waas describe it as 'the catch-all solution' used (wrongly, in their view) to fill shortcomings in the legal definition of a stateless person.[88] They further argue that

> [i]n the absence of an internationally agreed substantive minimum content of nationality, it becomes near impossible to objectively draw a line on a spectrum beyond which statelessness can be assumed on the basis of 'ineffective nationality',

suggesting instead 'effective human rights protection' as a better line of inquiry.[89]

Based on this scholarship, this chapter argues that *de facto* statelessness is a discredited notion,[90] which has no place in the application of the Refugee Convention. For the purpose of refugee law, a person is either with a nationality or without a nationality; this being primarily a question of law and how law operates in practice: 'the term "stateless person" means a person who is not considered as a national by any State *under the operation of its law*'.[91]

Considerations of 'ineffective' nationality are a mixed question of law and fact; the person is *not* stateless in law since she or he has a nationality. Yet the rights attached to that nationality and how these are protected by the State of nationality might raise concerns under international human rights law, which, in turn may be relevant to establishing a well-founded fear of being persecuted on a ground protected by the Refugee Convention.

While the distinction between a national and a stateless person may appear straightforward on paper, in practice, decision-makers have, as explained above, introduced doubtful practices aimed at denying refugee protection to asylum seekers. For instance, people who, notwithstanding being confirmed (*de jure*) stateless in their country of habitual residence, are nevertheless treated by decision-makers as possessing the nationality of another State simply because they might have the technical possibility of applying for citizenship, despite having no real links or connection with that country, resulting in the denial of protection. Although the lawfulness of such practices may have been uncertain some years ago, they have since been unequivocally discredited by legal scholars.[92]

[87] Massey (n 84) 38, 40.

[88] Amal De Chickera and Laura van Waas, 'Unpacking Statelessness', in Tendayi Bloom, Katherine Tonkiss, and Phillip Cole (eds), *Understanding Statelessness* (Routledge 2017) 57.

[89] ibid 62. For more recent related scholarship, see Lindsey Kingston, *Fully Human: Personhood, Citizenship and Rights* (OUP 2019).

[90] I am thankful to Madeline Garlick for the word 'discredited'.

[91] Statelessness Convention (n 1) art 1(1) emphasis added.

[92] eg Macklin (n 32); Foster and Lambert (n 8) 127–31 (criticizing the practice of 'inchoate nationality').

To be sure, persons whose nationality is ineffective *have* a nationality and the discriminatory treatments to which they are subject should be assessed in terms of persecution by reference to international human rights law standards, including the equal enjoyment of rights by everyone in their country of nationality.[93] Where nationality is disputed or contested, the core issue becomes one of identification, which may or may not lead to the conclusion that the person concerned is without a nationality or with a nationality, and in some cases that nationality may be ineffective.[94] However, in none of these scenarios is the concept of *de facto* statelessness relevant to refugee protection.

5. Naturalization and Stateless Refugees

Thus far, this chapter has examined questions of nationality in refugee status determination. But what happens once a stateless person has been recognized as a refugee? It is well recognized that 'protection should be followed by a "solution"—an end to the period as a refugee, either by naturalizing (in a country of first protection or in a country of resettlement) or by being repatriated if the conditions that induced flight change durably'.[95] This section investigates naturalization as a solution for stateless refugees.[96]

The intention of the drafters of the Refugee Convention was to have refugees, *all* refugees, assimilated and naturalized as much as possible.[97] It was hoped that, with article 34,

> the refugee may familiarize himself with the language of the country of reception, its customs and way of life of the nation among whom he lives, so that he—without any feeling of coercion—may be more readily integrated in the economic, social and cultural life of the country of refuge.[98]

But naturalization is not a right for the stateless or the refugee;[99] at best, it is 'an *opportunity* to enjoy *facilitated* naturalisation'[100] since these acts continue to fall within States' discretion pursuant to UN Charter principles of sovereignty, independence, and

[93] Laura van Waas, *Nationality Matters: Statelessness under International Law* (Intersentia 2008) 24; Foster and Lambert (n 8) 112.

[94] van Waas (n 93) 24–5.

[95] Costello (n 24) 730.

[96] See Chapter 58 in this volume.

[97] Articles 3 and 34 mean that no distinction is made between refugees with a nationality and stateless refugees in matters of naturalization.

[98] Atle Grahl-Madsen, 'Commentary on the Refugee Convention 1951' (UNHCR 1997) art 34 para 3.

[99] Note that article 32 of the Stateless Convention contains the same provision as article 34 of the Refugee Convention but for stateless persons.

[100] van Waas (n 93) 365.

non-interference in the domestic affairs of a State.[101] However, this discretion is mitigated by rules and principles including non-discrimination and good faith, with the latter arguably calling for 'favourable conditions' to be put in place to facilitate naturalization *of stateless persons*,[102] and 'the objective of tackling statelessness should be weighed into the equation at all times'.[103]

In the same way that States are not compelled to grant their nationality to refugees within their territory ('shall facilitate as far as possible…'), the compulsory naturalization of refugees was never considered an option.[104] Loyalty to the homeland and a desire to return one day are some of the reasons that may prevent a refugee from applying for naturalization in his or her new country.[105] One might, however, ponder whether a *stateless refugee* has a duty to accept an offer of nationality from her country of refuge where she has long been established. Considering the duty of States to eliminate statelessness, can a case ever be made for lawfully imposing a nationality on a *de jure* stateless refugee? The legislation and practices of most States, to grant nationality automatically based on birth (*jus sanguinis* and *jus soli*), coupled with States' duty under international human rights law to eliminate statelessness, would suggest that in situations involving stateless persons the will or consent of the individual may be secondary. What is certain is that refugee status can never be lost for refusing to acquire the nationality of the country of refuge because the cessation clauses for refugee status (article 1C) are clear and limited.[106]

6. Conclusion

This chapter has examined statelessness in a refugee law context. It has highlighted that nationality is not just relevant to identifying who a person claims she is, but also the country of return, and the reasons for persecution. Nationality is further relevant in the identification of persecution itself because, commonly with *stateless* refugees, the source of persecution relates to matters concerning nationality (namely, discrimination on political, racial, or religious grounds). Increasingly, arbitrary denial of nationality and arbitrary withdrawal of nationality, alone or together with the harm resulting from statelessness, including severe deprivation of the rights to subsistence, basic health care, and education, are being recognized as the basis for refugee protection in countries

[101] Foster and Lambert (n 8) 45–6.

[102] eg European Convention on Nationality (adopted 6 November 1997, entered into force 1 March 2000) ETS 166, art 6(4)(g), explanatory report.

[103] van Waas (n 93) 369.

[104] James C Hathaway, *The Rights of Refugees under International Law* (CUP 2005) 982, fn 303.

[105] ibid 982.

[106] Hathaway and Foster note that 'only the voluntary acquisition of a new citizenship is grounds for cessation' in (n 43) 497.

across the world. However, significant gaps remain for certain large groups of stateless refugees, such as Palestinians.

The chapter has also argued that the refugee definition in article 1A(2) Refugee Convention calls for decision-makers to question the quality of the *nationality* of refugees in terms of access and enjoyment of human rights. This is not the same though as embracing *de facto* statelessness, which this chapter has argued is a discredited notion that has no place in refugee law.

While the issue of statelessness has increasingly attracted international attention, the particular challenges pertinent to stateless refugees have been overlooked. This chapter calls for more explicit analysis and guidance from UNHCR, the agency with the remit for both refugees and stateless persons, on the unique challenges in identifying and protecting stateless refugees. In particular, better alignment between the UNHCR Refugee Handbook and the UNHCR Stateless Handbook, especially on the meaning of key elements of the refugee definition such as 'not having a nationality', is required. More broadly, issues at the heart of the intersection between refugee protection and statelessness would be worthy of further judicial and scholarly exploration.

CHAPTER 45

CONFLICT REFUGEES

CORNELIS (KEES) WOUTERS*

1. Introduction

The vast majority of the world's refugees flee the atrocities and dangers of conflict.[1] In 2018, 67 per cent of all refugees worldwide came from just five countries: Syria, Afghanistan, South Sudan, Myanmar, and Somalia.[2] Violence in other countries, including in the north of Central America involving organized gangs, also contributed to a rise in the number of refugees.

Armed conflict and other situations of violence invariably cause human suffering, directly affecting the lives of civilian populations. Further, the indirect consequences of such situations can destroy State and societal structures, leaving people destitute and compelled to flee. The phrase 'armed conflict and other situations of violence' in this chapter should be understood broadly, referring to situations that are marked by a material level or spread of violence that affects the civilian population. The phrase is not limited to any specific meaning that 'armed conflict' or 'other situations of violence' may have under international humanitarian law (IHL).[3] In this chapter, the terms 'war', 'armed conflict', and 'conflict' are used interchangeably.

While it is difficult to argue that people should not be returned to the inherent dangers of war, different thinking and practices can be discerned when it comes to the role of international refugee law in providing protection to people displaced across borders by conflict. The discrepancies between recognizing people fleeing conflict as refugees and providing them with other, complementary, forms of international protection arise in part from the way in which armed conflicts are understood, the way in which the

* The views expressed are the personal views of the author and may not necessarily be shared by the United Nations or by UNHCR, of which the author is a staff member.

[1] Walter Kälin, 'Flight in Times of War' (2001) 83 International Review of the Red Cross 629.

[2] UNHCR, 'Global Trends Force Displacement in 2018' <www.unhcr.org/5d08d7ee7.pdf> accessed 26 November 2019.

[3] On which, see Chapter 12 in this volume.

definition of a refugee in the Refugee Convention has been interpreted and applied, and, in part, from limitations in the definition itself. Also relevant are broader refugee definitions in Africa and Latin America,[4] as well as the development of complementary forms of international protection, particularly subsidiary protection developed within EU law.[5] Recognizing 'conflict refugees' as refugees within the international legal framework requires an understanding of the dynamics of conflicts, as well as a dynamic interpretation of the refugee definitions at the global and regional levels, and appreciation of the complementarity of other forms of international protection.

This chapter explores the causes, character, and effects of conflicts, as well as the advanced understanding of the refugee definition in the Refugee Convention and regional instruments in the context of the inherent dangers in contemporary conflicts.[6]

2. Understanding Conflicts for the Purpose of Refugee Protection

Understanding the complexities of conflicts is essential when considering the applicability of international refugee law. Wars come in all shapes and sizes. In 2018, the Heidelberg Institute for Conflict Research counted 374 conflicts around the world, of which 214 were fought violently.[7] Conflicts can be rooted in ethnic, ideological, religious, or social grievances; fuelled by greed over resources, trade routes, land, and livelihoods; or in pursuit of economic gain. Most conflicts have multiple and overlapping causes and drivers.[8]

With a rise in non-international conflicts, a diversity of armed actors, including a diversity of irregular armed actors, with different—and often mixed—modes of violence, has emerged.[9] This blurs the traditional boundaries between war and peace and between combatants and civilians. It has also resulted in more protracted and cyclical conflicts. Periods of less violence are often just interludes between periods of greater intensity.

[4] See Chapters 15, 17, and 34 in this volume.

[5] See Madeline Garlick, 'Protection in the European Union for People Fleeing Indiscriminate Violence in Armed Conflict: Article 15(c) of the EU Qualification Directive' in Volker Türk, Alice Edwards, and Cornelis Wouters, *In Flight from Conflict and Violence: UNHCR's Consultations on Refugee Status and Other Forms of International Protection* (CUP and UNHCR 2017); see Chapter 36 in this volume.

[6] For a more elaborate understanding of the regional refugee criteria and protection instruments, see Chapters 15, 17, and 34 in this volume, and for analysis of complementary forms of international protection, including subsidiary protection, see Chapter 36 in this volume.

[7] Conflict Barometer 2018, 'Heidelberg Institute for International Conflict Research' <https://hiik.de/conflict-barometer/current-version/?lang=en> accessed 26 November 2019.

[8] Theo Farrell and Olivier Schmitt, 'The Causes, Character and Conduct of Internal Armed Conflict and the Effects of Civilian Populations, 1990–2010' in Türk, Edwards, and Wouters (n 5) 27–8.

[9] Jean-François Durieux and David J Cantor, 'Refuge from Inhumanity? Canvassing the Issues' in David J Cantor and Jean-François Durieux (eds), *Refuge from Inhumanity? War Refugees and International Humanitarian Law* (Brill Nijhoff 2014) 4; see Chapter 63 in this volume.

In modern-day conflicts, violence directed at civilians is a particular characteristic.[10] There has been an increasing targeting or terrorizing of civilians, and other forms of coercive violence, aimed at exploiting, controlling, or exterminating (parts of) the civilian population. While there has been a general decline in lethality in conflicts, their effects on people's lives and physical and mental integrity is evident.[11] Violence often takes place in crowded urban areas. The use and availability of low technological weaponry, such as machetes, automatic weapons, landmines, and rocket-propelled grenades, has further contributed to the spread of conflict into civilian areas. This invariably causes human suffering, directly affecting the lives of civilian populations. Violence in conflict may be widespread and large-scale, or rather small-scale, but it is rarely conducted indiscriminately or has an indiscriminate effect on civilians. For example, in 2019, UNHCR described the situation in Iraq as one of 'continuing insecurity in parts of Iraq and widespread human rights abuses', where, amongst others, ISIS conducted 'widespread attacks directed against civilians', but did so to target or affect religious and minority ethnic groups.[12]

A particularly concerning tool used in war is sexual and gender-based violence,[13] including rape, sexual and conjugal slavery, enforced prostitution, forced abortion and miscarriage, trafficking, and genital mutilation. Sexual and gender-based violence, which affects women and girls as well as men and boys, may be used as a weapon of war, aimed at destroying people's identity and dignity and the social fabric of communities.[14] Sexual and gender-based violence may be used to directly harm the victim, or as part of a broader strategy to control communities and territory.[15] Rape is particularly pervasive in many conflicts and cannot be characterized simply as lust. It is an expression by the perpetrator of control and power over the victim, as well as the family and community to which the victim belongs.[16] Particularly in situations of conflict, rape occurs in an overarching context of violence and impunity, of weak or misdirected State authority, and enhanced vulnerability and discrimination. It is therefore an effective tool for terrorizing civilian populations. Furthermore, the after-effects of rape must also be understood. Rape often results in societal stigma, leading to social, cultural, and economic exclusion of the victim, increased vulnerability, and further forms of violence.[17]

Children are also victims of conflict. Children may be more vulnerable to the effects of conflict because of their young age and immaturity. They may be subjected to forced separation from parents, malnutrition, disease, and deprivation of education. Children

[10] Farrell and Schmitt (n 8) 25. [11] ibid 30–1.

[12] UNHCR, 'International Protection Considerations with regard to People Fleeing the Republic of Iraq' (May 2019) 6, 39 <www.refworld.org/docid/5cc9b20c4.html> accessed 8 December 2019.

[13] Valerie Oosterveld, 'Women and Girls Fleeing Conflict: Gender and the Interpretation and Application of the 1951 Refugee Convention' in Türk, Edwards, and Wouters (n 5); Alice Priddy, 'Sexual Violence in Armed Conflict in 2012' in Stuart Casey-Maslen (ed), *The War Report 2012* (OUP 2013) 296–324.

[14] UN Secretary-General, 'Conflict Related Sexual Violence. Report of the Secretary-General', UN doc S/2019/280 (29 March 2019) 13, affirming sexual violence as a tactic of war.

[15] ibid. [16] Priddy (n 13) 306. [17] Report of the Secretary-General (n 14) 20.

may also be at risk of being exploited, trafficked, or recruited as child soldiers[18] (which may include brutal initiation rituals, fighting on front lines, killing others and being shot at, and other abuses, such as early or forced marriage, forced labour, or sexual slavery).[19] The recruitment of children (namely, the compulsory, forced, and voluntary conscription or enlistment of children into any kind of armed force or armed group) and the use of children under the age of 15 in hostilities, is prohibited in all circumstances[20] and qualifies as a war crime.[21] The prohibition in international law on the recruitment and the use in hostilities of children between the age of 15 and 18 is patchy, with some instruments allowing children to voluntarily join government armed forces.[22] The Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict prohibits all recruitment and use of children under the age of 18 by armed groups that are distinct from the armed forces of the State,[23] as well as the compulsory recruitment of under-18s into the State's armed forces.[24] The ILO Convention No 182 on the Worst Forms of Child Labour prohibits the forced or compulsory recruitment and use in armed conflict of all children and applies to the armed forces of a State and to non-State armed groups.[25] Children may also be specifically susceptible to harm resulting from gangs and gang violence,[26] which may affect large segments of society, especially where the rule of law is weak. For example, gangs in the northern part of Central America exercise high levels of control, often by

[18] The term 'child soldier' refers to a child associated with an armed force or armed group. This includes 'any person below 18 years of age who is or who has been recruited or used by an armed force or armed group in any capacity, including but not limited to children, boys, and girls used as fighters, cooks, porters, messengers, spies or for sexual purposes. It does not only refer to a child who is taking or has taken a direct part in hostilities.' UN Children's Fund (UNICEF), 'The Paris Principles. Principles and Guidelines on Children associated with Armed Forces or Armed Groups' (February 2007) definition 2.1 <www.refworld.org/docid/465198442.html> accessed 26 November 2019.

[19] Rachel Brett, Margaret Brett, and Haifa Rashed, 'Children Fleeing Conflict. Age and the Interpretation and Application of the 1951 Refugee Convention' in Türk, Edwards, and Wouters (n 5).

[20] CRC, art 38. See also Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (Additional Protocol I) art 77(2). Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (Additional Protocol II) art 4(3)(c).

[21] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90, arts 8(2)(b)(xxvi) and (e)(vii); Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone, annex Statute of the Special Court for Sierra Leone, 16 January 2002, art 4(c).

[22] Brett, Brett, and Rashed (n 19) 221–2.

[23] Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (adopted 25 May 2000, entered into force 12 February 2002) 2173 UNTS 222, art 4.

[24] ibid art 2.

[25] Convention (No 182) concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (adopted 17 June 1999, entered into force 19 November 2000) 2133 UNTS 161 (ILO Convention No 182) art 3(a).

[26] UNHCR, 'Guidance Note on Refugee Claims relating to Victims of Organized Gangs' (31 March 2010) <www.refworld.org/docid/4bb21fa02.html> accessed 26 November 2019.

violent means, over all aspects of life of members of the population in the areas under their control. This includes forced recruitment; harm or threats preventing recruited children from leaving; and forcing gang members to conduct violence against non-members and undertake criminal activities, such as trafficking drugs, arms, and people, to make a profit as well as consolidate or expand the gang's powerbase.[27]

Further, the indirect consequences of conflicts, such as food shortages, poverty, inflation, and disease, have increased. Conflicts often destroy State and societal structures and disrupt economies, leaving people marginalized and destitute.[28] Wars also exacerbate State fragility, shifting power from State to non-State actors, which exercise control over territories with little sense of responsibility towards the population.[29]

Finally, conflicts interact with disasters and the adverse effects of climate change. Given their geographical location, many countries experiencing conflict are already vulnerable to these impacts, which are worsened because of the effects of conflict on the State's ability to prevent and respond to them.[30] Priorities shift, assets weaken, and prevention, response, and adaptation activities become impossible to maintain. For example, drought conditions in Somalia are exacerbated by historical and ongoing political volatility, governance challenges, and conflict.[31]

Conflict-generating displacement is not a new phenomenon.[32] However, the complexities of conflict—causes, character, and effects—make it difficult to determine whether people fleeing conflicts are refugees.[33] An individual seeking protection will often have difficulty in giving a detailed account of the background and development of the conflict. Further, stereotypes, misunderstandings, and generalizations about the conflict may prevent a decision-maker from seeking a deeper understanding of the conflict.[34] Reliable and accurate information on countries in conflict may not be readily available or easy to obtain precisely because the country is in conflict. As UNHCR noted in its Guidelines on International Protection No 12, which deal specifically with claims for refugee status related to situations of armed conflict and violence, available country of origin information may not reflect the specific circumstances of women or men,

[27] UNHCR, 'Eligibility Guidelines for Assessing International Protection Needs of Asylum-Seekers from Honduras' (July 2016) <www.refworld.org/docid/579767434.html> accessed 26 November 2019, 44.

[28] Farrell and Schmitt (n 8) 33–4; Durieux and Cantor (n 9) 4.

[29] Volker Türk, Alice Edwards, and Cornelis Wouters, 'Introduction' in Türk, Edwards, and Wouters (n 5) 4.

[30] Catherine-Lune Grayson, 'When Rain Turns to Dust: Climate Change, Conflict and Humanitarian Action' (5 December 2019) <https://blogs.icrc.org/law-and-policy/2019/12/05/rain-dust-climate-change-humanitarian-action/> accessed 9 December 2019.

[31] Sanjula Weerasinghe, 'In Harm's Way: International Protection in the context of Nexus Dynamics between Conflict or Violence and Disaster or Climate Change', UNHCR Legal and Protection Policy Research Series, PPLA/2018/05 (2018).

[32] Durieux and Cantor (n 9) 4; Farrell and Schmitt (n 8) 34–5.

[33] Gilbert suggests that these complexities of conflicts have always existed: Geoff Gilbert, 'Exclusion is Not Just about Saying "No"' in Durieux and Cantor (n 9) 153.

[34] UNHCR, 'Safe at Last? Law and Practice in Selected EU Member States with Respect to Asylum-Seekers Fleeing Indiscriminate Violence' (27 July 2011) 18–19 <www.refworld.org/docid/4e2ee0022.html> accessed 26 November 2019.

including the prevalence of gender-related forms of harm, or take into account the changing composition and conduct of the armed actors involved.[35]

3. Refugee Convention

a. Historical Context

It has long been postulated that the Refugee Convention does not protect the victims of war since they are subjected to the general threats resulting from indiscriminate violence that normally prevails in conflict situations. The perception in many States, particularly those with highly developed individual refugee status determination procedures, is that the Refugee Convention was not designed for 'conflict refugees'[36] and that conflicts should trigger alternative forms of protection.[37] It is ironic that the Refugee Convention does not explicitly provide international protection to civilians fleeing conflict, given that the treaty was a response to the Second World War, and there is a popular presumption that protection from conflict forms the essence of refugee protection.[38] Even UNHCR has long adopted the 'exceptionality approach',[39] holding that '[p]ersons compelled to leave their country of origin as a result of international or national armed conflicts are not normally considered refugees under the 1951 Convention', unless a foreign army is seeking to persecute the population of the country it has invaded and occupied.[40] Alongside this, however, UNHCR's mandate has evolved to include 'individuals who are outside their country of origin or habitual residence and who are unable or unwilling to return there owing to serious threats to life, physical integrity or freedom resulting from generalized violence or events seriously disturbing public order',[41] based largely on the regional refugee criteria developed in Africa and Latin America.[42]

[35] UNHCR, 'Guidelines on International Protection No. 12: Claims for refugee status related to situations of armed conflict and violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees and the regional refugee definitions', HCR/GIP/16/12 (2 December 2016) para 92 <www.refworld.org/docid/583595ff4.html> accessed 26 November 2019.

[36] Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, OUP 2007) 126. UNHCR (n 34) 101; Vanessa Holzer, 'The 1951 Refugee Convention and the Protection of People Fleeing Armed Conflict and Other Situations of Violence' in Türk, Edwards, and Wouters (n 5); Hugo Storey, 'Armed Conflict in Asylum Law: The "War Flaw"' (2012) 31(2) RSQ 2, 5–8, referencing Canadian, Dutch, German, and UK decisions; Kälin (n 1) 629, referring to the perception that for a long time the 1951 Refugee Convention was mainly used to protect victims fleeing the often very stable totalitarian and authoritarian regimes.

[37] Alexander Betts, 'The Normative Terrain of the Global Refugee Regime' (2015) 29 Ethics & International Affairs 363.

[38] Farrell and Schmitt (n 8) 35; Durieux and Cantor (n 9) 5.

[39] Storey (n 36) 4.

[40] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/1P/4/ENG/REV.4 (1979, reissued 2019) paras 164, 165.

[41] eg UNHCR Iraq (n 12) 113.

[42] Vanessa Holzer, *Refugees from Armed Conflict: The 1951 Refugee Convention and International Humanitarian Law* (Intersentia 2015) 35–6. See Chapters 15, d 17, and 34 in this volume.

Notwithstanding UNHCR's restrictive position vis-à-vis the Refugee Convention, the UN Secretary-General, the Executive Committee of the High Commissioner's Programme (ExCom), and UNHCR itself have all acknowledged the large number of persons in need of international protection who have been forced to flee the dangers of conflict. ExCom did so in several Conclusions on International Protection in the mid-1990s.[43] In 1999, the UN Secretary-General observed that '[p]eople forced to leave their country of nationality or permanent residence should enjoy the protection of international refugee law, yet many do not'.[44] Also in 1999, UNHCR referred to the conflicts in the former Yugoslavia, the Great Lakes region, and Kosovo, as 'striking examples of situations where violence has been used as a means to persecute specific communities, and where ethnic or religious "cleansing" has been the ultimate purpose of war'.[45] While there was a growing appreciation in the 1990s that international refugee law was a relevant legal framework for the protection of people fleeing conflict across borders, the view persisted that only in theory would such people face a risk of persecution related to a Convention ground. In 2001, UNHCR explicitly considered the Refugee Convention to be applicable to conflict refugees where sufficient harm could be shown and a link to a Convention ground established. UNHCR in fact acknowledged that conflicts are often rooted in ethnic, religious, or political differences that specifically victimize populations, qualifying people as refugees within the meaning of the Refugee Convention.[46] At the same time, UNHCR reiterated, without further explanation, 'that there are persons who flee the indiscriminate effects of violence associated with conflict with no element of persecution'.[47] With the publication of the Guidelines on International Protection No 12 in 2016, UNHCR clarified unequivocally the applicability of the Refugee Convention to persons displaced by conflict. UNHCR accepted the primacy of the Refugee Convention to 'conflict refugees' and considered that 'almost each and every conflict that we're dealing with today would make the case for the [application of the] 1951 Convention'.[48] A clear example of this is the large number of 'risk profiles' UNHCR identifies in its country (of origin)

[43] ExCom Conclusion No 74 (XLV) 1994, para (k); ExCom Conclusion No 75 (XLV) 1994, para (i); UNHCR, 'Note on International Protection', UN doc A/AC.96/830 (7 September 1994) paras 8, 10–11, 31–2; UNHCR, 'Note on International Protection', UN doc A/AC.96/850 (1 September 1995) para 11; UNHCR, 'Note on International Protection', UN doc A/AC.96/898 (3 July 1998) para 4.

[44] UNSC, 'Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict', UN doc S/1999/957 (8 September 1999) 12.

[45] UNHCR, 'The 1951 Convention relating to the Status of Refugees: Its Relevance in the Contemporary Context' (February 1999) para 8 <www.refworld.org/docid/3ae6b3388.html> accessed 26 November 2019.

[46] UNHCR, 'Interpreting Article 1 of the 1951 Convention relating to the Status of Refugees' (April 2001) para 21 <www.refworld.org/docid/3b20a3914.html> accessed 26 November 2019.

[47] ibid para 22.

[48] Q&A with Volker Türk, (Former) Assistant High Commissioner for Protection, 'The 1951 Refugee Convention "is as relevant today as it was at the time" ' (2 December 2016) <www.unhcr.org/news/latest/2016/12/584036047/qa-1951-refugee-convention-relevant-today-time.html> accessed 26 November 2019.

guidance documents, which almost exclusively concern countries in conflict or otherwise experiencing public violence.[49]

The long-pervasive 'exceptionality approach' may have its roots in the drafting of the Refugee Convention itself, even though neither a textual nor a contextual reading supports this approach.[50] Negotiated in the aftermath of the Second World War, the drafters did not intend the refugee definition to cover persons fleeing the general dangers of war: indeed, a proposal to that effect by the International Committee for the Red Cross was rejected. However, the drafters understood that people fleeing the atrocities of war might also have a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion,[51] which is the analysis required under the refugee definition in article 1A(2). The definition contains no limitation on its application during times of peace or conflict.[52] In fact, the definition is indifferent towards the contextual situation in which a need for refugee protection is generated.[53] As such, a 'neutral'—or, perhaps more appropriately called, a contextual—approach to applying the Refugee Convention is called for in all circumstances, including when people flee conflicts.[54] What is required when dealing with refugee claims is an assessment of those claims based on individual facts and circumstances in the overall context of the country of origin.[55] The Convention is premised on the idea that people should be protected from harm to which they may be subjected because of their ethnicity, convictions, or other characteristics, or the group to which they belong. The real challenge is in understanding the realities of conflict and applying them to the elements of the refugee definition.

b. Challenges

To determine whether or not a person fleeing a conflict is a refugee requires an understanding and analysis of the conflict, that is, the factual situation in the country of origin affected by the conflict in its proper context, including the causes, character, and impact of the conflict on various populations and how it affects the particular individual

[49] Available on UNHCR's Refworld database: <www.refworld.org/publisher,UNHCR,COUNTRYPOS,,,0.html>.

[50] Vienna Convention on the Law of Treaties, 23 May 1969 (entered into force 27 January 1980) 1155 UNTS 331, arts 31(1) and 32.

[51] For a discussion on the drafting history of the refugee definition in relation to people displaced by conflict, see Holzer (n 36) 66–70.

[52] ibid 62. For a discussion on the effect of armed conflict on the application of treaties, including the Refugee Convention, see 63–9.

[53] Charlotte Lülf, *Conflict Displacement and Legal Protection: Understanding Asylum, Human Rights and Refugee Law* (Routledge 2019) 69.

[54] Jean-François Durieux, 'Of War, Flows, Laws and Flaws: A Reply to Hugo Storey' (2012) 31(3) RSQ 163.

[55] Storey (n 36) 9 introduced a slightly different 'normalcy approach', namely, an approach according to which claims for international protection by persons fleeing armed conflict should normally succeed unless there are special circumstances.

seeking refugee protection. Decision-makers assessing claims for refugee status often fail to consider how claims related to conflict are characterized by harm targeted towards, or affecting, a specific individual or group. Challenges arise in part from limited understanding of the intricacies of the conflict, and in part from complexities in applying elements of the refugee definition.

Applying the refugee definition to conflict situations involves legal interpretative challenges relating to: (a) the individualized phrasing of the definition; (b) the meaning of 'persecution'; (c) identifying the relevant Convention ground; (d) establishing a causal link between the fear of persecution and a Convention ground; and (e) the relevance and reasonableness of an internal flight alternative.

Before discussing each of these challenges below, it is important to consider the relevance of classifying a conflict as an 'armed conflict'. There is no universally agreed definition of armed conflict in international treaty law or in IHL.[56] While State adjudicators and UNHCR have classified multiple situations as an armed conflict for the purposes of refugee status determination, such classification is not necessarily based on IHL.[57] The classification of a situation as an armed conflict within the meaning of IHL is neither required nor determinative and may distort the assessment of the refugee claim, emphasizing the general character and impact of the situation, rather than the risk of persecution for particular civilians. Importantly, classifying a conflict as an international or a non-international armed conflict within the meaning of IHL is not needed and not necessarily helpful,[58] since it includes considerations that are not relevant for assessing a person's eligibility for refugee protection. For example, establishing an armed conflict under IHL depends not only on the severity of the violence involved, but also on the level of organization of the parties to the conflict.[59] Further, refugee status determination applies a forward-looking approach to the situation in the country of origin, which is absent in an IHL determination of armed conflict. Additionally, classifying a situation as an armed conflict could distract decision-makers from the refugee's predicament, which should be the focus of refugee status determination.[60] Many conflicts are not designated as armed conflicts for the purposes of IHL, yet the means employed and their consequences may be just as violent and harmful, which *is* relevant when assessing a claim for refugee status.[61]

Other labels, such as generalized or indiscriminate violence, may also be distorting. The terms 'generalized' and 'indiscriminate' have no clear meaning in law. 'Generalized' tends to refer to the character of the violence as being widespread and/or systematic, affecting a large number of people.[62] By contrast, 'indiscriminate' refers to the effects of

[56] Holzer (n 42) 19; Storey, 'The "War Flaw" and Why it Matters' in Cantor and Durieux (n 9) 43.

[57] Holzer (n 42) 83–4.

[58] Durieux (n 54) 166.

[59] Tamara Wood, 'The African War Refugee: Using IHL to Interpret the 1969 African Refugee Convention's Expanded Refugee Definition' in Cantor and Durieux (n 9) 199.

[60] Holzer (n 42) 87.

[61] UNHCR Guidelines (n 35) para 5; *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* [2000] HCA 55, para 147 (Gummow J).

[62] *The Massacres of El Mozote and Nearby Places v El Salvador*, Inter-American Court of Human Rights Series C No 252 (25 October 2012) 70, 193. Inter-American Commission on Human Rights (IACHR), 'Report on the Situation of Human Rights in Jamaica', OEA/Ser.L/V/II.144 (10 August 2012) 5, 27.

the violence, especially when there is a lack of distinction between military and civilian targets, or when the violence is specifically directed against civilian populations or is disproportionate to the anticipated military advantage.[63] When, from the outset of assessing a claim for refugee status, a situation in the country of origin is classified as 'generalized' and/or 'indiscriminate' violence, the decision-maker may not appreciate that widespread and systematic violence affects many people and that it may not be random.

c. Individualization

As mentioned above, the vast majority of the world's refugees flee conflict, often in large numbers and *en masse*. Large unmanageable numbers of refugees have also played a part in restrictive approaches to applying the Refugee Convention to people fleeing conflict.[64] The individualized character of the Convention definition in article 1A(2), written in the singular person, seems contradictory and inappropriate when applied to the displacement of civilian populations from countries in conflict.[65] Whole populations may suffer or be at risk of persecution in such situations. A restrictive interpretation of the definition would require individual members of affected populations to show a fear of persecution over and above the risks inherent in war.[66] Such an interpretation would disregard the characteristics and effects of conflict on populations and result in the refugee definition only applying to individuals singled out for persecutory harm, which has been widely criticized.[67] The refugee definition does not balance the claims of individuals against each other.[68] Particularly in conflict situations, entire communities or populations may be at risk of persecution, leaving each member of the community or population at risk; a risk that is shared by many other individuals.[69] The fact that many or all members of a community may be at risk does not undermine the validity of any particular individual's claim.[70] The test is whether an individual's fear of being persecuted is well founded, based on the general conditions in the country of origin in combination with personal facts and circumstances. In fact, at times, the impact of the

[63] Andreas Zimmermann and Claudia Mahler, 'Article 1 A, para. 2' in Andreas Zimmermann (ed), *The 1951 Convention relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (OUP 2011) 371.

[64] Durieux and Cantor (n 9) 5, referencing Atle Grahl-Madsen, 'The Emergent International Law relating to Refugees: Past-Present-Future' in Peter Macalister-Smith and Gudmundur Alfredsson (eds), *The Land Beyond: Collected Essays in Refugee Law and Policy by Atle Grahl-Madsen* (Martinus Nijhoff 2001) 205.

[65] Lülf (n 53) 2.

[66] *R v Secretary of State for the Home Department, ex parte Adan* [1998] UKHL 15; [1999] 1 AC 293 (Lord Slynn).

[67] See Holzer (n 42) 111 fn 509 for references.

[68] Lülf (n 53) 77.

[69] Goodwin-Gill and McAdam (n 36) 128; Zimmermann and Mahler (n63) 371; *Ralph Prophète v The Minister of Citizenship and Immigration*, 2008 FC 331 para 18.

[70] Holzer (n 42) 111.

conflict on an entire community strengthens, rather than weakens, the risk to any individual member of the community. Further, there is nothing in the refugee definition that requires individuals fleeing conflict to demonstrate a risk of harm over and above that of others caught up in the same situation. As such, potentially large numbers of people fleeing conflict may be recognized as refugees, provided they meet the other criteria of the definition.

d. Persecution

As already addressed above, the harms to which civilians are subjected in conflict are multiple. A conflict adds different layers of vulnerability through the means employed, the general degenerating situation, and the varying effects it has on different people.[71]

Whether harm is serious or severe enough to amount to persecution does not depend on whether it is conducted during, or is the result of, conflict.[72] The text and context of the refugee definition do not require a higher level of severity or seriousness of harm to amount to persecution in conflict situations. However, in times of conflict, a particular level of harm may ordinarily be expected and may not be in breach of international human rights law standards, particularly when it results from lawful and proportionate derogations. States may even declare a state of emergency.[73] While lawful derogations may not necessarily constitute persecution if adopted, as is strictly required by the exigencies of the situation,[74] the overall situation or a cumulation of measures may nonetheless be persecutory.[75]

Persecution may directly and immediately affect a person's life, physical integrity, or freedom in violation of human rights standards or even IHL standards. A series of harmful acts or omissions may also, cumulatively, amount to persecution. For example, regular exposure to security checks, property searches, or other forms of harassment, or the systematic denial of food and medical supplies, or the regular cutting off of water supplies and electricity may over time amount to persecution. Further, a conflict may have serious deleterious effects on the physical and psychological health of people or their personal development, which, particularly taking into account specific vulnerabilities of people, such as their age or gender, may amount to persecution. Indirect and longer-term consequences of conflict may also amount to persecution, including when they result in socio-economic shortcomings.[76] State institutions may become dysfunctional and vital services disrupted. As a result, crime may increase, access to food and livelihood options may be compromised, and access to education and health care services may be constrained. This may leave people without an adequate standard of living or even destitute, amounting to persecution.

[71] Lülf (n 53) 82. [72] *Ibrahim* (n 61) para 18 (Gaudron J).

[73] ICCPR, art 4; UN Human Rights Committee, 'CCPR General Comment No 29: Article 4: Derogations during a State of Emergency', UN doc CCPR/C/21/Rev.1/Add.11 (31 August 2001).

[74] UNHCR Guidelines (n 35) 16. [75] ibid; Holzer (n 42) 117.

[76] James C Hathaway and Michelle Foster, *The Law of Refugee Status* (CUP 2014) 228.

Further, conflict may interact with disasters and the adverse effects of climate change.[77] Decades of conflict and recurrent disasters may leave populations in a state of deep vulnerability through the destruction of livelihoods and the loss of livestock, growing rates of communicable diseases, increased displacement, continuous human rights abuses, and higher crime levels. Similarly, a combination of conflict, poor governance, and weak or corrupt institutions may lead to situations where disaster preparedness, risk reduction, and emergency response mechanisms are weak or absent. As a result, disasters, including floods, mudslides, earthquakes, droughts, and severe weather, are a further threat to people whose resilience has already been worn down.[78] Disasters may also lead to further tensions over natural resources and land, exacerbating communal tensions.[79]

e. For Reasons of Race, Religion, Nationality, Membership of a Particular Group, or Political Opinion

Being at risk of persecution alone is not sufficient to qualify as a refugee within the meaning of the Refugee Convention. The risk of persecution needs to be linked to one or more of the five Convention grounds, namely race, religion, nationality, membership of a particular social group, or political opinion. A persistent misperception regarding the applicability of the refugee definition to people displaced by conflict is the conventional assumption that the violence in conflict is general and indiscriminate.[80] As outlined above, harm that is general (namely widespread and/or systematic and affecting a large number of people) and indiscriminate (in the IHL sense of the term) may still target and be directed at specific individuals or populations. It is really only 'indiscriminate' in that the violence does not differentiate between military objectives and civilians and civilian objects because of the method of warfare chosen (for example, bombings, shellings, suicide attacks, and the use of improvised explosive

[77] Weerasinghe (n 31).

[78] UNHCR, 'Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan' (30 August 2018) 31–2 <www.refworld.org/docid/5b8900109.html> accessed 26 November 2019; UNHCR, 'Legal Considerations on Refugee Protection for People Fleeing Conflict and Famine Affected Countries' (2017) <www.refworld.org/docid/5906e0824.html> accessed 26 November 2019.

[79] 'Statement to the 69th Session of the Executive Committee of the High Commissioner's Programme: Statement by Volker Türk, Assistance High Commissioner for Protection' (4 October 2018) <www.unhcr.org/admin/dipstatements/5bb49b2f4/statement-69th-session-executive-committee-high-commissioners-programme.html> accessed 26 November 2019. Joshua Busby, 'The State of the Field in Climate and Conflict' (20 March 2018) <climateandsecurity.org/2018/03/20/the-state-of-the-field-in-climate-and-conflict/> accessed 10 December 2019. Neil Adger and others, 'Chapter 12: Human Security' in *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part A: Global and Sectoral Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (CUP 2014) 773, 776.

[80] Lülf (n 53) 86.

devices).[81] For instance, suicide attacks at marketplaces will have indiscriminate effects, but this weapon of war is used intentionally to affect large groups of people with suspected or associated distinct profiles, or to instil terror on the basis of a discriminatory and oppressive agenda. As a result, populations are either affected or targeted because they reside near hideouts of prominent opposition fighters, or because they belong or support an opposing fighting party—or are perceived to do so. Often particular neighbourhoods, villages, towns, or larger geographical areas are targeted because they are a real, or perceived, stronghold of a particular armed group. The perception of support for the 'other side' may be based on little more than the civilians' physical presence or origin in neighbourhoods or villages presently or previously under the control of, or having a presence of, armed groups. UNHCR has, for example, consistently noted that '[a] particular feature of the conflict in Syria is that different parties to the conflict frequently impute a political opinion to larger groups of people, including families, tribes, religious or ethnic groups, or whole towns, villages or neighbourhoods, by association'.[82] Civilians in such areas are at risk of persecution by reason of either their perceived opposition to, or support for, one (or more) of the armed groups. The risk of them being harmed is very real and is in no way diminished by the fact that they may not be targeted for, or exposed to, harm on an individual basis.[83]

The reality of many conflicts also means that journalists, human rights defenders, health care professionals, and humanitarian aid workers are often targeted for doing their work.[84] Reporting critically on conflicts or aiding the victims of war is frequently seen as supporting the opposition or assisting the enemy. These professionals are at risk of persecution by association, whereby the Convention ground is established by the persecutor's perception of the professionals' association with opposing groups and, as a result thereof, an attributed political opinion or religious belief.[85]

The complexity of drivers of conflict, as well as the strategies, tactics, and means and methods of warfare of the armed actors involved, have complicated the establishment of the appropriate Convention ground. There is usually no single explanation for a particular conflict. Multiple and overlapping causes may exist, which may change over time.[86] Conflicts may be primarily profit-driven but may also aim to consolidate or expand the actors' powerbase, implying that the actors' conduct may be racial, religious, or politically motivated. Violence in conflict is seldom a means to itself, carried out without reason.[87]

[81] Holzer (n 42) 189.
[82] UNHCR, 'International Protection Considerations with regard to People Fleeing the Syrian Arab Republic, Update V' (3 November 2017) 33 <www.refworld.org/docid/59f365034.html> accessed 26 November 2019; see also earlier updates.
[83] Blanche Tax, 'Refugee by Association' (2014) 47 Forced Migration Review 26.
[84] eg UNHCR Iraq (n 12); Michelle Foster, 'The "Ground with the Least Clarity": A Comparative Study of Jurisprudential Developments relating to "Membership of a Particular Social Group"', UNHCR Legal and Protection Policy Research Series, PPLA/2012/02 (2012) 71; UNHCR Guidelines (n 35) 38.
[85] Holzer (n 42) 214.
[86] Farrell and Schmitt (n 8) 54.
[87] Lülf (n 53) 89.

f. Internal Flight Alternative

A final relevant issue concerns the applicability of an internal flight alternative in the context of conflicts.[88] Conflicts may be limited to specific parts of a country, giving rise to the question of whether people have a protection alternative in their own country. However, it is highly questionable whether an internal flight alternative can be a relevant consideration in conflicts. Violence and oppression are often widespread and not geographically limited to one (or more) part(s) of the country. Further, conflicts may be fluid, with changing frontlines and escalations in violence, often involving a variety of actors, who may operate in diverse geographical areas and not be easily identifiable, nor have effective and durable control over territories. As such, people may not be free from a risk of persecution in all parts of the country, even though some parts may not be affected by the conflict. In such cases, it is relevant to consider whether these parts are practically and safely accessible. For example, minefields may prevent people from reaching these areas.[89] Even when a conflict has ended, places may continue to be inaccessible because of destroyed infrastructure or explosive remnants of war.[90] The unpredictability, volatility, and fluidity of conflict make it difficult to imagine an internal flight alternative to be a relevant consideration in any conflict. However, even when the conflict is geographically limited and confined to a specific part of the country, and an internal flight alternative can be a relevant consideration for decision-makers, it should be borne in mind that the humanitarian situation in such an area may be dire. Even the presence of humanitarian aid and humanitarian aid organizations to protect and assist the population in the area will not make the area a reasonable internal flight alternative.[91] The area may be overcrowded, limiting access to shelter, food, water, and other basic needs; inhabitants may be vulnerable to crime and exploitation; and there may be little prospects for improvements within a reasonable timeframe.[92] Finally, the existence of protected zones in accordance with IHL, or safe zones created under UN Security Council resolutions, does not necessarily make these areas a relevant or reasonable internal flight alternative under international refugee law. The safety of the people protected in these zones is easily compromised.[93]

4. Regional Refugee Criteria

Regional refugee instruments, such as the OAU Convention in Africa and the Cartagena Declaration in Latin America, have expanded the scope of the refugee definition by

[88] For a general discussion on the use of the internal flight alternative, see Chapter 38 in this volume.

[89] Holzer (n 42) 176. [90] ibid 177. [91] ibid 179.

[92] *Sufi and Elmi v UK* Apps Nos 8319/07 and 11,449/07 (ECtHR, 28 July 2011) 291.

[93] UNHCR Guidelines (n 35) para 43. Geoff Gilbert and Anna Magdalena Rüsch, 'Creating Safe Zones and Safe Corridors in Conflict Situations: Providing Protection at Home or Preventing the Search for Asylum?' (June 2017) Kaldor Centre for International Refugee Law Policy Brief No 5 <www.kaldorcentre.unsw.edu.au/sites/default/files/Policy_brief_Creating_safe_zones_and_safe_corridors.pdf> accessed 10 December 2019.

adopting specific regional criteria.[94] These are often seen as being a generous and flexible alternative to defining a refugee.[95] Their adoption has contributed to the long-time persistent exceptionality approach of the Refugee Convention to 'conflict refugees'.[96] Where the composite elements of the refugee definition in the Refugee Convention create a range of interpretative questions, the regional refugee criteria appear better equipped to protect people fleeing conflict as they refer to people's compulsion to flee more general and indiscriminate situations of harm.[97] The OAU Convention was in part adopted to protect people fleeing the various struggles on the African continent for independence from colonial rule.[98]

The regional refugee criteria should not be viewed as alternatives to the Refugee Convention definition. This would ignore the primacy of the Refugee Convention and the complementary character of regional refugee protection instruments.[99] The Refugee Convention definition and the regional refugee criteria are not mutually exclusive; a person may be a refugee under both. However, the complementary character of the regional instruments means that it is preferable to first assess whether a person is a refugee under the Refugee Convention, before turning to the regional criteria. However, in relation to conflicts, where often many people simultaneously seek protection, applying the regional criteria may be more practical and efficient.[100] States parties to the OAU Convention show varied practices,[101] including using the regional criteria to adjudicate refugee claims on a *prima facie* basis.[102]

Under the complementary definitions in the regional instruments, fear of persecution for reasons of a person's ethnicity, convictions, or characteristics is not determinative; rather, the core element is being forced to leave one's home because of general dangers resulting from situational events. The OAU Convention refers to external aggression, occupation, foreign domination, and events seriously disturbing public order, while the Cartagena Declaration refers to generalized violence, foreign aggression, internal conflicts, massive violation of human rights, and other circumstances that have seriously disturbed public order. Many of these situations are the result of conflict.

[94] OAU Convention, art I (2); Cartagena Declaration, conclusion III(3). Marina Sharpe, *The Regional Law of Refugee Protection in Africa* (OUP 2018); Tamara Wood, 'Who Is a Refugee in Africa? A Principled Framework for Interpreting and Applying Africa's Expanded Refugee Definition' (2019) 31 IJRL 290; David J Cantor and Diana Trimiño Mora, 'A Simple Solution to War Refugees?' in Cantor and Durieux (n 9) 204; Michael Reed-Hurtado, 'The Cartagena Declaration on Refugees and the Protection of People Fleeing Armed Conflict and Other Situations of Violence in Latin America' in Türk, Edwards, and Wouters (n 5) 141. Chapters 15, 17, and 34 in this volume.

[95] Wood (n 59) 179. The relevance of the Cartagena Declaration is critically discussed by José Fischel de Andrade, 'The 1984 Cartagena Declaration: A Critical Review of Some Aspects of its Emergence and Relevance' (2019) 38 RSQ 341.

[96] Storey (n 36) 6; Türk, Edwards, and Wouters, 'Introduction' (n 29); Wood (n 59) 180.

[97] Kälin (n 1) 637; Marina Sharpe, 'The 1969 OAU Refugee Convention in the context of Individual Refugee Status Determination' in Türk, Edwards, and Wouters (n 5); Wood (n 59) 180.

[98] See Chapter 15 in this volume.

[99] Storey (n 36) 19. See also Chapters 15 and 17 in this volume.

[100] UNHCR Guidelines (n 35) para 88.

[101] Sharpe (n 97) 127–9; Sharpe (n 94) 63.

[102] Sharpe (n 94) 67. Ivor Jackson, *The Refugee Concept in Group Situations* (Martinus Nijhoff 2004) 4.

The application of the regional refugee criteria is not without its own legal interpretative challenges. For the OAU Convention, this may be largely because there is very little relevant case law or scholarly analysis on which to draw, and much is left to a principled interpretation based on the rules of treaty interpretation provided under the Vienna Convention on the Law of Treaties (VCLT).[103] The Cartagena Declaration is not a legally binding instrument and, as such, not a treaty to which the VCLT rules of treaty interpretation apply. The importance of the regional refugee criteria included in the Cartagena Declaration depends on their incorporation into the domestic legal system of Latin American States.[104]

IHL has played a part in interpreting the situational events listed in the regional refugee criteria, particularly in relation to external aggression and occupation (in the OAU Convention) and internal conflicts, foreign aggression, generalized violence, and other circumstances that seriously disturb public order (in the Cartagena Declaration).[105] Some situational events listed can be clearly delineated, whereas others remain ambiguous. In Africa, the ground 'events seriously disturbing public order' appears to be the main one used, while the other grounds are largely ignored.[106] The concept of 'public order' does not have a single meaning under international law. It can be broadly linked to the prevailing level of the administrative, social, political, and moral order of the State. The prevailing level is to be assessed according to the effective functioning of the State in relation to its population, and based on respect for the rule of law and human dignity to such an extent that the life, security, and freedom of people are protected.[107] An alternative, narrower interpretation is based instead on the level of law and order in a country as assessed according to the effective functioning of law and order mechanisms, or even focusing exclusively on IHL.[108] The latter approach does not appear to be widely accepted.[109] Also, the threshold of what amounts to a 'serious' disruption of public order as opposed to a 'normal' disruption remains unclear: how bad does the fighting or the violence need to be before public order is seriously disturbed?[110] Notwithstanding the ambiguity of the meaning of 'public order', conflict appears to be the most common example of an event seriously disturbing public order. State practice reveals that this includes a range of conflicts—internal and international, between

[103] Wood (n 94) 298, 303. [104] Fischel de Andrade (n 95) 358.

[105] Wood (n 59) 182; Reed-Hurtado (n 94) 154, referring to the Principles and Criteria for the Protection of and Assistance to Central American Refugees, Returnees and Displaced Persons in Latin America (CIREFCA), January 1990 (1990) 2 IJRL 83–117.

[106] Sharpe (n 94) 133.

[107] Alice Edwards, 'Refugee Status Determination in Africa' (2006) 14 African Journal of International and Comparative Law 220. Sharpe (n 94) 49. The French language version of OAU Convention art I(2) refers to 'ordre public'. See also UN Economic and Social Council, 'The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights', UN doc E/CN.4/1985/4 (28 September 1984) para 22. UNHCR Iraq (n 12) 114.

[108] Wood (n 59) 198.

[109] ibid 199; Storey (n 36) 7; Micah Rankin, 'Extending the Limits or Narrowing the Scope? Deconstructing the OAU Refugee Definition 30 Years On' (2005) 21 South Africa Journal on Human Rights 18.

[110] Wood (n 59) 197.

non-State actors, and between State and non-State actors, and not limited to an IHL understanding of armed conflict.[111]

What is crucial for qualifying as a refugee under the regional criteria is the existence, in either part or the whole of the country, of one of the situational events mentioned, and whether this event has compelled those claiming protection to leave the country and seek protection abroad. A conflict may result in any or all of the situational events mentioned in the regional refugee criteria. What is relevant is that at least one can be identified, and that there is a connection between the event and the individual's compulsion to leave. While it can be argued that the connection is one of geographic proximity of the person with the situational event,[112] that may not be fully satisfactory. An assessment of a threat or risk to life, physical integrity, or liberty is required.[113] Clearly, in accordance with the refugee criteria elaborated in the Cartagena Declaration, people's lives, safety, or freedom must have been threatened.

5. Conclusion

Legal practitioners and commentators have long held the view that people fleeing the atrocities and dangers of conflict are not refugees within the meaning of the Refugee Convention, but there has been a shift in recent years. Now, it is recognized (by commentators, courts, and UNHCR) that people displaced by conflict can have a well-founded fear of being persecuted for one or more of the Convention grounds, and, moreover, that the realities of many, if not most, contemporary conflicts is that civilian populations are targeted or disproportionately affected because the conflict is rooted in, motivated, or driven by—and/or conducted along the lines of—race, ethnicity, religion, politics, gender, or social group divides (or may impact people along these lines). Even so, not all people fleeing conflict will be refugees within the meaning of article 1A(2) of the Refugee Convention. Where the harm resulting from conflict is truly indiscriminate, regional refugee criteria developed in Africa and Latin America may still enable people fleeing the dangers of war to qualify as refugees.

111 Sharpe (n 94) 134–5.

112 UNHCR Guidelines (n 35) para 50; Sharpe (n 94) 59.

113 Wood (n 59) 195.

CHAPTER 46

DISPLACEMENT IN THE CONTEXT OF CLIMATE CHANGE AND DISASTERS

JANE McADAM

1. Introduction

The adverse effects of disasters and climate change are already impacting on human mobility. They contribute to displacement, influence decisions to migrate, trigger evacuations, and motivate planned relocations. Yet, there remain many legal, policy, and operational gaps.

Existing legal frameworks do not expressly address the movement of people across borders in response to, or in anticipation of, disasters or climate change-related harms. However, international law contains principles that affect what States are, and are not, permitted to do in such circumstances. This chapter examines the limits and scope of international refugee law, human rights law, and the law on statelessness to address displacement in the context of disasters and climate change. The chapter also considers measures that would enable people to remain in their homes, where possible and desirable, or to migrate or relocate elsewhere as an adaptation strategy in anticipation of potential future harm.

While the magnitude of movement associated with climate change is unknown, the evidence base is much richer than it was just a decade ago. Since 2008, the Internal Displacement Monitoring Centre (IDMC) has compiled data on internal displacement linked to sudden-onset disasters (such as storms, cyclones, floods, and landslides). In 2017 and 2018, disasters triggered by sudden-onset natural hazards displaced more people internally than conflict—61 per cent compared to 39 per cent.[1] In 2019, the figure

[1] Internal Displacement Monitoring Centre (IDMC), *GRID 2019: Global Report on Internal Displacement* (IDMC 2019) 1; IDMC, *GRID 2018: Global Report on Internal Displacement* (IDMC 2018) 6–7. There is no systematic data on cross-border displacement in this context, but there is evidence that most people remain in countries within the same geographical region: IDMC, *GRID 2017: Global Report on Internal Displacement* (IDMC 2017) 53.

was even higher—75 per cent compared to 25 per cent.[2] The impacts of climate change are predicted to amplify the effects of disasters as they become more frequent and/or intense.[3]

Meanwhile, slower-onset impacts (such as sea-level rise, erosion, and desertification) may result in a more gradual deterioration of physical conditions that ultimately render land uninhabitable for human settlement. Cumulatively, this may weaken people's resilience as their traditional coping mechanisms are challenged, contributing, in turn, to further displacement.[4] Displacement may be triggered by sudden-onset disasters, slow-onset processes, or a combination of both.[5] It is unknown how many people are displaced by slow-onset disasters worldwide: it is difficult to monitor and hard to distinguish from other internal movement, since 'it encapsulates a wide range of phenomena, drivers, triggers, impacts and movement types'.[6]

At the outset, it is important to appreciate five key factors. First, the impacts of climate change and disasters do not cause displacement on their own. Rather, they interact with a range of other drivers (economic, social, and political) that themselves affect mobility.[7] In particular, climate change amplifies the frequency and/or severity of certain disasters, such as extreme weather events. Secondly, regardless of the measures put in place to mitigate or adapt to the effects of climate change, some displacement is inevitable.[8] Thirdly, some disasters are not affected by climate change at all (eg earthquakes),[9] but they can have an equally devastating impact on people and give rise to the same assistance and protection needs. This chapter refers to displacement in the context of both 'disasters' and 'climate change' because drawing sharp distinctions between the two is unhelpful from a human rights and protection-oriented perspective. While a specific focus on climate change is important when it comes to attributing responsibility, concentrating on the complex issue of causation and responsibility in the present context may be a distraction when it comes to securing the protection needs of the

[2] IDMC, *GRID 2020: Global Report on Internal Displacement* (IDMC 2020) 1.

[3] Daniel G Huber and Jay Gulledge, 'Extreme Weather and Climate Change: Understanding the Link and Managing the Risk' (Center for Climate and Energy Solutions 2011) 2 <https://www.c2es.org/site/assets/uploads/2011/12/white-paper-extreme-weather-climate-change-understanding-link-managing-risk.pdf> accessed 4 December 2019.

[4] Jane McAdam, Bruce Burson, Walter Kälin, and Sanjula Weerasinghe, *International Law and Sea-Level Rise: Forced Migration and Human Rights*, FNI Report 1/2016 (Fridtjof Nansen Institute and Kaldor Centre for International Refugee Law 2016) para 53. A 'hazard' becomes a 'disaster' when people's coping capacity is exceeded. Since disasters are always contingent on underlying social, economic, political, and environmental factors, it is inaccurate to speak of 'natural' disasters.

[5] IDMC developed a global model to assess the risk of displacement associated with sudden-onset hazards. It estimates an average annual displacement of 13.9 million people, not including people displaced as a result of pre-emptive evacuations or slow-onset hazards, 'which makes the risk estimates very conservative': IDMC 2018 (n 1) 52 (fn omitted).

[6] IDMC 2019 (n 1) 73; see also v.

[7] UNHCR, *UNHCR's Strategic Directions 2017–2021* (2017) 7; IDMC 2017 (n 1) 39.

[8] Government Office for Science (UK), *Foresight: Migration and Global Environmental Change: Future Challenges and Opportunities* (2011) 9–10, 193.

[9] Although some scientific work does suggest a link: Bill McGuire, *Waking the Giant: How a Changing Climate Triggers Earthquakes, Tsunamis, and Volcanoes* (OUP 2016).

displaced.[10] Fourthly, and significantly from the standpoint of international law, most movement occurs within countries rather than across borders.[11] When cross-border movement does occur, people will generally remain within their own region. Finally, migration can be an important climate change adaptation strategy, but often the law hinders rather than facilitates this.

In essence, legal and policy frameworks should be developed which assist people to: (a) remain *in situ*, where this is possible and desirable; (b) move elsewhere, in anticipation of harm; and (c) be protected and assisted if they are displaced (whether internally or across an international border).[12] At all times, the dignity of those who move must be a paramount consideration.[13]

2. Internally Displaced Persons

The majority of disaster displacement will occur within countries rather than across international borders, although some may become cross-border if not adequately managed.[14] A number of existing legal instruments are relevant despite not having been drafted specifically for this context.[15] The 1998 Guiding Principles on Internal Displacement,[16] recognized by the international community as an 'important international framework for the protection of internally displaced persons',[17] expressly include those 'who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular

[10] Walter Kälin and Nina Schrepfer, 'Protecting People Crossing Borders in the Context of Climate Change: Normative Gaps and Possible Approaches', UNHCR Legal and Protection Policy Research Series, PPLA/2012/01 (2012) 10; Jane McAdam, *Climate Change, Forced Migration, and International Law* (OUP 2012) 23–4, 92–6. For a critique of causality, see Calum TM Nicholson, 'Climate Change and the Politics of Causal Reasoning: The Case of Climate Change and Migration (2014) 180 The Geographical Journal 151.

[11] Government Office for Science (n 8) 9–10, 37; Asian Development Bank (ADB), *Addressing Climate Change and Migration in Asia and the Pacific: Final Report* (ADB 2012) viii, 4.

[12] McAdam, Burson, Kälin, and Weerasinghe (n 4) para 58.

[13] See 'Nansen Principles' (Nansen Conference on Climate Change and Displacement in the 21st Century, Oslo, 6–7 June 2011) Principle 1 <https://www.regjeringen.no/globalassets/upload/ud/vedlegg/hum/nansen_prinsipper.pdf>; International Law Association, Resolution 6/2018 and accompanying Sydney Declaration of Principles on the Protection of Persons Displaced in the Context of Sea Level Rise.

[14] Nansen Initiative on Disaster-Induced Cross-Border Displacement, 'Agenda for the Protection of Cross-Border Displaced Persons in the context of Disasters and Climate Change: Vol 1' (December 2015) para 99. IDMC 2017 (n 1) 49 notes 'there is still insufficient data to determine how many of the people who flee or migrate across borders were IDPs before doing so'. However, '[i]t is clear . . . that many IDPs fail to find safety and security in their own country, leading to significant numbers of cross-border movements within and beyond the region': IDMC 2019 (n 1) 41 (fn omitted).

[15] Human rights instruments continue to apply, for instance. See also International Law Commission (ILC), 'Protection of Persons in the event of Disasters: Draft Articles and Commentary', in *Report of the International Law Commission 68th Session*, UN doc A/71/10 (2016) ch IV.

[16] United Nations Commission on Human Rights, 'Guiding Principles on Internal Displacement', UN doc E/CN.4/1998/53/Add.2 (11 February 1998).

[17] 'World Summit Outcome', UNGA res 60/1 (16 September 2005) para 132.

as a result of or in order to avoid the effects of… natural or human-made disasters'.[18] They encompass those who flee (or are evacuated) from the anticipated impacts of a disaster, as well as those who are forced to leave their homes in the aftermath of a disaster.

Although not directly enforceable themselves, the Guiding Principles reflect binding international legal standards and set out in detail how internally displaced persons (IDPs) should be treated, assisted, and protected. The challenge lies in strengthening their normative and operational implementation in the disaster context and developing the capacity of the relevant authorities to apply them.[19]

In Africa, the 2006 Great Lakes IDP Protocol[20] and the 2009 African Union Convention for the Protection and Assistance of Internally Displaced in Africa (Kampala Convention)[21] expressly encompass those displaced by disasters. Uniquely, the Kampala Convention requires States parties to 'take measures to protect and assist persons who have been internally displaced due to natural or human made disasters, *including climate change*'.[22] However, ratifications remain low and '[m]uch work… remains to be done to translate this important instrument into practice and to secure concrete improvements in the protection of and assistance to internally displaced persons'.[23]

3. International Refugee Law

The drivers of displacement are typically multi-causal, and conflict, persecution, and disasters are often interlinked.[24] Since 'the impacts of a disaster may create conditions that reinforce or bolster claims for refugee status under the Refugee Convention',[25] refugee law should not automatically be dismissed when climate change or disasters play a role. Disasters not only interact with other drivers of displacement but may also provide an overarching context for displacement (such as where they trigger armed

[18] Guiding Principles (n 16). See also African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) (adopted 23 October 2009, entered into force 6 December 2012) 49 ILM 86, art 1.

[19] McAdam, Burson, Kälin, and Weerasinghe (n 4) para 76; International Law Association, Committee on International Law and Sea Level Rise, *Interim Report* (2016) 25. See also Sydney Declaration (n 13); Protection Agenda (n 14) para 100.

[20] Protocol on the Protection and Assistance to Internally Displaced Persons (International Conference on the Great Lakes Region, 30 November 2006) arts 1, 3(2), 3(5), 6(4)(c).

[21] Kampala Convention (n 18) art 1(k).

[22] ibid art 5(4) (emphasis added).

[23] Chaloka Beyani, 'Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons', UN doc A/HRC/26/33 (4 April 2014) para 79. Some States have developed national laws or policies: Tamara Wood, 'Protection and Disasters in the Horn of Africa: Norms and Practice for Addressing Cross-Border Displacement in Disaster Contexts' (Technical Paper, Nansen Initiative on Disaster-Induced Cross-Border Displacement 2013) 18.

[24] See Sanjula Weerasinghe, 'In Harm's Way: International Protection in the Context of Nexus Dynamics between Conflict or Violence and Disaster or Climate Change', UNHCR Legal and Protection Policy Research Series, PPLA/2018/05 (2018).

[25] ibid 10.

conflict or result in a breakdown of law and order).[26] UNHCR rightly emphasizes the importance of focusing on the broader 'social and political characteristics of the effects of climate change or the impacts of disasters' and their potentially 'significant adverse effects on State and societal structures and individual well-being and the enjoyment of human rights' when assessing protection claims in this context.[27]

The Refugee Convention may therefore be relevant in a disaster context where: (a) certain individuals or groups are persecuted by the government (such as having humanitarian assistance withheld or being targeted for undertaking disaster-relief work);[28] (b) secondary impacts, such as 'increases in gender-based violence in temporary shelters, discrimination in assistance and solutions, shortcomings in evacuation procedures, etc',[29] give rise to a conventional refugee claim; (c) the adverse impacts of disasters or climate change intersect with or amplify persecution for a Convention reason;[30] (d) Convention refugees (persecuted for reasons unrelated to the disaster) flee across a border. In each of these cases, the act or omission by the government (or non-State actor)—rather than the disaster itself—would give rise to the well-founded fear of persecution (for a Convention reason) and lack of State protection.

More generally, however, the Refugee Convention will be of limited utility in situations of disaster displacement. The impacts of climate change or a disaster themselves will generally not satisfy the meaning of 'persecution' because of the need for human agency,[31] and a further challenge will be identifying a 'persecutor'. While it could be argued that the persecutor is the 'international community', and industrialized States in particular, they are likely to be the very countries in which people will seek protection. This represents a reversal of the traditional refugee paradigm,[32] something the New Zealand Court of Appeal described as an attempt 'to stand the Convention on its head'.[33] Furthermore, even if the impacts of disasters or climate change were accepted as constituting 'persecution', it would be difficult to establish a link with one or more of the five Convention grounds,[34] given that such impacts are largely indiscriminate.[35] Even so,

[26] In such cases, the broader regional refugee definitions may apply: OAU Convention, art 1(2); Cartagena Declaration, conclusion III(3); see Chapters 15, 17, and 34 in this volume.

[27] UNHCR, 'Legal Considerations regarding Claims for International Protection Made in the Context of the Adverse Effects of Climate Change and Disasters' (1 October 2020) para 5 (fn omitted) <https://www.refworld.org/docid/5f75f2734.html> accessed 1 November 2020.

[28] See *AF (Kiribati)* [2013] NZIPT 800413, paras 55–70; *AC (Tuvalu)* [2014] NZIPT 800517–520, paras 84–6, 97. In *Refugee Appeal No 76374* [2009] NZRSAA 83, the New Zealand Refugee Status Appeals Authority found that the applicant was a refugee because she had been targeted for coordinating disaster relief after Cyclone Nargis in Myanmar. See also examples in David J Cantor, 'Law, Policy, and Practice concerning the Humanitarian Protection of Aliens on a Temporary Basis in the Context of Disasters' (Background Paper, Nansen Initiative on Disaster-Induced Cross-Border Displacement 2015) 17.

[29] Elizabeth Ferris, 'Disasters and Displacement: What We Know, What We Don't Know' (*Brookings Planetpolicy*, 9 June 2014) <http://www.brookings.edu/blogs/planetpolicy/posts/2014/06/09-climate-change-natural-disasters-ferris> accessed 28 November 2019.

[30] Weerasinghe (n 24).

[31] See *AF (Kiribati)* (n 28) para 54.

[32] McAdam (n 10) 45.

[33] *Teitiota v The Chief Executive of the Ministry of Business, Innovation and Employment* [2014] NZCA 173, [2014] NZAR 688, para 40 (tacitly drawing on ibid 52).

[34] For a detailed analysis of the application of refugee law in this context, see McAdam (n 10) ch 2.

[35] *AF (Kiribati)* (n 28) para 56; *Teitiota v The Chief Executive of the Ministry of Business Innovation and Employment* [2013] NZHC 3125, para 54; *Teitiota* 2014 (n 33) para 19.

decision-makers need to be aware of 'the deeply social nature of disasters, within which existing patterns of discrimination and marginalisation are exacerbated', and ensure that individual claims are scrutinized within this context.[36]

To date, no refugee claim based on the harmful impacts of climate change has succeeded.[37] The New Zealand Immigration and Protection Tribunal has acknowledged that the complex relationship between environmental degradation, disasters, and human vulnerability means that protection under the Refugee Convention should not automatically be ruled out,[38] but has noted that human rights law seems to offer the most scope for protection in such circumstances.

Before turning to human rights law, it is important to note the potential capacity of regional refugee law to protect the disaster displaced (since much remains to be formally tested).[39] The prevailing view among relevant States is that disasters will not engage the regional refugee definitions in the OAU Convention and the Cartagena Declaration unless they are also linked to a breakdown of public order or protection.[40] This is why Somalis fleeing conflict, drought, and famine in 2011–12 were granted refugee status pursuant to the OAU Convention,[41] and some Haitians were granted refugee

[36] Matthew Scott, 'Finding Agency in Adversity: Applying the Refugee Convention in the Context of Disasters and Climate Change' (2016) 35(4) RSQ 26, 28; Matthew Scott, *Climate Change, Disasters and the Refugee Convention* (CUP 2020); UNHCR (n 27). The UN Office for Disaster Risk Reduction's definition of 'disaster' reflects this approach: <https://www.undrr.org/terminology/disaster> accessed 16 October 2020.

[37] See eg *AF (Kiribati)* (n 28); *Teitiota* 2013 (n 35); *Teitiota* 2014 (n 33); *Teitiota v The Chief Executive of the Ministry of Business Innovation and Employment* [2015] NZSC 107; *AF (Tuvalu)* [2015] NZIPT 800859; *AD (Tuvalu)* [2014] NZIPT 501370; *AC (Tuvalu)* (n 28); and earlier Australian and New Zealand cases cited in Jane McAdam, 'The Emerging New Zealand Jurisprudence on Climate Change, Disasters and Displacement' (2015) 3 Migration Studies 131 endnote 2.

[38] *AF (Kiribati)* (n 28) paras 56–70.

[39] UNHCR, 'Summary of Deliberations on Climate Change and Displacement' (UNHCR Expert Roundtable on Climate Change and Displacement, Bellagio, 22–25 February 2011) para 9. See further McAdam, Burson, Kälin, and Weerasinghe (n 4) 33–6; Sydney Declaration (n 13) 65.

[40] OAU Convention, art 1(2); Cartagena Declaration, conclusion III(3). See further Wood (n 23) 23–31; Alice Edwards, 'Refugee Status Determination in Africa' (2006) 14 African Journal of International and Comparative Law 204, 225–7; McAdam, Burson, Kälin, and Weerasinghe (n 4) paras 85–91; Kälin and Schrepfer (n 10) 34; Vikram Kolmannskog, '"We Are in Between": Case Studies on the Protection of Somalis Displaced to Kenya and Egypt during the 2011 and 2012 Drought' (2014) 2 International Journal of Social Science Studies 83; Marina Sharpe, 'The 1969 African Refugee Convention: Innovations, Misconceptions, and Omissions' (2012) 58 McGill Law Journal 95. The 2014 Brazil Declaration recognizes cross-border displacement in the context of climate change and disasters as a new challenge, but does not describe such people as 'refugees': The Brazil Declaration: A Framework for Cooperation and Regional Solidarity to Strengthen the International Protection of Refugees, Displaced and Stateless Persons in Latin America and the Caribbean (Brasilia, 3 December 2014), preamble, ch 7. In Europe, protection could potentially be forthcoming under the Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the event of Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts between Member States in Receiving Such Persons and Bearing the Consequences Thereof [2001] OJ L212/12 (Temporary Protection Directive) (were it ever triggered) or the subsidiary protection provisions of the EU Qualification Directive: McAdam (n 10) ch 4; Vikram Kolmannskog and Finn Myrstad, 'Environmental Displacement in European Asylum Law' (2009) 11 EJML 313.

[41] Nansen Initiative (n 14) para 56; Wood (n 23) 32–3. See also Weerasinghe (n 24) 2–4, 36–60.

status pursuant to the Cartagena Declaration as a result of the breakdown in law and order generated by the 2010 earthquake.[42]

4. Human Rights Law

International human rights law sets out minimum standards of treatment that States must afford to individuals within their territory or jurisdiction. It is 'firmly established'[43] that 'the adverse effects of climate change have a range of direct and indirect implications for the effective enjoyment of all human rights'.[44] For instance, extreme weather events may threaten the right to life; increased food insecurity may jeopardize the right to adequate food; and flooding, erosion, or sea-level rise may threaten the right to adequate housing. When these issues are considered alongside pre-existing stressors such as overcrowding, environmental fragility, poor development practices, food scarcity, and so on, then they may (individually or cumulatively) threaten people's ability to live in safety and dignity.[45] Furthermore, if States do not take positive steps to realize such rights, or provide adequate safeguards against known risks,[46] then they may breach their human rights obligations.[47]

Under human rights law, the principle of *non-refoulement* relevantly protects people from forcible return to a real risk of life-threatening circumstances or other cruel, inhuman, or degrading treatment.[48] The Human Rights Committee has accepted in principle that the effects of climate change may expose people to such risks, 'thereby triggering the *non-refoulement* obligations of sending states'.[49] It has also noted that 'the conditions of life in such a country may become incompatible with the right to life with dignity before the risk is realized', meaning that protection should be forthcoming before the situation is imminently life-threatening.[50]

The right to life is enmeshed with other human rights, such as the right to an adequate standard of living and the right not to be deprived of a means of subsistence. The Convention on the Rights of the Child links it to the State's duty 'to ensure to the maximum

[42] Cantor (n 28) 18.

[43] See eg UN Human Rights Council, 'Report of the Independent Expert on Issues of Human Rights Obligations relating to the Enjoyment of a Safe, Clean Healthy and Sustainable Environment, John H Knox: Mapping Report', UN doc A/HRC/25/53 (30 December 2013) para 17; Office of the High Commissioner for Human Rights, 'Mapping Human Rights Obligations relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Focus Report on Human Rights and Climate Change' (June 2014).

[44] 'Human Rights and Climate Change', Human Rights Council res 26/27 (June 2014) para 1.

[45] For a detailed analysis, see McAdam, Burson, Kälin, and Weerasinghe (n 4) section 1.3.

[46] *AF (Kiribati)* (n 28) para 63 and references cited there.

[47] See n 43–44.

[48] See Chapter 36 in this volume.

[49] *Teitiota v New Zealand*, UN doc CCPR/C/127/D/2728/2016 (24 October 2019) para 9.11.

[50] ibid. See further Jane McAdam, 'Protecting People Displaced by the Impacts of Climate Change: The UN Human Rights Committee and the Principle of *Non-Refoulement*' (2020) 114 AJIL 708.

extent possible the survival and development of the child',[51] and the Committee on the Rights of the Child has explained that it must be implemented holistically, 'through the enforcement of all the other provisions of the Convention, including rights to health, adequate nutrition, social security, an adequate standard of living, [and] a healthy and safe environment'.[52]

Both the Inter-American Commission on Human Rights and the European Court of Human Rights regard the right to life as linked to the right to a healthy environment.[53] In particular, the obligation to protect the right to life may also include protection from environmental harm,[54] including protection from disasters where the risk is known.[55] The New Zealand Immigration and Protection Tribunal has expressly acknowledged that the right to life may be compromised by the impacts of disasters and climate change, but it has drawn a distinction between 'man-made' and 'natural' hazards on the basis that the State has less control over the latter.[56] Thus, where a family from Tuvalu argued that they would be in danger of being arbitrarily deprived of their lives if returned—*inter alia* on account of the impacts of climate change (in particular, a lack of fresh drinking water and sea-level rise)—the Tribunal found that while life in Tuvalu would be more challenging than in New Zealand, there was insufficient evidence to establish that their lives would be at risk as a result of any act or omission by the government of Tuvalu.[57]

Courts have recognized that 'destitution' or 'dire humanitarian conditions' may constitute inhuman or degrading treatment,[58] although to date protection has only been forthcoming when exposure could be attributed to the direct (in)action of the State rather than to a general state of affairs.[59] While the European Court of Human Rights has accepted that removal to inhuman or degrading conditions based on a lack of resources (rather than deliberate acts or omissions by the State) may be precluded in 'a

[51] CRC, art 6(2).

[52] Committee on the Rights of the Child, 'General Comment No 7 (2005): Implementing Child Rights in Early Childhood', UN doc CRC/C/GC/7/Rev.1 (20 September 2006).

[53] Inter-American Commission on Human Rights, 'Report on the Situation of Human Rights in Ecuador', OEA/Ser.L/V/II.96, doc 10, rev 1 (24 April 1997) ch 8; *Yanomami v Brazil*, Inter-American Commission on Human Rights, Case No 7615 (Res No 12/85, 5 March 1985); cases cited in Loukis G Loucaides, 'Environmental Protection through the Jurisprudence of the European Convention on Human Rights' in Loukis G Loucaides, *The European Convention on Human Rights: Collected Essays* (Martinus Nijhoff 2007).

[54] See *Öneryildiz v Turkey* (2005) 41 EHRR 20, paras 71–2.

[55] *Budayeva v Russia*, App Nos 15339/02, 21166/02, 20058/02, 11673/02, and 15343/02 (ECtHR, 20 March 2008) paras 137, 158. See further Hélène Ragheboom, *The International Legal Status and Protection of Environmentally Displaced Persons: A European Perspective* (Brill 2017).

[56] *AC (Tuvalu)* (n 28) para 75.

[57] ibid. However, in that case, the Tribunal permitted the family to remain on discretionary humanitarian grounds: see *AD (Tuvalu)* (n 37) and discussion in McAdam (n 37).

[58] eg *Sufi and Elmi v United Kingdom*, App Nos 8319/07 and 11,449/07 (ECtHR, 28 June 2011); *D v United Kingdom* (1997) 24 EHRR 423; *R v Secretary of State for the Home Department, ex parte Adan* [2001] 2 AC 477.

[59] See analysis in *SHH v United Kingdom* (2013) 57 EHRR 18; Case C-542/13 *M'Bodj v Etat Belge* (CJEU, 18 December 2014), para 41; Case C-353/16 *MP (Sri Lanka) v Secretary of State for the Home Department* [2018] 1 WLR 5585, para 51.

very exceptional [case] where the humanitarian grounds against removal are compelling',[60] this is an extremely high threshold.[61] The convoluted and sometimes inconsistent jurisprudence in this area is arguably a result of policy concerns about opening the floodgates, and there are different lines of reasoning depending on whether the relevant 'treatment' is considered to be the act of removal itself or the conditions in the country to which removal is proposed,[62] and whether such treatment is attributable to the State.[63] Costello has rightly noted that the practical workability of such distinctions is doubtful,[64] and that the focus on State attribution is 'out of kilter with the rest of the Article 3 case law'.[65]

In New Zealand, which has the most developed case law on displacement in the context of disasters and climate change, the need to show a real risk of inhuman or degrading 'treatment' has been interpreted as requiring a positive act or omission by an authority that 'transcend[s] failure of the state's general economic policies to provide for an adequate standard of living'.[66] Applying this logic to the disaster context, the New Zealand Tribunal has found that a State's incapacity to respond to a disaster will generally

[60] *SHH* (n 59) para 92, in accordance with the principles set out in *N v United Kingdom* (2008) 47 EHHR 39. See also *Paposhvili v Belgium*, App No 41738/10 (ECtHR, Grand Chamber, 13 December 2016); *AM (Zimbabwe) v Secretary of State for the Home Department* [2020] UKSC 17.

[61] The Inter-American Commission on Human Rights has borrowed this 'exceptionality' test but has applied it in a more relaxed way: David J Cantor and Stefania E Barichello, 'The Inter-American Human Rights System: A New Model for Integrating Refugee and Complementary Protection?' (2013) 17 International Journal of Human Rights 689, 693, referring to *Mortlock v United States*, Inter-American Commission on Human Rights Report No 63/08, Case No 12.534 (25 July 2008).

[62] The court has consistently observed that it is not the function of the European Convention on Human Rights to iron out socio-economic differences between States, noting that 'the level of treatment available in the Contracting State and the country of origin may vary considerably': *N v United Kingdom* (n 60) para 44.

[63] Contrast *D v United Kingdom* (n 58), *N v United Kingdom* (n 60), *MSS v Belgium and Greece*, App No 30696/09 (ECtHR, Grand Chamber, 21 January 2011), and *Sufi and Elmi* (n 58). In *SHH* (n 59), the court sought to reconcile the approach in *N v United Kingdom* with that in *Salah Sheekh v The Netherlands*, App No 1948/04 (ECtHR, 11 January 2007) and *Sufi and Elmi*. The dissenting judges viewed *SHH* as 'fall[ing] somewhere in between these lines of the Court's case-law and thus rais[ing] a new issue before the Court': Joint Dissenting Opinion of Judges Ziemele, Björgvinsson, and De Gaetano, para 3. See also the conceptualization of 'domestic' and 'foreign' cases by Lord Bingham in *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323, para 9.

[64] Cathryn Costello, 'The Search for the Outer Edges of *Non-Refoulement* in Europe: Exceptionality and Flagrant Breaches' in Bruce Burson and David J Cantor (eds), *Human Rights and the Refugee Definition: Comparative Legal Practice and Theory* (Brill 2016) 193, citing *SHH* (n 59).

[65] Costello (n 64) 190. The Human Rights Committee has noted as recently as 2018 that 'States parties must…exercise due diligence to protect the lives of individuals against deprivations caused by persons or entities, *whose conduct is not attributable to the State*. The obligation of States parties to respect and ensure the right to life *extends to reasonably foreseeable threats and life-threatening situations* that can result in loss of life': Human Rights Committee, 'General Comment No 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life', UN doc CCPR/C/GC/36 (30 October 2018) para 7 (emphasis added, fns omitted), read with paras 30–1 on non-removal.

[66] See eg *BG (Fiji)* [2012] NZIPT 800091, para 148. Australian law stipulates that 'treatment' must be 'intentionally inflicted': Migration Act 1958 (Cth) (Australia), s 5(1). See also *R (Adam) v Secretary of State for the Home Department* [2005] UKHL 66, [2006] 1 AC 396, para 7 (Lord Bingham).

be insufficient to constitute 'treatment', but if a State were to withhold post-disaster assistance on a discriminatory basis, or arbitrarily withhold access to available foreign assistance when domestic capacity were lacking, this could potentially constitute ill-'treatment' of the disaster-affected population.[67]

Thus, while the impacts of a disaster or climate change may 'provide a context in which a claim for recognition as a protected person' might be grounded,[68] the mere fact of the disaster, or a State's general incapacity to respond to it, is not enough. Furthermore, if a State is taking steps to protect those within its territory or jurisdiction (eg through disaster risk reduction or climate adaptation measures) then it is unlikely to be considered to have abrogated its obligations under human rights law.[69]

Beyond the legal principle of *non-refoulement*, there is support in State practice for what Kälin and Schrepfer describe as a 'returnability test' based on 'whether, in light of the prevailing circumstances and the particular vulnerabilities of those concerned, [people] can be required to return to their country of origin'.[70] A survey of State practice shows that at least 50 countries in recent decades have received, or refrained from returning, people in the aftermath of disasters because it is unsafe or impractical.[71] Practices have been very *ad hoc*, including the issuance of special humanitarian visas in the aftermath of a disaster,[72] temporary stay arrangements for people abroad at the time of a disaster and unable to return home,[73] expedited processing of, and/or flexibility with requirements for, regular migration visa applications, and temporary labour migration schemes to assist those living in precarious circumstances.[74] Free movement agreements may also facilitate admission and stay in the aftermath of a disaster.[75]

[67] *BG (Fiji)* (n 66) para 84. See discussion of the ILC's 'Draft Articles on the Protection of Persons in the Event of Disasters' in ILC (n 15) 13–17 in *AC (Tuvalu)* (n 28) paras 91–8.

[68] *AC (Tuvalu)* (n 28) para 70.

[69] See *AC (Tuvalu)* (n 28) para 75; *Budayeva v Russia* (n 55). In New Zealand, 'treatment' does not encompass the act of removal; cf approach by the European Court of Human Rights, on which see Walter Kälin, 'Limits to Expulsion under the International Covenant on Civil and Political Rights' in Francesco Salerno (ed), *Diritti dell'uomo, estradizione ed espulsione* (CEDAM 2003) 161.

[70] Kälin and Schrepfer (n 10) 65. Goodwin-Gill identifies an even broader principle of refuge in customary international law, which includes that 'deeper level of obligation which underpins, among others, rescue at sea, the landing of the shipwrecked, and the admission of victims of conflict or other humanitarian disaster': Guy S Goodwin-Gill, '*Non-Refoulement*, Temporary Refuge, and the "New" Asylum Seekers' in David J Cantor and Jean-François Durieux (eds), *Refuge from Inhumanity? War Refugees and International Humanitarian Law* (Brill 2014) 440.

[71] Nansen Initiative (n 14) 6.

[72] Nansen Initiative on Disaster-Induced Cross-Border Displacement, 'Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change: Vol 2' (2015) 40, 46, referring to examples from Argentina, Peru, the United States, Finland, Mexico, Peru, and Sweden, among others.

[73] ibid 26, 40, 51, 52, referring to Canada, the Americas, and Singapore. See also UNHCR, 'Guidelines on Temporary Protection and Stay Arrangements' (February 2014).

[74] Nansen Initiative (n 72) 43 (Spain and Senegal). See also Sydney Declaration (n 13) 64.

[75] Nansen Initiative (n 72) 43–4; Bruce Burson and Richard Bedford, 'Clusters and Hubs: Toward a Regional Architecture for Voluntary Adaptive Migration in the Pacific' (Discussion Paper, The Nansen Initiative on Disaster-Induced Cross-Border Displacement 2013) 7–10.

5. Issues of Timing

While the effects of a disaster may be felt immediately, it may take many years before the deleterious impacts of slower-onset processes of climate change make life intolerable. At present, protection pathways do not offer an easy solution for people seeking to escape the future impacts of climate change. This is because many of their effects will take years to manifest at a sufficiently harmful level to satisfy the required threshold for 'inhuman or degrading treatment' or a threat to life; or may be severe but temporary, and not render return unlawful; or an internal flight alternative may be considered reasonable.[76] As Burson has observed, 'the longer the time-horizon contemplated for these thresholds or magnitudes to be reached, the less real and more speculative becomes the risk of qualifying harm as at the time of the decision . . . because there is more opportunity for risk-reducing factors to intrude'.[77]

However, it is useful to recall that every protection claim, in whatever context, involves an element of speculation as to future risk.[78] Thus, in refugee law, a person may have a 'well-founded fear' of being persecuted even if the risk of harm is as low as 10 per cent,[79] provided that the risk is plausible and reasonable.[80] An interesting counterpoint is provided by the precautionary principle in international environmental law, which provides that 'full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation' where 'threats of serious or irreversible damage' exist.[81] Like the 'well-founded fear' test in refugee law, the precautionary principle effectively operates as an insurance policy against potential harm. It does not require definitive proof of harm; the possibility of a risk that serious harm may ensue is sufficient to warrant protection (in the former case) and due diligence (in the latter).

[76] See generally Jessica Schultz, *The Internal Protection Alternative in Refugee Law: Treaty Basis and Scope of Application under the 1951 Convention relating to the Status of Refugees and Its 1967 Protocol* (Brill 2019); UNHCR, 'Guidelines on International Protection: "Internal Flight or Relocation Alternative" within the context of Article 1A(2) of the 1951 Refugee Convention and/or 1967 Protocol relating to the Status of Refugees', HCR/GIP/03/04 (23 July 2003) paras 29–30.

[77] Bruce Burson, 'The Concept of Time and the Assessment of Risk in Refugee Status Determination' (Kaldor Centre for International Refugee Law Annual Conference, UNSW Sydney, 18 November 2016) 10 <https://www.kaldorcentre.unsw.edu.au/sites/default/files/B_Burson_2016_Kaldor_Centre_Annual_Conference.pdf> accessed 28 November 2019. For analysis of the jurisprudence, see Adrienne Anderson, Michelle Foster, Hélène Lambert, and Jane McAdam, 'Imminence in Refugee and Human Rights Law: A Misplaced Notion for International Protection' (2019) 68 ICLQ 111.

[78] Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, OUP 2007) 54.

[79] *INS v Cardoza-Fonseca*, 480 US 421, 431 (1987); *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379.

[80] *Chan* (n 79) 389 (Dawson J), citing *Cardozo-Fonseca* (n 79) 431; *Refugee Appeal No 71404/99* [1999] NZRSAA 292, paras 26–7. See also Adrienne Anderson, Michelle Foster, Hélène Lambert, and Jane McAdam, 'A Well-Founded Fear of Being Persecuted . . . But When?' (2020) 42 Sydney Law Review 155.

[81] UNGA, 'Annex I Rio Declaration on Environment and Development' in 'Report of the United Nations Conference on Environment and Development', UN doc A/CONF.151/26, vol I (12 August 1992) Principle 15.

In its consideration of whether the future impacts of climate change precluded removal to the small Pacific island State of Kiribati, the New Zealand Tribunal required only that there be 'sufficient evidence to establish substantial grounds for believing the appellant would be in danger',[82] comparable to the 'well-founded fear' test in refugee law. However, the danger must be a present one, and in applications to date, the feared harm has remained 'firmly in the realm of conjecture or surmise'.[83] The Human Rights Committee (examining the same case) endorsed the Tribunal's reasoning that risks materializing in 10 to 15 years' time were too speculative to give rise to protection now, since they 'could allow for intervening acts by the Republic of Kiribati, with the assistance of the international community, to take affirmative measures to protect and, where necessary, relocate its population'.[84]

6. Statelessness

The capacity of the statelessness regime to protect people at risk of displacement in the context of disasters and climate change is limited. However, it is briefly addressed here, given the propensity for it to be mooted as a solution for the inhabitants of small island States at risk of inundation by sea-level rise.[85]

The protection afforded by the two treaties on statelessness is expressly confined to those 'not considered as a national by any State under the operation of its law'.[86] It does not extend to people who are *de facto* stateless—that is, those who have a nationality but who are unable to exercise the rights of citizens. Unless a State were to deprive its citizens of nationality, which would be unlawful in this context,[87] the statelessness definition could only be triggered if the State no longer existed—because it would no longer be an entity capable of considering them as nationals under the operation of its law. This is not only a highly speculative and convoluted legal argument, but also one that is unlikely to offer much protection in reality.

Since the law on the extinction of States does not contemplate their physical disappearance, scholars have reversed the rules on the creation of States to determine if and when statehood might be lost on account of the impacts of climate change. To come into existence, a State must have a defined territory, a permanent population, an effective government, and the capacity to enter into relations with other States.[88] However,

[82] *AF (Kiribati)* (n 28) para 90. [83] ibid. [84] *Teitiota v New Zealand* (n 49) para 9.12.

[85] See further McAdam (n 10) ch 5.

[86] Convention relating to the Status of Stateless Persons (adopted 28 September 1954, entered into force 6 June 1960) 360 UNTS 117 (1954 Statelessness Convention) art 1. See also Convention on the Reduction of Statelessness (adopted 30 August 1961, entered into force 13 December 1975) 989 UNTS 175 (Convention on the Reduction of Statelessness).

[87] Convention on the Reduction of Statelessness (n 86) art 8; ICCPR, art 24(3); UDHR, art 15; 1954 Statelessness Convention (n 86) art 32.

[88] Montevideo Convention on the Rights and Duties of States (adopted 26 December 1933, entered into force 26 December 1934) 165 LNTS 19, art 1. This is generally accepted as reflecting customary international law.

the strong presumption of continuity of statehood means that the absence of one or more of these elements does not automatically mean that a State ceases to exist.[89] Even if a State were to experience a 'very extensive loss of actual authority',[90] past practice suggests that other States would very likely continue to recognize it as a State for some time.[91] Further, rather than the loss of territory signalling the State's demise (especially if rights to the exclusive economic zone were maintained),[92] it is far more likely that a loss of population, and with it effective government, would be the first sign that a State had started to 'disappear' as a legal entity.[93] Finally, from a purely practical perspective, the statelessness treaties are not well ratified, and few States have a procedure in place to determine who is stateless (and thus provide an appropriate legal status).[94]

7. International Policymaking and Standard-setting

Notwithstanding some earlier efforts, it was the Nansen Initiative on Disaster-Induced Cross-Border Displacement (2012–15) and its successor, the Platform on Disaster Displacement (2016–), that put climate change and disaster displacement on the global

[89] James Crawford, *The Creation of States in International Law* (2nd edn, OUP 2006) 700, 701, 715.

[90] ibid 89.

[91] In the climate change context, Kälin has argued that it is 'difficult to imagine that any other UN member state would want to tarnish its own reputation by being seen as lacking any compassion for the dire fate of such island states by asking for their exclusion from…international organisations': Walter Kälin, 'Conceptualising Climate-Induced Displacement' in Jane McAdam (ed), *Climate Change and Displacement: Multidisciplinary Perspectives* (Hart Publishing 2010) 102. Rayfuse argues that the 'deterritorialized' State would continue to interact as part of the international community for some time: Rosemary Rayfuse, 'W(h)ither Tuvalu? International Law and Disappearing States' [2009] University of New South Wales Faculty of Law Research Series 9; see also Maxine A Burkett, 'The Nation Ex-Situ' in Michael B Gerrard and Gregory E Wannier (eds), *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* (CUP 2013).

[92] See generally International Law Association, 'Baselines under the International Law of the Sea' (Final Report, 2018) <https://www.ila-hq.org/images/ILA/DraftReports/DraftReport_Baselines.pdf> accessed 4 December 2019; Davor Vidas, David Freestone, and Jane McAdam (eds), *International Law and Sea Level Rise: Report of the International Association Committee on International Law and Sea Level Rise* (Brill 2018).

[93] For detailed analysis, see McAdam (n 10) ch 5; Jenny Grote Stoutenburg, *Disappearing Island States in International Law* (Martinus Nijhoff 2015); Rosemary Rayfuse, 'International Law and Disappearing States: Maritime Zones and the Criteria for Statehood' (2011) 41(6) Environmental Policy and Law 281.

[94] Ratifications have increased significantly as a result of UNHCR's IBelong campaign, and more States are establishing status determination procedures (although there are still relatively few in place). See Gábor Gyulai, 'Statelessness Determination and the Protection Status of Stateless Persons: A Summary Guide of Good Practices and Factors to Consider when Designing National Determination and Protection Mechanisms' (European Network on Statelessness 2013) 7; Katia Bianchini, 'A Comparative Analysis of Statelessness Determination Procedures in 10 EU States' (2017) 29 IJRL 42; Michelle Foster and Hélène Lambert, 'Statelessness as a Human Rights Issue: A Concept Whose Time Has Come' (2016) 28 IJRL 564.

policymaking map.[95] These State-led yet bottom-up consultative processes, involving States, experts, affected communities, and civil society, helped to generate and coordinate research on disaster displacement, resulting in more nuanced understandings of the phenomenon. In turn, they secured the inclusion of important language on disasters, climate change, and human mobility in a number of international instruments. These include the Sendai Framework for Disaster Risk Reduction 2015–2030,[96] the 2030 Agenda for Sustainable Development,[97] the 2015 Paris Outcome on climate change,[98] the Agenda for Humanity (annexed to the UN Secretary-General's report for the 2016 World Humanitarian Summit),[99] and—perhaps most significantly—the 2018 Global Compact for Safe, Orderly and Regular Migration.[100] A Task Force on Displacement was also developed as part of the UN Framework Convention on Climate Change (UNFCCC) process 'to develop recommendations for integrated approaches to avert, minimize and address displacement related to the adverse impacts of climate change'.[101]

The recommendations set out in the Nansen Initiative's Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change, endorsed by 109 States in October 2015, continue to provide a roadmap for policy developments at the international, regional, and national levels. The Protection Agenda highlighted the normative gaps in addressing displacement, migration, and planned relocation; identified effective practices that States could incorporate into their own

[95] For background on institutional developments in this area, see Nina Hall, *Displacement, Development, and Climate Change: International Organizations Moving beyond Their Mandates* (Routledge 2016); Jane McAdam, 'Creating New Norms on Climate Change, Natural Disasters and Displacement: International Developments 2010–2013' (2014) 29(2) Refuge 11; Jane McAdam, 'From the Nansen Initiative to the Platform on Disaster Displacement: Shaping International Approaches to Climate Change, Disasters and Displacement' (2016) 39 UNSW Law Journal 1518.

[96] 'Sendai Framework for Disaster Risk Reduction 2015–2030', UNGA res 69/283 (23 June 2015). Note, also, the Cancún Adaptation Framework which noted the importance of '[m]easures to enhance understanding, coordination and cooperation with regard to climate change induced displacement, migration and planned relocation': UN Framework Convention on Climate Change (UNFCCC), 'Decision 1/CP.16, The Cancun Agreements: Outcome of the Work of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention' in 'Report of the Conference of Parties on its Sixteenth Session, held in Cancun from 29 November to 10 December 2010', UN doc FCCC/CP/2010/7/Add.1 (15 March 2011) para 14(f).

[97] 'Transforming Our World: The 2030 Agenda for Sustainable Development', UNGA res 70/1 (25 September 2015).

[98] UNFCCC, 'Decision 1/CP.21, Adoption of the Paris Agreement' in 'Report of the Conference of the Parties on its Twenty-First Session, held in Paris from 30 November to 13 December 2015', UN doc FCCC/CP/2015/10/Add.1 (29 January 2016).

[99] UNGA, *One Humanity: Shared Responsibility: Report of the Secretary-General for the World Humanitarian Summit*, UN doc A/70/709 (2 February 2016) Annex, viii.

[100] Global Compact for Migration, Objective 2, para 18(h)–(l); Objective 5, para 21(g)–(h). Weaker language is included in the Global Compact on Refugees, paras 8, 12, 63, although see Volker Türk and Madeline Garlick, 'Addressing Displacement in the Context of Disasters and the Adverse Effects of Climate Change: Elements and Opportunities in the Global Compact on Refugees' (2019) 31 IJRL 389. See also the New York Declaration for Refugees and Migrants, paras 1, 18, 43, 50.

[101] UNFCCC (n 98) para 49; see also para 50. The Task Force was established under the auspices of the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts.

laws and policies[102] (rather than advocating for a global guiding framework or a new treaty[103]); and set out priority areas for future work.[104] It advocated a toolbox of strategies to manage the risks of future displacement and build resilience in affected communities,[105] guided by the rationale that the most human rights-sensitive approach would mean enabling people to stay at home when desirable and safe,[106] and facilitating movement away from dangerous areas before disasters strike (rather than responding only once people were forced to flee).

In particular, the Protection Agenda recommended that States: (a) integrate mobility into disaster risk reduction and climate change adaptation strategies;[107] (b) ensure that the needs of IDPs displaced by the impacts of climate change and/or disasters are addressed by relevant laws;[108] (c) review and develop humanitarian protection mechanisms for (at least temporary) admission and stay;[109] (d) enhance migration opportunities ('migration with dignity') as a positive form of adaptation that can build people's long-term resilience and enable livelihood diversification;[110] and (e) consider the use of planned relocation as a preventative or remedial measure, mindful of its complexity and the need for in-depth consultation, consent, and planning.[111] States also have obligations to avert, minimize, and prevent foreseeable harm, including by safeguarding the right to life, which in some circumstances, could require the evacuation of people (on a temporary basis) from unsafe areas.[112] Implementing these responses demands a holistic, whole-of-government approach.

[102] Nansen Initiative (n 14); Nansen Initiative (n 72).

[103] For a critique, see Jane McAdam, 'Swimming against the Tide: Why a Climate Change Displacement Treaty is *Not* the Answer' (2011) 23 IJRL 1.

[104] The UN Secretary-General encouraged States to give 'favourable consideration' to incorporating its insights 'into national policies and practices': UNGA, *In Safety and Dignity: Addressing Large Movements of Refugees and Migrants: Report of the Secretary-General*, UN doc A/70/59 (21 April 2016) para 119.

[105] For more detailed analysis of each component, see Jane McAdam, 'Building International Approaches to Climate Change, Disasters and Displacement' (2016) 33 Windsor Yearbook of Access to Justice 1. See also Sydney Declaration (n 13), overseen by the author as Co-Rapporteur for the Committee on Sea Level Rise for the International Law Association.

[106] See Carol Farbotko, 'Voluntary Immobility: Indigenous Voices in the Pacific' (2018) 57 Forced Migration Review 81, 82, who notes that '[v]oluntary immobility is an important coping device, helping to strengthen cultural and spiritual agency among those facing the loss of their homeland'.

[107] Nansen Initiative (n 14) paras 76–86, 117–18, Sendai Framework (n 96) paras 27–8.

[108] Nansen Initiative (n 14) paras 99–105, 123–4.

[109] ibid paras 46–7, 114–15.

[110] ibid paras 87–93, 119–20. But see François Gemenne, 'One Good Reason to Speak of "Climate Refugees"' (2015) 49 Forced Migration Review 70.

[111] Nansen Initiative (n 14) paras 94–8, 121–2; Brookings, Georgetown University, and UNHCR, 'Guidance on Protecting People from Disasters and Environmental Change through Planned Relocation' (7 October 2015); Georgetown University, UNHCR, and IOM, 'A Toolbox: Planning Relocations to Protect People from Disasters and Environmental Change' (2017); Republic of Fiji, 'Planned Relocation Guidelines: A Framework to Undertake Climate Change Related Relocation' (2018); Government of Vanuatu, 'National Policy on Climate Change and Disaster-Induced Displacement' (2018).

[112] See Sydney Declaration (n 13) 57–8 (Principle 5 and commentary); Bruce Burson, Walter Kälin, Jane McAdam, and Sanjula Weerasinghe, 'The Duty to Move People out of Harm's Way in the Context of Climate Change and Disasters' (2018) 37 RSQ 379.

8. Conclusion

While there remain legal gaps when it comes to the protection of people displaced in the context of disasters and climate change, there is not a complete void. There are many effective practices that States could implement now to address mobility in this context. While international refugee law and human rights law provide some protection for those escaping the impacts of disasters and climate change, a longer-term and more sustainable approach lies in broader, systemic policies that take into account the nature of such movement—which are yet to be created in most settings. Pre-emptive strategies, ranging from disaster risk reduction and climate change adaptation, through to migration opportunities and planned relocation, may help to avert displacement in some cases, ensure that people are displaced for shorter periods of time in others, and provide durable solutions for those who need to move on a permanent basis. Such strategies also help people to maintain a degree of agency over if, when, and where they move.

As jurisprudence and State practice evolve, there will be an ongoing need to tease out the intersections between refugee law, human rights law, disaster law, environmental law, and climate change law at the international, regional, and domestic levels, as well as to scrutinize the outer limits of the principle of *non-refoulement* when it comes to protecting those at risk of—or already experiencing—displacement. Closer analysis of the impacts of displacement, migration, and planned relocation on particular groups, including women, children, and those with disabilities, would enable more targeted assistance and protection, especially to avoid the exacerbation of pre-existing vulnerabilities and patterns of discrimination.[113]

Equally, it will be important to find ways to ensure that the law has the capacity and reach to provide just outcomes for those who are affected by the adverse impacts of climate change and disasters, whether they remain *in situ* or move. In part, this raises the question whether the notion of climate justice can be translated into meaningful outcomes on the ground, especially as improvements in climate science make it easier to attribute causal links and responsibility.[114] A related and no less salient consideration is how to give effect to the principle of intergenerational equity in the context of climate change, given that the most devastating impacts of climate change will be felt most acutely by future generations.[115]

[113] See Volker Türk, 'Remarks' (Discussion Forum on Climate Change, Berlin, 17 June 2014) 5.

[114] Sophie Marjanac and Lindene Patton, 'Extreme Weather Event Attribution Science and Climate Change Litigation: An Essential Step in the Causal Chain?' (2018) 36(3) Journal of Energy and Natural Resources Law 265.

[115] See Volker Türk, 'Restructuring Refuge and Settlement: Responding to the Global Dynamics of Displacement' (2011) 28(2) Refuge 117; Petitioners' Communication to the Committee on the Rights of the Child in the case of *Sacchi v Argentina* (23 September 2019) <https://childrenvsclimatecrisis.org/wp-content/uploads/2019/09/2019.09.23-CRC-communication-Sacchi-et-al-v.-Argentina-et-al.pdf> accessed 28 November 2019, arguing that the 'climate crisis is a children's rights crisis' (para 13). On climate justice, see Fanny Thornton, *Climate Change and People on the Move: International Law and Justice* (OUP 2018).

CHAPTER 47

INTERNAL DISPLACEMENT

WALTER KÄLIN

1. Introduction

In 2019, 10.8 million people affected by armed conflict and violence had to flee and find refuge within their own country, joining the estimated total of 50.8 million internally displaced persons (IDPs) worldwide.[1] During the period 2009–19, around 22.7 million people on average were newly displaced each year on account of sudden-onset disasters, most of them weather-related.[2] While these figures by far surpass the total number of refugees,[3] IDPs are all too often neglected—not only by their governments, but also by the international community.[4] The 'paucity of legal scholarship on IDPs', identified by Cantor, which is particularly 'notable when compared to that on other special interest groups, such as refugees, women, or children',[5] further reflects the fact that internal displacement is not sufficiently high up on national and international agendas.

[1] Internal Displacement Monitoring Centre (IDMC), *GRID 2020: Global Report on Internal Displacement* (IDMC 2020) 1.

[2] Calculated on the basis of the annual figures in ibid. The total stock of those internally displaced in the context of disasters and the adverse effects of climate change is unknown (especially in the context of slow-onset disasters). On the methodological difficulties and absence of data, see IDMC, 'Disaster Displacement: A Global Review, 2008–2018' (May 2019) 21 <www.internal-displacement.org/sites/default/files/publications/documents/201905-disaster-displacement-global-review-2008–2018.pdf> accessed 4 August 2019. See further Chapter 46 in this volume.

[3] At the end of 2018, UNHCR counted 20.4 million refugees under its mandate: UNHCR, 'Figures at a Glance' (19 June 2019) <www.unhcr.org/figures-at-a-glance.html> accessed 4 August 2019.

[4] UNHCR's budget allocations illustrate this situation significantly. Its revised budget for 2019 includes roughly US$6.7 billion for its global refugee programme while the amount foreseen to be spent in IDP operations is less than US$1.2 billion. See Executive Committee of the High Commissioner's Programme, 'Update on Budgets and Funding for 2018 and 2019', EC/70/SC/CRP.7/Rev.2 (4 March 2019) 25.

[5] David J Cantor, ' "The IDP in International Law"? Developments, Debates, Prospects' (2018) 30 IJRL 191, 192. Many of the publications listed in the comprehensive bibliography contained in Ala Al-Mahaidi, Léa Gross, and David Cantor, *Revitalising IDP Research: A 'State of the Art' Review* (Refugee Law Initiative 2018) 35–47 are policy-oriented rather than legal in nature.

The experiences of refugees and IDPs have much in common. Both are forced to leave their homes and habitual places of residence, leaving behind their livelihoods, property, and community assets. Both struggle to find safety somewhere else and risk becoming dependent on humanitarian assistance while return or other durable solutions ending their predicament remain elusive. Furthermore, the two categories may interact. On the one hand, refugees who lose their status and are repatriated or return to their country of nationality on a voluntary basis may become IDPs if, due to continuing insecurity, they are unable to go back to their homes.[6] On the other hand, IDPs may decide to leave their country at a later stage and seek asylum abroad.[7]

It is not surprising that social science approaches tend to lump refugees and IDPs together under the notion of 'forced displacement'.[8] By contrast, this chapter argues that refugee law and the law related to internal displacement are conceptually fundamentally different because IDPs remain citizens or habitual residents of their countries, and thus depend on the national protection of their governments, while refugees as foreigners are in need of international protection. Discussing the protection of IDPs from a comparative perspective, Section 2 analyses the Guiding Principles on Internal Displacement (Guiding Principles) and their impact as a soft law instrument,[9] as well as the legally binding Kampala Convention.[10] Section 3 explores the conceptual differences between the notion of 'refugee' and 'internally displaced person', and the ensuing lack of a specific legal status for IDPs. This leads to the identification, in Section 4, of the law of IDP protection as part of international human rights law, rather than as a separate branch of international law similar to refugee law. Section 5 examines why the concept of national protection for IDPs has specific implications for the role of the international community, including with regard to humanitarian access. Section 6 argues that despite these differences, IDP-related approaches to durable solutions can help to inform refugee law and policy, and that there is already a degree of convergence between the two areas. Section 7 concludes by suggesting some directions for further research.

2. The Normative Framework

International refugee law is mainly enshrined in binding treaties. Its history dates back to the refugee conventions adopted by the League of Nations in the early twenti-

6 See eg UNHCR, 'UNHCR Position on Returns to Southern and Central Somalia (Update I)' (May 2016) para 22 <https://www.refworld.org/docid/573de9fe4.html> accessed 4 August 2019.

7 See eg IDMC, 'Nowhere to Return to: Iraqis' Search for Durable Solutions Continues' (IDMC 2018) 5; Susanne Jaspars and Margie Buchanan-Smith, 'Darfuri Migration from Sudan to Europe: From Displacement to Despair' (Humanitarian Policy Group, Overseas Development Institute 2018) 24.

8 See eg Oliver Bakewell, 'Conceptualising Displacement and Migration: Processes, Conditions, and Categories' in Khalid Koser and Susan Martin (eds), *The Migration–Displacement Nexus: Patterns, Processes, and Policies* (Berghahn 2011).

9 United Nations Commission on Human Rights, 'Guiding Principles on Internal Displacement', UN doc E/CN.4/1998/53/Add.2 (11 February 1998) (Guiding Principles).

10 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (adopted 23 October 2009, entered into force 6 December 2012) 49 ILM 86 (Kampala Convention).

eth century[11] and culminated with the adoption of the Refugee Convention in 1951. By contrast, attempts by the international community to create a normative framework for IDPs were until the 1990s limited to some scattered provisions in international humanitarian law.[12]

International humanitarian law does not use the notion of the 'IDP' *per se*, instead considering IDPs as part of the civilian population protected in times of armed conflict. Displacement-specific provisions in the Fourth Geneva Convention of 1949 and its Additional Protocols of 1977 are those prohibiting forced displacement unless it can be justified by 'imperative military reasons or to safeguard the security' of civilians living in an area affected by military operations.[13] Based on these provisions, forced displacement was declared a crime against humanity as well as a war crime in the Rome Statute of 1998.[14]

National protection remains precarious where IDPs have been displaced by the acts or omissions of their government or where governments are too weak or otherwise unable to provide the necessary protection. Putting the issue of IDP protection on the international agenda only became possible after the end of the Cold War,[15] when the then UN Human Rights Commission created the mandate of a Representative of the Secretary-General on Internally Displaced Persons in 1992.[16] The first mandate-holder, Dr Francis Deng, presented the Guiding Principles to the Commission in 1998 in response to a request 'to develop an appropriate framework…for the protection of internally displaced persons'.[17] The Guiding Principles combine a needs-based approach with a rights-based approach and cover all phases of the displacement cycle.[18] Focusing

[11] See Claudena M Skran, 'Historical Development of International Refugee Law' in Andreas Zimmermann (ed), *The 1951 Convention relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (OUP 2011) 3; Gilbert Jaeger, 'On the History of the International Protection of Refugees' (2001) 83 International Review of the Red Cross 727, 729ff.

[12] See Chapters 12 and 63 in this volume.

[13] Geneva Convention relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (Fourth Geneva Convention) art 49; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3, art 78(1) (Protocol I); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (Protocol II) art 17. See Vincent Chetail, 'The Transfer and Deportation of Civilians' in Andrew Clapham, Paola Gaeta, and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (OUP 2015); Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (OUP 2012) 285–92.

[14] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (Rome Statute), art 7(2)(d) in conjunction with art 7(1)(d) (crime against humanity) and art 8(2)(a)(vii) and art 8(2)(e)(viii) (war crime).

[15] See Thomas G Weiss and David A Korn, *Internal Displacement: Conceptualization and Its Consequences* (Routledge 2006) 11–29.

[16] United Nations Commission on Human Rights, 'Internally Displaced Persons', UN doc E/CN.4/RES/1992/73 (5 March 1992).

[17] United Nations Commission on Human Rights, 'Internally Displaced Persons', UN doc E/CN.4/RES/1996/52 (19 April 1996).

[18] Principles 5–9 relate to protection from displacement. Principles 10–23 apply to protection during displacement while principles 24–27 address the issue of humanitarian assistance, and principles 28–30 cover guarantees relevant for 'return, resettlement and reintegration', that is, durable solutions ending displacement.

on the specific needs of IDPs, they 'identify rights and guarantees relevant to the protection of persons from forced displacement and to their protection and assistance during displacement as well as during return or resettlement and reintegration'.[19]

Unlike refugee law with its notion of 'international protection' as a substitute for the national protection which refugees no longer enjoy, the Guiding Principles rest on the key concept of national protection. Such protection has its roots in an understanding of sovereignty not as a right of States to do as they want but, as Deng and his co-authors put it, as their responsibility 'to ensure minimum standards of security and social welfare for their citizens and be accountable both to the national body politic and the international community'.[20] Principle 3 enshrines the concept of sovereignty as responsibility by insisting that 'the primary duty and responsibility to provide protection and humanitarian assistance to internally displaced persons within their jurisdiction' rests with the national authorities.

The Guiding Principles themselves are 'soft law' and not legally binding.[21] However, they 'reflect and are consistent with international human rights law and international humanitarian law'.[22] They spell out in more detail what is implicit in existing guarantees applicable to and relevant for IDPs, and thus draw their legal authority from the hard law on which they are built.[23] Thus, as highlighted by Cantor, they 'make an implicit claim to binding legal force'.[24] This is certainly true for most principles,[25] although when the Guiding Principles were published in 1998, some may have echoed a more a progressive development of the law than a mere restatement of it.[26] Since that time, however,

[19] Guiding Principles, Introduction, para 1.

[20] Francis M Deng, Sadikiel Kimaro, Terrence Lyons, Donald Rothchild, and I William Zartman, *Sovereignty as Responsibility: Conflict Management in Africa* (Brookings Institution 1996) 211. With regard to the Guiding Principles, see Roberta Cohen and Francis Deng, *Masses in Flight: The Global Crisis of Internal Displacement* (Brookings Institution Press 1998) 275–80; Francis M Deng, 'The Global Challenge of Internal Displacement' (2001) 5 Washington University Journal of Law and Policy 141, 144–5.

[21] On the soft law character of the Guiding Principles, see Phil Orchard, 'Protection of Internally Displaced Persons: Soft Law as a Norm-Generating Mechanism' (2010) 36 Review of International Studies 281; Megan Bradley and Angela Sherwood, 'Addressing and Resolving Internal Displacement: Reflections on a Soft Law "Success Story"' in Stéphanie Lagoutte, Thomas Gammeltoft-Hansen, and John Cerone (eds), *Tracing the Roles of Soft Law in Human Rights* (OUP 2016).

[22] Guiding Principles, Introduction, para 3.

[23] Principle 12, for example, first restates the right to be protected from arbitrary arrest and detention, alluding to ICCPR, art 9. It then highlights that, in order '[t]o give effect to this right', IDPs 'shall not be interned in or confined to a camp' unless absolutely necessary 'in exceptional circumstances', and that internment or confinement 'shall not last longer than required by the circumstances'. Finally, it recalls the absolute prohibition of hostage-taking as enshrined in international humanitarian law.

[24] David J Cantor, *Returns of Internally Displaced Persons during Armed Conflict: International Law and Its Application in Colombia* (Brill 2018) 12.

[25] For the legal foundation of each principle, see Walter Kälin, *Guiding Principles on Internal Displacement: Annotations* (rev edn, American Society of International Law and Brookings Institution 2008).

[26] See eg Principle 25(2) on the prohibition of arbitrary denial on humanitarian access. On the weak legal foundations of Principle 28 on the right to return, see Cantor (n 24) 80. On the notion of progressive development, see James Crawford, 'The Progressive Development of International Law: History, Theory and Practice' in Denis Alland, Vincent Chetail, Oliver de Frouville, and Jorge E Viñuales (eds), *Unité et diversité du droit international/Unity and Diversity of International Law: Ecrits en l'honneur du Professeur Pierre-Marie Dupuy/Essays in Honour of Professor Pierre-Marie Dupuy* (Brill 2014) 19.

'the Guiding Principles are legally "hardening" at the global level',[27] as well as in regions and countries affected by internal displacement.

Even though some States contested the validity of the Guiding Principles in the years after 1998,[28] by 2005 UN Member States unanimously recognized the Guiding Principles 'as an important international framework for the protection of internally displaced persons'.[29] This is not mere rhetoric: more than 40 States have adopted or are in the process of adopting laws, strategies, and policies fully or at least partially consistent with the Guiding Principles.[30] Although implementation often remains weak,[31] a recent study found that, '[o]n average, countries that institute domestic legislation to protect IDPs as prescribed by the Guiding Principles see a significant decrease in the magnitude of displacement'.[32] It concluded that '[t]he evidence suggests that a regime based on "soft law" has increasingly made a difference in national policies and practices'.[33]

In Africa, this 'hardening' of the Guiding Principles through a bottom-up process has been significantly reinforced by the Kampala Convention.[34] It not only addresses internal displacement in the context of armed conflict, violence, and disasters (article 1(k)) and climate change (article 5(4)), but is also applicable to displacement induced by development projects (article 10). While the Kampala Convention is based on the human rights of IDPs (in particular, the Guiding Principles), it is formulated in terms not of rights but rather the obligations of States and other actors: non-State actors (article 7), the African Union (article 8), and international humanitarian agencies and

[27] Cantor (n 5) 197. An example is United Nations Security Council Resolution 2139, UN doc S/RES/2139 (22 February 2014) regarding Syria, recognizing 'that arbitrary denial of humanitarian access... can constitute a violation of international humanitarian law'.

[28] See Weiss and Korn (n 15) 112, referring to the UN Economic and Social Council, where Egypt managed to prevent the adoption of a resolution on humanitarian issues in 2000, and other instances of opposition by Egypt, Sudan, and other States.

[29] '2005 World Summit Outcome', UNGA res 60/1 (16 September 2005) para 132; and subsequent resolutions including 'Protection of and Assistance to Internally Displaced Persons', UNGA res 72/182 (19 December 2017) para 7, and United Nations Human Rights Council, 'Mandate of the Special Rapporteur on the Human Rights of Internally Displaced Persons', UN doc A/HRC/RES/32/11 (1 July 2016) para 14.

[30] Phil Orchard, *Protecting the Internally Displaced: Rhetoric and Reality* (Routledge 2019) 234ff. The text of laws and policies can be accessed at Global Protection Cluster, 'Global Database on IDP Laws and Policies' <www.globalprotectioncluster.org/global-database-on-idp-laws-and-policies> accessed 4 August 2019.

[31] Orchard (n 30) 224 found that 'in only 12 of those states have these policies and laws been implemented in a consistent manner'.

[32] Gabriel Cardona-Fox, *Exile within Borders: A Global Look at Commitment to the International Regime to Protect Internally Displaced Persons* (Brill 2019) 68.

[33] ibid 181.

[34] On the Kampala Convention, see Romola Adeola and Frans Viljoen, 'The Right Not to Be Arbitrarily Displaced in Africa' (2017) 25 African Journal of International Law 459; Allehone M Abebe, *The Emerging Law of Forced Displacement in Africa: Development and Implementation of the Kampala Convention on Internal Displacement* (Routledge 2017); Mehari Tadele Maru, *The Kampala Convention and Its Contributions to International Law* (Eleven International Publishing 2014); Won Kidane, 'Managing Forced Displacement by Law in Africa: The Role of the New African Union IDPs Convention' (2011) 44 Vanderbilt Journal of Transnational Law 1; Lauren Groth, 'Engendering Protection: An Analysis of the 2009 Kampala Convention and Its Provisions for Internally Displaced Women' (2011) 23 IJRL 221.

other organizations (article 6). It also contains a strong obligation to incorporate it into domestic law and create the necessary institutional arrangements (article 3(2)). As at mid-2020, the Kampala Convention had been ratified by 31 of the 55 Member States of the African Union,[35] and many lagged behind with the adoption of implementing legislation. In this regard, Orchard's conclusion that, at present, 'it is easier to discuss the Convention as having anticipatory enforcement mechanisms, rather than effective mechanisms'[36] is still a fair assessment. Nevertheless, the Kampala Convention provides a model for regional approaches to IDP protection, even though there are currently no attempts to develop binding law within the framework of other regional organizations. In Europe, in particular, tensions between countries such as Russia and Ukraine and between Armenia and Azerbaijan would make it extremely difficult for the Council of Europe to agree on such an instrument.[37]

Overall, the soft law approach of the Guiding Principles has been successful,[38] including by providing UN treaty bodies and regional human rights courts with entry points to assess human rights violations on the basis of the Principles' underlying hard law provisions. Soft law also has limitations, however. As observed by Bradley and Sherwood, 'IDP soft law tools do not yet comprehensively fill the interpretation gap arising from the hard law instruments from which they are derived'.[39] Furthermore, due to their lack of binding force, the Guiding Principles cannot prevent domestic laws and policies that deviate from and undermine international standards.

3. Notions: IDPs and Refugees Compared

The Guiding Principles and the Kampala Convention describe IDPs as

> persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.[40]

[35] See African Union, 'List of Countries Which Have Signed, Ratified/Acceded to the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention)' (18 June 2020) <https://au.int/en/treaties/african-union-convention-protection-and-assistance-internally-displaced-persons-africa> accessed 16 October 2020.

[36] Orchard (n 30) 55.

[37] See, however, Council of Europe Committee of Ministers, 'Recommendation Rec(2006)6 of the Committee of Ministers to Member States on Internally Displaced Persons' (5 April 2006).

[38] On some of the reasons for this success, see Walter Kälin, 'The Guiding Principles on Internal Displacement and the Search for a Universal Framework for the Protection of Internally Displaced Persons' in Vincent Chetail and Céline Bauloz (eds), *Research Handbook on International Law and Migration* (Edward Elgar 2014) 612, 631ff.

[39] Bradley and Sherwood (n 21) 180.

[40] Guiding Principles, Introduction, para 2; Kampala Convention, art 1(k).

Besides the fact that IDPs remain within their own country, this notion differs conceptually from the refugee definition in article 1A(2) of the Refugee Convention in several important respects. It only requires that flight is predominantly forced, leaving no or little room for choice. In particular, it is not necessary that it is motivated by a well-founded fear of persecution based on specific reasons. Rather, the list of circumstances that may trigger displacement is non-exhaustive.

Furthermore, the Guiding Principles and the Kampala Convention do not provide a specific legal status for persons forced to flee which may be granted as an outcome of status determination. This has several legal implications. In particular, there is no need for IDP equivalents to the cessation and exclusion clauses of the Refugee Convention (articles 1C[41] and 1F).[42] IDPs suspected of having committed crimes can be prosecuted as criminals, but this does not change the fact that they are displaced. Ending internal displacement is a factual situation and not an issue of withdrawing some form of legal status. The Guiding Principles and the Kampala Convention link rights to a specific factual situation and thus promote an approach similar to the conventions addressing the rights of the child or persons with disabilities.[43] States may nevertheless choose to create a legal status for IDPs in domestic law, an approach adopted by some European countries.[44] However, experience suggests that, by highlighting the 'otherness' of IDPs, a legal status may, rather than helping them, further contribute to their marginalization or even discrimination, particularly in situations of protracted displacement, and thus undermine their efforts to re-join mainstream life.

Finally, unlike refugees whose legal status may leave them with lesser entitlements than those enjoyed by citizens of the country of refuge,[45] IDPs—as citizens or habitual residents of their country—are entitled to enjoy the same level of protection as their non-displaced fellow citizens.[46]

4. IDP Protection as Human Rights Protection

The fact that being internally displaced does not entail a specific legal status means that the Guiding Principles, rather than creating a new branch of law analogous to refugee law, simply codify, highlight, and in a few cases progressively develop guarantees contained in international human rights and humanitarian law that are particularly

[41] See Chapter 57 in this volume.

[42] See Chapter 39 in this volume.

[43] CRC; Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3.

[44] See eg Azerbaijan: Law No 668-1Q on IDP (Internally Displaced Person) and Refugee Status (21 May 1999), art 1 <https://www.refworld.org/docid/3ae6b4fd4.html> accessed 4 August 2019.

[45] Refugee Convention, arts 13, 15, 17–19, 21, and 22(2) allow Contracting States to grant refugees rights at levels below those enjoyed by their own citizens.

[46] Kälin (n 25) 5.

relevant for the protection of IDPs. Thus, the international law of IDP protection remains part of these two branches of law.

This has the big advantage that—unlike in refugee law where the Refugee Convention and regional instruments do not provide for international monitoring mechanisms by independent experts or judges—UN treaty bodies and regional human rights mechanisms, as well as the UN's Universal Periodic Review (UPR) mechanisms,[47] are able to monitor the human rights situation of IDPs and decide individual cases submitted to them. This is an opportunity that counterbalances, to some extent, the challenges arising from the absence of 'international protection' in the sense of refugee law. UN treaty bodies regularly invoke the Guiding Principles,[48] albeit sometimes in a manner that fails to sufficiently take into account the subtleties of the hard law underlying them.[49] Cantor even goes as far as suggesting that, in their concluding observations on States' reports, UN treaty bodies are reading certain Principles back into hard human rights law in ways that go beyond mere interpretation, 'modify[ing] the original provisions from which [the Guiding Principles are] supposedly derived'.[50] However, this assessment might not sufficiently take into account the fact that treaty bodies are not exercising a quasi-judicial function when examining States' reports.[51]

Although their case law does not yet cover all relevant aspects of IDP protection, regional human rights courts play a particularly important role. The Inter-American Court of Human Rights, for instance, has found a violation of the prohibition of forced displacement in several cases, highlighting that such prohibition is implicit in the right to freedom of movement.[52] The European Court of Human Rights has concluded that internal displacement caused by violent acts attributable to the State may amount to inhuman treatment.[53] More generally, the Inter-American Court of Human Rights has highlighted that the condition of IDPs 'can be understood as a *de facto* situation of lack of' human rights protection which 'obliges the States to adopt measures of a positive nature

[47] Since the beginning of the UPR in 2008 until January 2020, 351 recommendations regarding IDPs were made to States under review. See the recommendations tagged with the issue 'Internally displaced persons' in UPR.Info, 'Database of Recommendations' <www.upr-info.org/database> accessed 16 October 2020.

[48] See Cantor (n 5) 200–1 and the multiple references therein.

[49] Cantor (n 24) 80–1.

[50] ibid 81 with regard to Guiding Principle 28(1). See similarly Cantor (n 5) 209.

[51] On the reasons why concluding observations may legitimately make recommendations on policy issues rather than just be limited to the identification of violations, see Walter Kälin, 'Examination of State Reports' in Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (CUP 2012) 59–60.

[52] *Mapiripán Massacre v Colombia*, Inter-American Court of Human Rights Series C No 134 (15 September 2005) para 188; *Barrios Family v Venezuela*, Inter-American Court of Human Rights Series C No 237 (24 November 2011) para 162; *Santo Domingo Massacre v Colombia*, Inter-American Court of Human Rights Series C No 259 (30 November 2012) para 255; *Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v Colombia*, Inter-American Court of Human Rights Series C No 270 (20 November 2013) para 219. See similarly, *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan*, African Commission on Human and Peoples' Rights, Comm Nos 279/2003, 296/2005 (May 2009) para 189.

[53] See *Yöyler v Türkey*, App No 26973/95 (ECtHR, 24 July 2015) paras 74f and 79, finding that the burning of houses and subsequent displacement amounted to violations of arts 3 and 8 of the ECHR.

to reverse the effects of [this] situation of weakness, vulnerability and defencelessness, even in relation to the actions and practices of private third parties'.[54] A particular risk for IDPs is being discriminated against as a displaced person either during or—as addressed by the European Court of Human Rights[55]—after displacement. Furthermore, regional courts recognize a right to return even though such right is not part of the wording of the conventions they apply. The European Court derives such a right from the right to respect for one's home and private life,[56] whereas the Inter-American Court has held that a State whose authorities have caused the displacement violates the right to liberty of movement and freedom to choose one's residence if it does not take measures allowing IDPs to rebuild their lives.[57] Similarly, the European Court has highlighted that 'the authorities have the primary duty and responsibility to establish conditions, as well as provide the means, which allow the applicants to return voluntarily, in safety and with dignity, to their homes or places of habitual residence, or to resettle voluntarily in another part of the country'.[58] Of importance, too, is the obligation of authorities to assist IDPs in recovering their property or, if this is not possible, obtaining compensation.[59]

The fact that international human rights and humanitarian law comprehensively protect IDPs leads to the question as to whether it makes sense to create a specific normative framework for them. Hathaway triggered an intense debate in 2007 when he claimed that promoting the protection of the rights of IDPs was just a 'key part of the strategy of containment' used by European States to limit the influx of refugees from the Balkans in the 1990s,[60] and asked '[w]hy should they be treated as a category of concern distinguished from other internal human rights victims who have not been displaced?'[61] As Cohen and others responded, the justification for specific provisions on internal displacement lies in the fact that IDPs have displacement-specific needs not shared by people who, despite being affected by armed conflict or disaster, are able to remain in their homes.[62] Unlike non-displaced people, they need *inter alia*[63] to be able to (i) be protected against arbitrary displacement; (ii) leave the danger zone and reach a (relatively) safe location and not be

[54] *Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v Colombia*, Inter-American Court of Human Rights Series C No 270 (20 November 2013) para 315.

[55] For a case of discrimination in the allocation of pension funds to returning IDPs to an area where they belong to an ethnic minority see *Šekerović and Pašalić v Bosnia and Herzegovina*, App No 5920/04 and 67396/09 (ECtHR, 15 September 2011) paras 34ff.

[56] The ECtHR derived a right of return of IDPs to their homes from ECHR, art 8: *Cyprus v Turkey* (2002) 35 EHRR 30, para 175.

[57] *Río Negro Massacres v Guatemala*, Inter-American Court of Human Rights Series C No 250 (4 September 2012) paras 183f.

[58] *Doğan v Turkey*, Apps No 8803–8811/02, 8813/02, and 8815–8819/02 (ECtHR, 29 June 2004) para 154.

[59] See *Sargsyan v Azerbaijan*, App No 40167/06 (ECtHR, Grand Chamber, 16 June 2015) paras 219ff; *Loizidou v Turkey*, App No 15318/89 (ECtHR, 28 July 1998) paras 4ff; Principle 29(2) of the Guiding Principles.

[60] James C Hathaway, 'Forced Migration Studies: Could We Agree Just to "Date"?' (2007) 20 JRS 349, 357.

[61] ibid 360.

[62] See Roberta Cohen, 'Response to Hathaway' (2007) 20 JRS 370; Erin Mooney, 'The Concept of Internal Displacement and the Case for Internally Displaced Persons as a Category of Concern' (2005) 24 RSQ 9.

[63] See Walter Kälin, 'Internal Displacement' in Elena Fiddian-Qasmiyeh, Gil Loescher, Katy Long, and Nando Sigona (eds), *The Oxford Handbook of Refugee and Forced Migration Studies* (OUP 2014) 163, 166f and references therein.

forced to return to such zone; (iii) find a place to stay temporarily, whether inside or outside a camp; (iv) avoid discrimination because of their being displaced; (v) have any lost personal documentation restituted and such documents issued to children born during displacement even if, according to the law, documentation can be obtained only at the place of habitual residence;[64] (vi) register as voters and participate in elections and referenda even if, according to the law, these political rights can only be exercised at the place of habitual residence;[65] (vii) have real estate and other immovable property left behind protected against being taken over by others or have them restituted; and (viii) find a durable solution ending their displacement.[66]

Thus, a specific focus on IDPs is not only justified, but is in fact required in light of the key human rights principles of equality and non-discrimination. These principles not only require States to treat people in like situations equally (equal treatment precept) but also to give everyone his or her due, as 'it is inadmissible to place on the same footing factual circumstances that are essentially different and thus require differentiated treatment (differentiation precept)'.[67] In other words, the special treatment of IDPs is legitimate because they find themselves in situations that are sufficiently different from those of non-displaced persons. As Mooney succinctly puts it, 'ensuring that IDPs can enjoy their human rights in full equality with others requires paying attention to and addressing the specific needs and risks to which the experience of internal displacement exposes them'.[68] Thus, the justification of conceptualizing IDPs as a special category of concern lies in their specific vulnerabilities and their ensuing right to protection.[69] This was explicitly recognized by the Inter-American Court of Human Rights when it held that 'the differentiated situation of displaced persons places States under the obligation to give them preferential treatment and to take positive steps to revert the effects of said condition of weakness, vulnerability, and defenselessness, including those vis-à-vis actions and practices of private third parties'.[70]

5. The Subsidiary Role of the International Community

Whereas the international community plays a key role in the (international) protection of refugees, it has a subsidiary, albeit important, role with respect to IDPs. It discharges

[64] See Conor Foley and Barbara McCallin, 'The Recovery of Personal Documentation' in Walter Kälin, Rhodri C Williams, Khalid Koser, and Andrew Solomon (eds), *Incorporating the Guiding Principles on Internal Displacement into Domestic Law: Issues and Challenges* (American Society of International Law and Brookings Institution 2010).

[65] See Jeremy Grace and Erin Mooney, 'Political Participation Rights, in Particular the Right to Vote' in Kälin, Williams, Koser, and Solomon (n 64).

[66] On durable solutions, see Section 6.

[67] Walter Kälin and Jörg Künzli, *The Law of International Human Rights Protection* (2nd edn, OUP 2019) 343.

[68] Mooney (n 62) 23.

[69] ibid.

[70] *Mapiripán Massacre* (n 52) para 179.

this role mainly through the provision of humanitarian protection and assistance. While no single agency has a mandate for protecting and assisting IDPs (unlike UNHCR vis-à-vis refugees), the Emergency Relief Coordinator (ERC) and, through him or her, the Office for the Coordination of Humanitarian Affairs (OCHA) have been recognized by the General Assembly as playing a 'central role . . . for the coordination of, protection of and assistance to internally displaced persons, inter alia, through the inter-agency cluster system'.[71] However, the ERC's mandate is limited to humanitarian action, and the coordination position does not have an operational role, nor the capacity to focus primarily on IDPs. Thus, the UN system lacks a visible focal point with a clear mandate to assist and protect IDPs. This is a major institutional gap in the international response to the challenges of internal displacement.

The cluster system was introduced in 2005 to facilitate coordination among organizations in humanitarian emergencies and to ensure that the humanitarian response in key thematic areas (such as shelter, camp management, water, sanitation, health, and protection) would be predictable, timely, and effective.[72] In 2014, a study found that 'the overall international response to IDPs has improved over the past decade' and the 2005 '[h]umanitarian reform has made a difference in improving the effectiveness of international response'.[73] At the same time, the cluster system has been weak in assisting IDPs to rebuild their lives and find durable solutions ending their displacement. As highlighted by former UN Secretary-General Ban Ki-moon, all too often humanitarian actors 'provide short-term assistance to millions of displaced persons, sometimes for decades', instead of moving to an approach 'that goes from meeting immediate humanitarian needs to one that preserves the dignity and improves the lives and self-reliance of displaced persons'.[74]

A specific challenge often faced by humanitarian actors is the lack of access to IDPs in need of assistance. According to international law, humanitarian assistance by the international community can, in principle, only be provided with the consent of the State concerned.[75] Under article 2(1) of the ICESCR, however, States are obliged to work towards the full realization of rights, such as the right to adequate food and shelter and the right to health, not only 'individually' but also 'through international assistance and co-operation'. Thus, with regard to these rights, 'States have a joint and individual responsibility . . . to cooperate in providing disaster relief and humanitarian assistance in times of emergency, including assistance to refugees and internally displaced persons'.[76]

[71] UNGA 2017 (n 29) para 27.

[72] See Simon Russell and Vicky Tennant, 'Humanitarian Reform: From Coordination to Clusters' in Fiddian-Qasmiyeh, Loescher, Long, and Sigona (n 63).

[73] Elizabeth Ferris, *Ten Years after Humanitarian Reform: How Have IDPs Fared?* (Brookings Institution 2014) 12.

[74] UNGA, *One Humanity: Shared Responsibility. Report of the Secretary-General for the World Humanitarian Summit*, UN doc A/70/709 (2 February 2016) para 81.

[75] 'Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations', UNGA res 46/182 (19 December 1991) annex, para 3.

[76] Committee on Economic, Social and Cultural Rights, 'General Comment No 12: The Right to Adequate Food (Art 11)', UN doc E/C.12/1999/5 (12 May 1999) para 38; Committee on Economic, Social and Cultural Rights, 'General Comment No 14: The Right to the Highest Attainable Standard of Health (Art 12)', UN doc E/C.12/2005/4 (11 August 2000) para 40.

As such, States that are unable to provide necessary humanitarian assistance are arguably obliged to seek and authorize humanitarian assistance by international actors.

States are sometimes unwilling to request humanitarian assistance, however, particularly when they suspect that IDPs support insurgents.[77] To address such situations, Guiding Principle 25(2) stresses that consent to humanitarian assistance by international actors 'shall not be arbitrarily withheld, particularly when authorities concerned are unable or unwilling to provide the required humanitarian assistance'. In 2014, the UN Security Council, in Resolution 2139 on Syria, gave credence to this Guiding Principle by recalling 'that arbitrary denial of humanitarian access and depriving civilians of objects indispensable to their survival, including wilfully impeding relief supply and access, can constitute a violation of international humanitarian law'.[78] In the context of disasters, the International Law Commission has similarly recognized that '[c]onsent to external assistance shall not be withheld arbitrarily'.[79] Finally, the UN Human Rights Committee has recognized that denial of humanitarian access may amount to violations of the right to life and the prohibition of inhuman treatment, and has called on the State concerned to '[a]uthorize and facilitate the timely and unrestricted access of humanitarian assistance to civilian populations in all conflict-affected areas in full compliance with the prohibition of arbitrary denial of humanitarian access'.[80] These pronouncements are important contributions to a growing consensus that the primary responsibility of States to assist and protect IDPs may include the duty to grant humanitarian access.

6. Ending Displacement: Towards Convergence?

The cessation clause in article 1C of the Refugee Convention provides that refugee status ends either as a consequence of an act of the refugee him- or herself (such as re-establishment in his or her country of origin or the re-acquisition of a lost nationality),

[77] See UNGA, 'Protection of and Assistance to Internally Displaced Persons: Note by Secretary-General', UN doc A/65/282 (11 August 2010) paras 55–91, providing an overview of factual and legal challenges related to humanitarian access to IDPs. See also Dapo Akande and Emanuela-Chiara Gillard, 'Oxford Guidance on the Law relating to Humanitarian Relief Operations in Situations of Armed Conflict: Commissioned by the United Nations Office for the Coordination of Humanitarian Affairs' (October 2016) <www.unocha.org/sites/dms/Documents/Oxford%20Guidance%20pdf.pdf> accessed 26 August 2019; Felix Schwendimann, 'The Legal Framework of Humanitarian Access in Armed Conflict'(2011) 93 International Review of the Red Cross 993.

[78] UNSC Resolution 2139 (22 February 2014) 10th preambular para. In UNSC Resolution 2165 (14 July 2014), the Council found that Syria had arbitrarily withheld consent to relief operations and therefore authorized delivery of humanitarian goods across borders and conflict lines without Syria's consent.

[79] International Law Commission, 'Draft Articles on the Protection of Persons in the Event of Disasters', adopted by the International Law Commission at its 68th session: see International Law Commission, 'Report on the Work of the Sixty-Eighth Session', UN doc A/71/10 (2016) 59, art 13.

[80] Human Rights Committee, 'Concluding Observations on the Fourth Periodic Report of the Sudan', UN doc CCPR/C/SDN/CO/4 (19 August 2014) para 8(f).

or through an administrative act by the country of asylum (such as the granting of citizenship or a decision that the refugee can no longer refuse to accept the protection of his or her country of origin).[81] While cessation does not automatically lead to a solution for refugees,[82] the two concepts are interlinked. Thus, in 1997, UNHCR stressed that a 'refugee ceases to require international protection where he or she repatriates voluntarily and reintegrates into the country of origin, or settles in the host country and obtains the nationality of that country, or resettles in another country and obtains the nationality of that country'.[83] The statement puts the emphasis on the moment when a refugee crosses the border to his or her country of origin or is granted citizenship by the country of asylum or resettlement, suggesting that refugees find a durable solution at a specific point in time.

As mentioned above, cessation clauses do not exist for IDPs. While return to the place of origin, local integration, and settlement in another part of the country (called 'resettlement' in Guiding Principles 28–30) parallel the three solutions envisaged for refugees, the Guiding Principles place the emphasis on the need for special efforts to 'establish conditions, as well as provide the means' to allow IDPs to return to their homes or settle elsewhere in the country and to facilitate their (re-)integration.[84] They therefore acknowledge that finding durable solutions is not a one-time event but rather a complex process.[85] According to the Inter-Agency Standing Committee (IASC) Framework on Durable Solutions for Internally Displaced Persons, such solutions are 'achieved when former IDPs no longer have specific assistance and protection needs that are linked to their displacement and such persons can enjoy their human rights without discrimination resulting from their displacement'.[86] In terms of process, achieving durable solutions requires, in particular, that IDPs are able to make a free and informed decision as to what kind of solution they prefer and are allowed to participate in planning and implementing it.[87] In substantive terms, durable solutions are achieved once IDPs enjoy, without discrimination, long-term safety and security; an adequate standard of living, including a minimum access to adequate food, water, housing, healthcare, and basic education; access to employment and livelihoods; and restitution of their property or compensation for it. Depending on the context, access to, and replacement of personal and other documentation, reunification with family members, the possibility to exercise their political rights, and access to effective remedies for displacement-related violations of their rights might be other elements necessary to make solutions durable.[88]

[81] See Chapter 57 in this volume; Maria O'Sullivan, *Refugee Law and Durability of Protection: Temporary Residence and Cessation of Status* (Routledge 2019).

[82] See Chapters 58 to 61 in this volume.

[83] UNHCR Standing Committee, 'Note on the Cessation Clauses', EC/47/SC/CRP.30 (30 May 1997) para 28.

[84] Guiding Principle 28(1).

[85] This is reflected in the IASC Framework on Durable Solutions for Internally Displaced Persons, for instance. See UNGA, 'Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, Walter Kälin. Addendum: Framework on Durable Solutions for Internally Displaced Persons', UN doc A/HRC/13/21/Add.4 (29 December 2009) para 15.

[86] ibid para 8. [87] ibid para 22. [88] ibid para 83.

While it has always been clear that, in many situations, the same conditions need to be met for refugees, traditional refugee law approaches have focused on issues such as the timing, conditions, and voluntariness of return[89] rather than the rights-based approach promoted by the IASC Framework. This may change now with the Comprehensive Refugee Response Framework (CRRF) adopted as part of the 2016 New York Declaration for Refugees and Migrants. The CRRF recognizes the importance of activities such as the provision of identity documents; facilitation of socio-economic reintegration of returnees or restitution of property;[90] provision of access to 'legal, physical and other support mechanisms';[91] and investments 'in building human capital, self-reliance and transferable skills as an essential step towards enabling long-term solutions'.[92] In the 2018 Global Compact on Refugees, States commit to support countries of origin 'with respect to social, political, economic and legal capacity to receive and reintegrate returnees', including 'support for development, livelihood and economic opportunities and measures to address housing, land and property issues'.[93] While these instruments do not present a comprehensive and coherent approach comparable to the one provided by the IASC Framework on Durable Solutions, they indicate a move towards a certain convergence of approaches to durable solutions for IDPs and refugees.

However, progress at the conceptual level is still not adequately reflected on the ground. On the occasion of the 2016 World Humanitarian Summit, then UN Secretary-General Ban Ki-moon called on the international community 'to collectively work towards a clear, ambitious and quantifiable target for reducing new and protracted internal displacement, in a dignified and safe manner'[94] and encouraged '[h]umanitarian and development actors…to work collaboratively across silos and mandates to implement plans with a clear and measurable collective outcome'[95] to increase the self-sufficiency and resilience of IDPs and achieve durable solutions for them. His call for a 'New Way of Working'[96] to meet 'people's immediate humanitarian needs while at the same time reducing risk and vulnerability over multiple years through the achievement of collective outcomes'[97] was endorsed by the UN General Assembly.[98] However, the implementation of this approach[99] requires fundamental changes in a UN institutional culture fraught with competition over resources and turf battles between agencies and

[89] See the discussion in Chapter 59 in this volume.

[90] New York Declaration for Refugees and Migrants, para 11.

[91] ibid para 12. [92] ibid para 13. [93] Global Compact on Refugees, para 89.

[94] UNGA 'One Humanity: Shared Responsibility. Report of the Secretary-General for the World Humanitarian Summit', UN doc A/70/709 (2 February 2016) para 83.

[95] ibid para 84(b).

[96] For details and progress made see the information provided at Joint Steering Committee to Advance Humanitarian and Development Collaboration, 'The New Way of Working' <www.un.org/jsc/content/new-way-working> accessed 4 August 2019.

[97] UNGA, 'Outcome of the World Humanitarian Summit: Report of the Secretary-General', UN doc A/71/353 (23 August 2016) para 34.

[98] 'Strengthening of the Coordination of Emergency Humanitarian Assistance of the United Nations', UNGA res 71/127 (8 December 2016) para 22.

[99] For more details, see Walter Kälin and Hannah Entwisle Chapuisat, *Breaking the Impasse: Reducing Protracted Internal Displacement as a Collective Outcome* (OCHA 2017) 54ff.

organizations, rather than valuing and rewarding genuine cooperation. A first important step was the recent strengthening of the role of Resident Coordinators as leaders of UN country teams with enhanced authority to build a solid nexus between humanitarian and development programming activities.[100] In addition, there needs to be a shift away from heavily earmarked short-term humanitarian funding provided by donors to their favourite agencies towards more flexible, long-term financing that provides incentives for cooperation towards collective outcomes addressing protracted internal displacement. Finally, seeing IDPs—and their hosts—as people with agency, and supporting them as active participants in the process of finding durable solutions, rather than as beneficiaries of assistance, would go a long way in overcoming traditional 'care and maintenance' approaches.

7. Outlook

In the past two decades, important progress has been made in terms of developing a normative framework for the protection and assistance of IDPs, and humanitarian responses providing life-saving support have become more effective. The record is less positive with regard to the implementation of existing norms and, in particular, the ability of States and the international community to address the widespread phenomenon of protracted internal displacement and to find durable solutions for IDPs.

Compared with the international regime for the protection of refugees, IDP protection lags behind with regard to the institutions and processes necessary to address internal displacement effectively. At the normative level, many States affected by internal displacement still lack adequate domestic laws, and outside Africa, binding regional conventions on the assistance and protection of IDPs (responsive to particular regional needs) do not exist. Institutionally, there is no clear and visible institutional home within the UN that transcends humanitarian action and human rights to bring together the UN system as a whole. Despite progress made with the UN's 'New Way of Working', joint outcome-oriented action by humanitarian, development, and, where relevant, peacebuilding actors remains insufficient. Donor incentives to work towards collective outcomes are still too limited. While UNHCR's Executive Committee or the Global Refugee Forum instituted by the Global Compact on Refugees facilitate ongoing discussions,[101] a comparable global platform for the comprehensive discussion of issues related to internal displacement does not exist.

[100] 'Repositioning of the United Nations Development System in the context of the Quadrennial Comprehensive Policy Review of Operational Activities for Development of the United Nations System', UNGA res 72/279 (31 May 2018) paras 7–17.

[101] Global Compact on Refugees, para 103.

These weaknesses are exacerbated by the rather limited interest of legal scholars to focus on the protection of IDPs, a situation that is at odds with the urgency and complexity of the worldwide internal displacement crisis. There are a number of topics requiring further exploration and analysis, including the interplay between the Guiding Principles as soft law and the hard law underlying them; the exact meaning of some of the Principles; the degree of legitimate limitations that States might impose on the rights of IDPs;[102] the role of international human rights and humanitarian law in preventing internal displacement;[103] the character and scale of positive legal obligations during displacement and with regard to durable solutions; the protection of IDPs displaced by disasters and the adverse effects of climate change; and the relevance of international criminal law to the protection of IDPs.[104]

[102] See eg Cantor (n 24) 54ff; Cantor (n 5) 206–7 on possible limitations on the right to return.

[103] But see Romola Adeola, 'The Kampala Convention and the Right Not to be Arbitrarily Displaced in Africa', (2018) 59 Forced Migration Review 15, 15ff.

[104] For a comprehensive overview of research topics, see Al-Mahaidi, Gross, and Cantor (n 5).

PART VI

REFUGEE RIGHTS AND REALITIES

CHAPTER 48

THE RIGHT TO ASYLUM

MARÍA-TERESA GIL-BAZO AND ELSPETH GUILD

1. Introduction

Asylum, understood as 'the protection that a State grants on its territory or in some other place under the control of certain of its organs to a person who comes to seek it',[1] is a well-known institution in international law and its historical roots in State practice are well established.[2] Asylum is different from refugee status, as the former constitutes an institution for protection, while the latter refers to the content of the protection offered to those who meet the refugee definitions under the relevant international instruments. As such, asylum and refugee status are two separate but related institutions. More recently, the term 'international protection' has been coined to refer to the protection granted by States to various categories of persons, including those who are not refugees but benefit from other forms of protection, as discussed in Section 3.[3]

This chapter explores the right to asylum, including the right to seek asylum and the right to be granted asylum, in international law of universal and regional scope. It does so by examining the evolution of asylum in international law and practice, as well as the jurisprudence of a number of courts, most notably the Court of Justice of the European Union (CJEU) and the Inter-American Court of Human Rights (IACtHR). Although the African Court on Human and Peoples' Rights (ACtHPR) has not yet ruled explicitly on the right to asylum, the chapter does consider regional standards of protection in Africa.

The chapter explores these issues in historical perspective, offering a critique of the current state of play regarding asylum, refugee status, and international protection, including in the context of the Global Compact on Refugees in December 2018. It

[1] Institute of International Law (5th Commission), 'Asylum in Public International Law', Resolutions Adopted at its Bath Session (September 1950) art 1.

[2] For an overview of the evolution of this institution, see Atle Grahl-Madsen, *Territorial Asylum* (Almqvist & Wiksell International 1980), and Egidio Reale, 'Le droit d'asile' (1938) 63 Recueil des Cours de l'Académie de Droit International de La Haye 473.

[3] See also Chapter 36 in this volume.

examines trends arising in regional contexts and analyses their contribution to a holistic interpretation of States' obligations towards refugees and others in need of protection.

2. The Relationship between Asylum and Refugee Status

As stated above, asylum is different from refugee status: the former constitutes the institution for protection, while the latter refers to the content of the protection offered to those who benefit from asylum.[4] Furthermore, asylum is both a right of States to grant it, as well as a human right of individuals.[5]

The practice of asylum pre-dates the existence of the international regime for the protection of refugees (which arose during the inter-war period in the twentieth century) and the international regime for the protection of human rights (which was developed by the UN post-1948). Asylum constitutes the protection that a State grants to an individual on its territory (territorial asylum) or in some other place under the control of certain of its organs (such as diplomatic premises and warships).[6]

While it is beyond the scope of this chapter to offer a detailed account of the religious and historical foundations of human rights, which have been well explored in the literature,[7] asylum finds its roots in the most ancient bodies of norms for human conduct, both in relation to individuals as well as to societies. Indeed, evidence of the normative character of asylum can be found in its nature as a religious command, a call for divine protection against human in/justice. All three monotheistic religions impose a duty of hospitality and protection to strangers, which constitutes a notable aspect of the anthropological and historical background to the law and practice of asylum over time. Long before the international regime for the protection of refugees was born in the twentieth century, asylum had been practised for thousands of years, and was known in most ancient civilizations. The Kadesh Treaty—concluded in the thirteenth century BC between Ramses II and Hatusil III, king of the Hitittes—is the first known international

[4] For a discussion on the distinction between asylum and refugee status, see María-Teresa Gil-Bazo, 'Asylum as a General Principle of International Law' (2015) 27 IJRL 3, 7–10.

[5] For an analysis of the dual nature of asylum, see María-Teresa Gil-Bazo, 'The Charter of Fundamental Rights of the European Union and the Right to be Granted Asylum in the Union's Law' (2008) 27(3) RSQ 33, 37–40.

[6] Institute of International Law (n 1).

[7] On the historical and religious background of asylum, see Reale (n 2) 473–510; Cristina Gortázar Rotaeche, *Derecho de Asilo y 'No Rechazo' del Refugiado* (Dykinson 1997) 38–59; María-Teresa Gil-Bazo, *The Right to Asylum as an Individual Human Right in International Law: Special Reference to European Law* (UMI 1999) 33–56; William Felice, 'The Historical Foundation of Human Rights' (1998) 12 Ethics & International Affairs 221; and Christian Green and John Witte, 'Religion' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (OUP 2013).

treaty and it already contains protection clauses.[8] In nine provisions, the treaty establishes that the exchange of population between the two sovereigns will only take place on condition that neither the individuals themselves, nor their families, will be subject to punishment.[9] In its primitive form, asylum was not concerned with the politically persecuted, but rather with the broader category of those in distress, who could be innocent or guilty. Today, asylum is enshrined in constitutions around the world as a right of refugees and other persecuted individuals,[10] and it can be argued that it has acquired the status of a general principle of international law.[11]

By contrast, the status of refugees in international law was established by treaty only in the early twentieth century, identifying groups of persons who had lost the protection of their country of origin.[12] The adoption of international treaties establishing the standard of treatment of refugees reflected the understanding that refugees were a special group of non-nationals that required a collective response by the international community. The international refugee regime expressed the recognition amongst States of their mutual obligations in relation to this category of forced migrant, defined not so much by the causes of their flight or plight, but rather by the lack of protection by the State of their nationality. Today, the international legal regime for the protection of refugees is enshrined in the Refugee Convention and its 1967 Protocol, as well as regional instruments developed in Africa, Latin America, and, more recently, Europe.

In 2018, the UN General Assembly affirmed the Global Compact on Refugees. It highlights the identification of international protection needs as an area requiring support in order to ease the burden on host countries and to benefit refugees and host community members:

> Mechanisms for the fair and efficient determination of individual international protection claims provide an opportunity for States to duly determine the status of those on their territory in accordance with their applicable international and regional obligations (A/RES/72/150, para 51), in a way which avoids protection gaps and enables all those in need of international protection to find and enjoy it.[13]

[8] François Crépeau, *Droit d'asile. De l'hospitalité aux contrôles migratoires* (Bruylant 1995) 29; Eduardo Luque Angel, *El derecho de asilo* (San Juan Eudes 1959) 42; William R Smyser, 'Refugees: A Never-Ending Story' in Richard Pierre Claude and Burns H Weston (eds), *Human Rights in the World Community* (2nd edn, University of Pennsylvania Press 1992) 114; Georg Stadtmüller, *Historia del Derecho Internacional Público* (Aguilar 1961) 16.

[9] For a transcript of the protection clauses, including the exchanges of population between sovereigns and the treatment to be afforded to strangers, see Wolf Gunther Plaut, *Asylum: A Moral Dilemma* (Praeger 1995) 145–7.

[10] See Chapters 14 and 49 in this volume.

[11] For a full analysis of the nature of asylum as a general principle of international law, see Gil-Bazo (n 4).

[12] See for instance the refugee definitions in the Arrangement relating to the Issue of Identity Certificates to Russian and Armenian Refugees (adopted 12 May 1926) 89 LNTS 47. See also James C Hathaway, 'The Evolution of Refugee Status in International Law: 1920–1950' (2008) 33 ICLQ 348; Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, OUP 2007) 16–20.

[13] Global Compact on Refugees, para 61.

The Global Compact on Refugees is not legally binding. Instead, it is intended to aid more equitable burden- and responsibility-sharing amongst UN Member States in the delivery of their existing international protection obligations.

3. Asylum and International Protection

Even though asylum, as a long-established institution in international law, covers not only refugees but also other groups in need of protection, more recently the protection given to such persons has been encapsulated by the term 'international protection'. As Fortin convincingly argues, this term originally referred to the 'diplomatic protection' that the international community offers to refugees (and others, such as stateless persons),[14] and it is different from the set of rights, benefits, and obligations that the host State offers to refugees and which is better described by the term 'asylum'.[15] Despite the fact that international protection and asylum were well-established terms, the European Commission chose to part from that established terminology in 2000 and use international protection (instead of asylum) as the term to refer to the protection granted by EU Member States to refugees and beneficiaries of subsidiary protection.[16] The term then appeared in the European Commission's proposal for a so-called Qualification Directive in 2001[17] and eventually found its way into law for the first time in 2004 when the EU adopted the Qualification Directive on the status of refugees and persons eligible for subsidiary protection.[18]

Arguably, this shift is a way of trying to restrict asylum to refugees within the meaning of the Refugee Convention, with the new term applying to *all* individuals in need of

[14] Antonio Fortin, 'The Meaning of "Protection" in the Refugee Definition' (2000) 12 IJRL 548.

[15] María-Teresa Gil-Bazo, 'Refugee Status and Subsidiary Protection under EC Law: The Qualification Directive and the Right to Be Granted Asylum' in Anneliese Baldaccini, Elspeth Guild, and Helen Toner (eds), *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy* (Hart Publishing 2007) 229, 237.

[16] Communication from the Commission to the Council and the European Parliament Towards a Common Asylum Procedure and a Uniform Status, Valid throughout the Union, for Persons Granted Asylum [2000] COM(2000) 755 final.

[17] European Commission, Proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection [2002] OJ C51 E/325.

[18] 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] OJ L304/12, art 2. This was recast in 2011: Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted (recast) [2011] OJ L337/9.

protection (including those to whom asylum would have traditionally applied).[19] This approach by the EU eventually led to the adoption of the first legal instrument of a supranational nature containing a separate status for individuals protected under international human rights law, complementary to the Refugee Convention, rather than to the adoption of a single status for all persons granted asylum, whether on Refugee Convention grounds or on international human rights law grounds. As McAdam explains: '[I]t is essential to appreciate that the "complementary" aspect of "complementary protection" [derived from international human rights law] is not the form of protection or resultant status accorded to an individual, but rather the source of the additional protection. Its chief function is to provide an alternative basis for eligibility for protection.'[20] Indeed, the European Commission did consider the option of having '[a] single status, conferring the same types of rights on refugees recognised under the Geneva Convention and on persons enjoying subsidiary protection'.[21] However, this option was not favoured by all Member States and, therefore, the Directive on the matter introduced two separate statuses, as mentioned above.[22]

This European regional approach was later endorsed globally by UNHCR, which considered complementary protection in its 2000 Global Consultations. Rather than calling for an expanded refugee definition (as in the African or Latin American regions) with its corresponding single status for all persons in need of protection, it adopted an Agenda for protection, calling on

> States to consider the merits of establishing a single procedure in which there is first an examination of the 1951 Convention grounds for refugee status, to be followed, as necessary and appropriate, by the examination of the possible grounds for the grant of complementary forms of protection.[23]

In 2005, UNHCR's Executive Committee (ExCom) adopted a Conclusion promoting the use of complementary protection amongst States worldwide, which encouraged 'the use of complementary forms of protection for individuals in need of international protection who do not meet the refugee definition under the 1951 Convention or the 1967 Protocol'.[24]

[19] It should be stressed that asylum is an ancient legal institution that predates the refugee regime and, therefore, the beneficiaries of asylum have historically included not only the groups that were later identified as refugees within the meaning of the UN Refugee Convention, but many others. For an overview of asylum in historical terms, see Gil-Bazo (n 7).

[20] Jane McAdam, *Complementary Protection in International Refugee Law* (OUP 2007) 23.

[21] Communication from the Commission to the Council and the European Parliament Towards a Common Asylum Procedure and a Uniform Status, Valid throughout the Union, for Persons Granted Asylum [2000] COM(2000) 755 final, 12.

[22] See further Chapter 36 in this volume.

[23] UNHCR, 'Global Consultations on International Protection. Agenda for Protection', UN doc A/AC.96/965/Add.1 (26 June 2002) Goal 1, Objective 3, 6–7.

[24] UNHCR ExCom Conclusion No 103 (LVI), 'The Provision on International Protection including through Complementary Forms of Protection' (2005) para (i).

It appears that a European regional approach whose purpose was arguably to restrict the right to asylum to Convention refugees only (parting from the historical tradition of asylum) was later uncritically endorsed by UNHCR globally, and seems to have found its way into the language of other regional bodies. Indeed, the IACtHR now refers to international protection in its decisions on asylum. It is most unfortunate that the Americas, with its long and principled tradition on asylum, has chosen to embrace a concept alien to its own practice and its expanded refugee definition.

To be clear, while international protection is rightly used to refer to the protection offered by UNHCR itself, the issue arises with the use of the term to refer to the protection offered by States, which constitutes an incorrect interpretation of the Refugee Convention[25] and abandons the use of the well-established and inclusive term 'asylum', which covers all those in need of protection. The history of asylum and its current wording in constitutional provisions show that asylum, as a protection institution, is not only open to refugees within the Refugee Convention, but also to other categories of persons in need of protection. There is no reason to exclude persons in need of protection for grounds other than those established in the Refugee Convention from the protection that asylum, as an institution of protection, provides.[26]

4. The Right to Seek Asylum in International Instruments

In international law, no universal treaty contains a right *to* asylum. The UDHR provides that '[e]veryone has the right *to seek and to enjoy asylum* from persecution',[27] but this is not reflected in the Refugee Convention, its Protocol, or the ICCPR, even though being able to seek asylum is a prerequisite to accessing refugee protection. The contemporary concern about the right to seek asylum is that it is all too frequently frustrated by States attempting to stop asylum seekers from reaching their territory.[28] This is despite the fact, so eloquently observed by Goodwin-Gill, that there is an 'obligation on states not to frustrate the exercise of the right to seek asylum in such ways as to leave individuals at risk of persecution or other relevant harm'.[29] As countries in the Global North have honed practices of deterrence,[30] academics and practitioners have turned to the right to seek asylum to test the legality in international law of these measures.[31] This section examines the meaning and scope of that right.

[25] Fortin (n 14). [26] Gil-Bazo (n 4).

[27] UDHR, art 14(1) (emphasis added).

[28] Alice Edwards, 'Human Rights, Refugees, and the Right "To Enjoy" Asylum' (2005) 17 IJRL 293.

[29] Guy S Goodwin-Gill, 'The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement' (2011) 23 IJRL 443.

[30] See also Chapter 27 in this volume.

[31] Tom Clark, 'Human Rights and Expulsion: Giving Content to the Concept of Asylum' (1992) 4 IJRL 189.

a. What is the Right to Seek Asylum?

It is perhaps not surprising that the right to seek asylum appears in the foundational human rights declaration adopted after the Second World War, a conflict that created millions of refugees, many of whom were still living in temporary camps. While for these refugees, the right to leave was not of immediate concern (since they were seeking a durable solution to their displacement), that right, contained in article 13(2) of the UDHR, has become an important consideration for many refugees around the world. However, it is not directly related to the right to seek asylum. The negotiation process of article 14 (the right to seek asylum) was based on two drafts, one provided by the Secretariat to the drafting committee (with additions by the US delegation),[32] and one by the UK.[33] The right to seek asylum was included in the Secretariat's draft, but only in the form of a right exercisable by States to grant asylum to refugees (thus a State sovereigntist provision). However, as Gammeltoft-Hansen and Gammeltoft-Hansen explain, two religiously based non-governmental organizations[34] pressed for the recognition of a right for individuals facing persecution not only to flee, but also to be received in another country.[35] There was no unanimity in the working group charged with negotiating the provision that a reference to asylum should even be included in the UDHR, and this further entitlement did not materialize on account of concerns about State sovereignty. While the asylum provision changed shape substantially over the course of the drafting process, with many alternative wordings suggested, it did survive in the final document. Even so, there was rather acute criticism by some delegations.[36] Indeed, opposition to the inclusion of a right to seek asylum created odd bedfellows in the UN General Assembly when the UDHR was finalized. Notably, the USSR and South Africa found themselves arguing together against any legal implications of such a right.[37]

Key to the acceptance of the asylum provision was that it was not equivalent to a right *to* asylum. Such a right would have created legal obligations on States to provide asylum, a matter that was not acceptable to many of the more vocal States. The right to seek asylum was understood as a right to a *procedure* through which an individual would be able to claim asylum, and States in the General Assembly did not find this controversial.

[32] UN Economic and Social Council, 'First Addendum to Draft Outline of International Bill of Rights', UN doc E/CN.4/AC.1/3/Add.1 (2 June 1947).

[33] UN Economic and Social Council, 'Summary Record of the 4th Meeting, Held at Lake Success, New York, on Thursday, 12 June 1947', UN doc E/CN.4/AC.1/4 (5 June 1947). For a fuller discussion of the drafting process, see Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (University of Pennsylvania Press 1999).

[34] International Federation of Christian Trade Unions and the World Jewish Congress.

[35] Hans Gammeltoft-Hansen and Thomas Gammeltoft-Hansen, 'The Right to Seek—Revisited. On the UN Human Rights Declaration Article 14 and Access to Asylum Procedures in the EU' (2008) 10 EJML 439, 443.

[36] The drafting history is well covered in Goodwin-Gill and McAdam (n 12) 358–62. Gammeltoft-Hansen and Gammeltoft-Hansen (n 35) have provided a critique of the drafting history of the right to seek asylum from the perspective of contemporary practices.

[37] For a fuller discussion, see Morsink (n 33) 7–35.

Even though the right to seek asylum was not incorporated into the Refugee Convention, its procedural characteristics are inherent in the principle of *non-refoulement*. Article 33(1) of the Refugee Convention obliges States to determine whether an individual is a refugee because to remove someone to a country where he or she has a well-founded fear of being persecuted is prohibited, unless article 33(2) applies. Lauterpacht, in his analysis of the UDHR in 1948,[38] was firmly of the view that article 14(1) constituted a right of every State to offer refuge—an interpretation that harks back to a State sovereigntist interpretation of the provision.

Article 14 of the UDHR has three parts: the right to seek asylum, the right to enjoy asylum, and a carve-out that the right may not be invoked in the case of prosecutions arising from non-political crimes or from acts contrary to the purposes and principles of the UN. The right to enjoy asylum, as analysed by Edwards, includes not only refugee status in accordance with the Refugee Convention, but also all human rights in other UN treaties.[39] The third part of the provision is reflected in the article 1F exclusion clause of the Refugee Convention,[40] and reveals the legal perception from the period when it was drafted that the right of asylum is a right of States. This perspective is well developed by Morgenstern, writing in 1949 from a comparative law perspective.[41] Morgenstern's discussion of the issue commences in a very traditional manner, repeating the doxa that 'there is an undisputed rule of international law to the effect that every state has exclusive control over the individuals on its territory'.[42] Such territorial sovereignty is presented as encompassing the power of the State to grant asylum. As Morgenstern bluntly stated of the international law of the era: 'international law as currently interpreted does not confer rights on individuals'.[43] The right of asylum is thus a right of a State in relation to the State of origin of the individual. The other aspect of Morgenstern's approach is the embeddedness of argument in comparative law of a small number of States, mainly France, Germany, the United Kingdom, and the United States. There is no regard as such to other potential sources of international law.

By 1966, Grahl-Madsen had developed a second component to the right to seek asylum which included at least an element of individual rights.[44] This was a substantial departure from the State-centric approach of earlier authors. In the following year, the General Assembly adopted the Declaration on Territorial Asylum,[45] which recalled the right to seek and to enjoy asylum in the UDHR, and noted that it is the duty of all States to respect the grant of asylum by a State. However, the Declaration did not blossom into a convention. Instead, the efforts in 1977 at the UN Conference on Territorial Asylum,

[38] Hersh Lauterpacht, 'The Universal Declaration of Human Rights' (1948) 25 British Yearbook of International Law 354.

[39] Edwards (n 28) 329.

[40] See further Chapter 39 in this volume.

[41] Felice Morgenstern, 'The Right of Asylum' (1949) 26 British Yearbook of International Law 327.

[42] ibid 329.

[43] ibid 332.

[44] Atle Grahl-Madsen, *The Status of Refugees in International Law*, vol 1 (AW Sijthoff 1966).

[45] Declaration on Territorial Asylum, UN General Assembly Resolution 2312 (XXII) (14 December 1967).

where it was intended that a treaty would be adopted, went badly wrong.[46] The purpose of the proposed new convention was to add a limited dimension of rights for individuals seeking asylum, in that States would be required to use their best endeavours to grant asylum in their territory to anyone fulfilling the criteria set out therein. Clearly, this was a step too far for States at the time. No further proposal for a convention was ever put forward at the UN level.

In 1983, Goodwin-Gill's first edition of *The Refugee in International Law* appeared.[47] There, and in subsequent editions,[48] the drafting history of the right to seek asylum in the UDHR was carefully examined and Goodwin-Gill concluded that the signatory States did not intend article 14(1) to constitute a substantive right to asylum or otherwise to affect States' sovereign claims over border control. When it came to the drafting of the Refugee Convention, asylum was mentioned only in the preamble and the Final Act of the Conference of Plenipotentiaries in the context of the need for international cooperation (since 'the grant of asylum may place unduly heavy burdens on certain countries').[49] Important post-1977 efforts to achieve progress on the elements of a right to seek asylum included the 1993 Vienna Declaration on Human Rights and Programme of Action, which reaffirmed the right to seek and enjoy asylum,[50] and a 2000 resolution by the Sub-Commission on Human Rights which called for respect of the right to seek and enjoy asylum.[51] The Sub-Commission also expressed concerns about restrictive non-entrée policies that effectively shut out people in search of asylum.[52] This became a major theme of analysis of article 14(1) of the UDHR from the early 2000s onwards.

UNHCR's Executive Committee has also stressed the importance of the right to seek asylum and States' duty not to frustrate its realization,[53] but this has not stopped a proliferation of deterrence measures.[54] The key elements for the individual—entry, stay, *non-refoulement*, and protection from prosecution for crossing borders in search of protection—are bundled into the Refugee Convention, with State contestation revolving around the exact meaning of what duty they have to admit a person seeking asylum to

[46] See generally Atle Grahl-Madsen, *Territorial Asylum* (Almqvist & Wiksell 1980).

[47] Guy S Goodwin-Gill, *The Refugee in International Law* (OUP 1983).

[48] Guy S Goodwin-Gill, *The Refugee in International Law* (2nd edn, OUP 1996); Goodwin-Gill and McAdam (n 12).

[49] Refugee Convention, preamble; Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, recommendation D.

[50] Vienna Declaration and Programme of Action, UN World Conference on Human Rights, UN doc A/CONF.157/23 (12 July 1993) para 23, cited in Goodwin-Gill and McAdam (n 12) 365.

[51] Sub-Commission on Human Rights Resolution 2000/20, 'The Right to Seek and Enjoy Asylum' (18 August 2000), cited in Goodwin-Gill and McAdam (n 12) 365. As Goodwin-Gill and McAdam note, this was affirmed in subsequent resolutions and also emphasized by the Executive Committee of UNHCR.

[52] Sub-Commission on Human Rights Resolution 2000/20 (n 51) preamble, cited in Edwards (n 28) 329; see Chapter 27 in this volume.

[53] UNHCR ExCom Conclusion No 82 (XLVIII), 'Safeguarding Asylum' (1997).

[54] See also James C Hathaway, 'The Emerging Politics of *Non-Entrée*' (1992) 91 Refugees 40; see Chapter 27 in this volume.

their territory.[55] Where States recognize individuals as refugees, they generally grant them the right to remain, at the very least, as a by-product of the prohibition on *refoulement*.

b. The Right to Enjoy Asylum

A refugee's right to enjoy asylum is generally accepted as being codified in the Refugee Convention through the legal status set out there, supplemented by human rights law[56] (since some of the Convention rights are more limited). Specifically, the Refugee Convention sets out a series of rights on the basis of equality with either nationals of the State or aliens generally, including the right to freedom of religion, exemption from reciprocity, the right to property (including industrial), of association, of access to the courts, employment, self-employment, access to the liberal professions, rationing, housing, education, relief and social security, free movement within the State, identification papers, travel documents, fiscal charges, transfer of assets, and naturalization.[57] An example of a right that has subsequently been included in human rights conventions, but which is also important for refugees, is the right to health care.[58]

c. Identifying the Scope of the Right

The scope of article 14(1) of the UDHR is contested. It is a right that can be exercised against the State of origin, possibly in conjunction with article 12(2) of the ICCPR (the right to leave any country). So, for instance, an individual who seeks asylum in accordance with the UDHR could make the claim to an official of another State (in an embassy or consulate, for instance).[59] Whether or not an individual who comes within the scope of the provision will actually fulfil the conditions to be granted asylum, however, is another matter.

The right to seek asylum has primarily procedural implications.[60] States must have procedures through which an individual can exercise the right in order to give it effect. The procedures necessary to seek asylum, in addition to requiring States to make it possible for the individual to make a claim, must also respect the principles of the UDHR (such as the principle of non-discrimination in article 7). While the undertaking

[55] Violeta Moreno-Lax, 'Must EU Borders Have Doors for Refugees? On the Compatibility of Schengen Visas and Carriers' Sanctions with EU Member States' Obligations to Provide International Protection to Refugees' (2008) 10 EJML 315.

[56] Edwards (n 28) 300; James C Hathaway, *The Rights of Refugees under International Law* (CUP 2005).

[57] Refugee Convention, arts 4, 7, 13–24, 26–30, 34.

[58] See eg ICESCR, art 12(1).

[59] Gregor Noll, 'Seeking Asylum at Embassies: A Right to Entry under International Law' (2005) 17 IJRL 542; Kate Ogg, 'Protection Closer to Home? A Legal Case for Claiming Asylum at Embassies and Consulates' (2014) 33(4) RSQ 81.

[60] Gammeltoft-Hansen and Gammeltoft-Hansen (n 36) 443.

in article 10 of the UDHR to a fair and public hearing is desirable, it is expressed to apply to a 'determination of… rights and obligations' and is thus unlikely to apply to asylum procedures.

Edwards argues that the procedural requirements of the right to seek asylum must be interpreted in light of, and subject to, the rights contained in subsequent human rights conventions.[61] Proper procedures ought to include guidance on how to assess the pertinent risk of persecution or serious harm. However, States may not have any procedures, or may have unsuitable ones. While States are apparently left to their own devices regarding the procedures to be put into place, developments in international refugee and human rights law on asylum procedures are significant. Under the Refugee Convention, the procedural gap was addressed in part by the adoption of UNHCR's *Handbook on Procedures and Criteria for Determining Refugee Status*.[62] Under international human rights law, supranational courts and treaty bodies have developed procedural standards under their *non-refoulement* caselaw, which in effect must be applied by States in asylum cases.[63] The discretion of States is not, therefore, unfettered as regards the necessary procedures to give effect to the right to seek asylum.

d. The Changing Nature of the UDHR?

One practical weakness of the right to seek asylum lies in the UDHR's non-binding nature. However, as is now well-established, many of the rights in the UDHR are in fact binding, for example if they reflect general principles of law or customary international law. In fact, the reference to the UDHR as part of customary law has become a standard argument amongst scholars.[64] Some commentators even argue that the UDHR has now acquired customary status *en bloc*,[65] but they are in a clear minority. Others draw a distinction between different provisions of the UDHR, insisting that State practice confirms the existence of only some rights as customary law.[66] The latter view takes into account the significance of contrary State practice and seems to be more nuanced. Given

[61] Edwards (n 28) 301–2.

[62] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/1P/4/ENG/REV.4 (1979, reissued 2019).

[63] Helena Johanna Margo Baldinger, *Rigorous Scrutiny Versus Marginal Review. Standards on Judicial Scrutiny and Evidence in International and European Asylum Law* (Wolf Legal Publishers 2013); Dana Baldinger, *Vertical Judicial Dialogues in Asylum Cases—Standards on Judicial Scrutiny and Evidence in International and European Asylum Law* (Brill 2015).

[64] Jochen von Bernstorff, 'The Changing Fortunes of the Universal Declaration of Human Rights: Genesis and Symbolic Dimensions of the Turn to Rights in International Law' (2008) 19 European Journal of International Law 903, 913.

[65] See eg John P Humphrey, 'The Universal Declaration of Human Rights: Its History, Impact and Juridical Character' in Bertrand G Ramcharan (ed), *Human Rights: Thirty Years After the Universal Declaration* (Martinus Nijhoff 1979) 21, 37.

[66] See eg Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (Clarendon Press 1989) 96–7, 134; Hurst Hannum, 'The UDHR in National and International Law' (2014) 3 Health and Human Rights 144, 148–9.

widespread deterrence measures related to the right to seek asylum, it would be premature to consider that the right to seek asylum in the UDHR has become customary international law. However, since the process of generating custom is inherently dynamic, article 14 may yet become part of the corpus of customary law, even if it has not so far. This question warrants further research.

Perhaps there is a future for article 14(1) of the UDHR to assist States to transform their practices so as to give effect to a real right to seek asylum. Those Global North States whose executives have long resisted the legal effect of the UDHR, and article 14, in particular, may find that their judiciaries are more willing to listen to arguments regarding its force. This may particularly be the case where the judiciary is faced with egregious violence against asylum seekers for the sole purpose of preventing them from claiming their right to seek asylum.

5. The Right to Asylum in Regional Instruments

As noted above, the right to seek and enjoy asylum in the UDHR did not find its way into any UN treaty. However, this is not to say that there is no internationally recognized right to asylum. Indeed, this gap in the universal human rights system has been filled at the regional level by the American and African regional human rights treaties, as well as in Europe by the Charter of Fundamental Rights of the EU, all of which enshrine a right to asylum.[67] Furthermore, the right to asylum in the first two regional instruments goes beyond the mere right to seek asylum in the UDHR, and includes a right to 'obtain'[68] or 'be granted'[69] asylum. While this explicit wording appears in the American and African treaties, the wording of the right to asylum in the EU context is not explicit. However, research on the right to asylum in article 18 of the Charter of Fundamental Rights of the EU, and in particular on its negotiating history, shows that the legislator discussed and rejected an explicit formulation of the right to seek asylum, in favour of the broader right to asylum.[70]

Despite the existence of a right to be granted asylum in these regional instruments, judicial interpretation by the respective regional courts of this right is scarce. So far, the

[67] See American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 114 UNTS 123, art 22(7); African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) OAU doc CAB/LEG/67/3 rev. 5, art 12(3); Charter of Fundamental Rights of the EU [2016] OJ C 202/389, art 18.

[68] African Charter on Human and Peoples' Rights, art 12(3).

[69] American Convention on Human Rights, art 22(7).

[70] For an analysis of article 18 of the Charter of Fundamental Rights of the EU, see María-Teresa Gil-Bazo, 'The Charter of Fundamental Rights of the European Union and the Right to be Granted Asylum in the Union's Law' (2008) 27(3) RSQ 33; Koen Lenaerts, 'The Contribution of the European Court of Justice to the Area of Freedom, Security and Justice' (2010) 59 ICLQ 255, 289.

only human rights court that has pronounced on the scope of the right to asylum is the IACtHR in a Consultative Opinion adopted in 2018,[71] 40 years after the entry into force of the American Convention on Human Rights. The IACtHR was seized by Ecuador on the institution of asylum as a human right in 2016. The court held a hearing in August 2017 where States, international governmental organizations, non-governmental organizations, and academics were invited to present their views. The court issued its opinion in May 2018. Although some scepticism has been expressed on the actual value of the right to asylum, based on the fact that regional instruments and constitutions often refer to international treaties and domestic legislation, the court made it clear that State discretion in the development of domestic legislation and the interpretation of international instruments can never undermine the essential content of the right:

> [T]he Convention and the American Declaration…refer to domestic legislation and to international conventions in order to make tangible the way in which the right of asylum becomes operational…. *This shall not, in any event, affect the essential core of the law and of the obligations acquired in the context of international human rights treaties*.[72]

The court further recalled that the human right to asylum under the Inter-American system is to 'seek' and to 'receive' asylum and stressed that '[t]hese words cannot be separated, i.e. the configuration of the law incorporates both components and it is therefore not permissible to adopt positions that seek to disintegrate their normative strength'.[73] Accordingly, the court went on to detail the content of these obligations, which include: the right to apply for asylum, the prohibition of rejection at the border without an individualized analysis of the claim, the duty of the State to allow entry into the territory and to give access to refugee status determination and asylum procedures, and the prohibition on States to take any action that prevents individuals from seeking protection.[74]

The court then went on to outline what the right to receive asylum means, emphasizing the principle of family unity and the extraterritorial effects of refugee status determination. The court affirmed that 'the right to receive asylum means that the State must grant protection provided that the requirements and conditions for it to be provided are met',[75] and that this extends to the applicant's family members, in accordance with the principle of family unity.

The court's opinion is already being referred to by domestic courts in the region. The Constitutional Court of Ecuador referred to it in a judgment suspending the application

[71] *The Institution of Asylum and Its Recognition as a Human Right in the Inter-American System of Protection (Interpretation and Scope of Articles 5, 22.7 and 22.8 in relation to Article 1(1) of the American Convention on Human Rights)*, Advisory Opinion OC-25/18, Inter-American Court of Human Rights Series A No 25 (30 May 2018). All quotations from this Advisory Opinion are Gil-Bazo's own translation.

[72] ibid para 121 (emphasis added). [73] ibid para 120. [74] ibid para 122.

[75] ibid para 123.

of various government decrees that affected Venezuelan refugees' right to seek and to receive asylum, and whose compatibility with the Constitution is currently pending before the Constitutional Court.[76]

In the African system, the ACtHPR has not yet pronounced on the right to asylum in article 12(3) of the African Charter on Human and Peoples Rights, although it has some case law on the protection of non-nationals. The African Commission on Human and Peoples' Rights (AComHPR), however, has already outlined some of the content of the right to asylum. In a case against Rwanda involving the expulsion of long-settled Burundian refugees, who were given a month to leave the country and were not allowed to bring their case before a competent judicial authority, the Commission found that article 12

> should be read as including a general protection of all those who are subject to persecution, that they may seek refuge in another state. Article 12.4 prohibits the arbitrary expulsion of such persons from the country of asylum. The Burundian refugees in this situation were expelled in violation of Article … 12 of the African Charter.[77]

Most interestingly, the AComHPR has also found a violation of the Charter when a State persecutes one of its citizens forcing them to flee and seek refuge elsewhere. In a case against Kenya, the Commission found that 'the persecution of the Complainant and his subsequent flight to the Democratic Republic of the Congo to have greatly jeopardised his chances of enjoying his' Charter-based rights.[78] This position has been recently confirmed:

> As Sudanese nationals, the Commission considers that [the applicants] have a right of return to their country…, the Commission considers that their apprehension of a well-founded fear of persecution by the authorities should they return, is a violation of [the right to return to their country under] Article 12 (2) of the Charter.[79]

In Europe, the Court of Justice of the EU (CJEU) has not yet pronounced on the content of the right to asylum in article 18 of the Charter of Fundamental Rights of the EU, despite having been asked explicitly in the cases of *NS*[80] and *Halaf*.[81] However, in his

[76] Caso No 0014-19-IN (judgment of 19 March 2019) para 28.

[77] *Organisation mondiale contre la torture, Association Internationale des juristes démocrates, Commission internationale des juristes, Union interafricaine des droits de l'Homme v Rwanda*, African Commission on Human and Peoples' Rights, Comm Nos 27/89, 46/91, 49/91, 99/93 (October 1996) para 31.

[78] *John D Ouko /Kenya*, Case No 232/99, (6 November 2000) para 30 <http://www.achpr.org/files/sessions/28th/comunications/232.99/achpr28_232_99_eng.pdf> accessed 15 May 2020.

[79] *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v Sudan*, Comm No 379/09 (10 March 2015) para 126 <https://www.fidh.org/IMG/pdf/achpr14eos_decis_379_09_sudan_eng.pdf> accessed 12 October 2020.

[80] Joined Cases C-411/10 and C-493/10 *NS v Secretary of State for the Home Department* and *ME and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* [2011] ECR I-13905.

[81] Case C-528/11 *Halaf v Darzhavna agentsia za bezhantsite pri Ministerski savet* [2012] OJ C 133, para 42.

opinion in *Elgafaji*, Advocate General Maduro construed asylum in the EU not only as emanating from the Charter, but also being a binding general principle of EU Law, resulting from the constitutional traditions of its Member States: '[The] fundamental right to asylum . . . follows from the general principles of Community law which, themselves, are the result of constitutional traditions common to the Member States.'[82]

In addition to regional treaties, the right to asylum is enshrined in constitutions worldwide, speaking to the nature of asylum as a foundational principle of the State itself. An overview of constitutions around the world shows that the right to asylum is enshrined in constitutions of countries across continents and legal traditions, with the exception of the UK and States whose legal systems have a shared history with the UK. The constitutions of Angola, Bénin, Bolivia, Bulgaria, Burundi, Brazil, Cape Verde, Chad, China, Colombia, Costa Rica, Cuba, Democratic Republic of Congo, the Dominican Republic, Ecuador, Egypt, El Salvador, France, Germany, Guatemala, Guinea-Conakry, Honduras, Hungary, Italy, Ivory Coast, Mali, Mozambique, Nicaragua, Paraguay, Peru, Portugal, Spain, and Venezuela, to name a few, all recognize the right to asylum. They all draw from the liberal-democratic tradition that emerged from the French Revolution changing the conception of the State and the relationship between individuals and the State. The wording of such constitutions reflects this tradition of protection. The broad range of beneficiaries of asylum reflects the historical tradition of the institution that offers protection on a variety of grounds, including, but not only, those that give rise to refugee status, in addition to protecting persons who flee persecution on account of their fight for freedom (including national liberation), for democracy, or for the rights of others.[83]

Constitutional courts have therefore pronounced on the scope of the right to asylum by reference to regional instruments. In Europe, the Sofia City Administrative Court in Bulgaria asked the CJEU to interpret the content of the right to asylum in the case of *Halaf*, already mentioned. Following the judgment of the CJEU, the Sofia Court ruled in the national proceedings that

> the right to asylum guaranteed under article 18 of the Charter [of Fundamental Rights of the EU] and the Treaty on the Functioning of the European Union (TFEU) includes the right of every third-country national that the Member State where he has applied for asylum fulfil *its obligation* of achieving the purpose in article 78(1) TFEU '*to offer appropriate status* to any third-country national in need of international protection'.[84]

[82] Advocate General Maduro's Opinion in case C-465/07 *Elgafaji and Elgafaji v Staatssecretaris van Justitie* [2009] ECR I-921, para 21. For an analysis of the constitutional foundations of asylum as a general principle of EU Law, Gil-Bazo (n 70) 46–8.

[83] For an analysis of the constitutional nature of asylum, see Gil-Bazo (n 4). For an overview of asylum in constitutions in Africa and Latin America, see María-Teresa Gil-Bazo and Maria-Beatriz Nogueira, 'Asylum in the Practice of Latin American and African States', UNHCR New Issues in Refugee Research, Research Paper 249 (2013).

[84] *Zuheyr Freyeh Halaf v Darzhavna agentsia za bezhantsite pri Ministerski savet*, Sofia City Administrative Court, Judgment No 297 (15 January 2014) para 21 (emphasis added). The authors are indebted to Valeria Ilareva for her translation of the judgment.

Likewise, the right to seek asylum in the African system has nevertheless been subject to examination by domestic courts in the region, referring to the specific regional instruments on refugee protection. In a landmark decision of December 2018, the South African Constitutional Court referred to article 12(3) of the African Charter, noting its particular pertinence to South Africa,[85] and found that 'South Africa's obligation is to ensure that refugees are afforded an opportunity to apply' for asylum.[86] The court went on to explain that the right to seek asylum and access to a proper determination procedure are constitutional imperatives derived from the principle of *non-refoulement*.[87] Likewise, any delays in applying for asylum can never result in 'an absolute disqualification from initiating the asylum application process'.[88]

6. Conclusion

This chapter examined the relationship between refugee status and asylum, noting that they are separate but related institutions. After identifying the nature of asylum as a right of States in the exercise of their sovereignty, as well as a right of individuals to receive it, the chapter considered the emergence of the concept of 'international protection' as a substitute term for asylum both in law and policy. The chapter then explored the right to asylum in the international system for the protection of human rights at the UN level, noting the limited scope of the right to seek and to enjoy asylum in the UDHR. The chapter further examined judicial interpretation of the right to asylum in international treaties of regional scope, showing that case law is scarce. Although the case law of constitutional courts on the right of asylum may compensate for the lack of detailed developments at the regional level, further research on State practice, and its significance to delimit a right to asylum in international law, remains an under-researched area.

[85] *Ruta v Minister of Home Affairs* [2018] ZACC 52, para 32.
[86] ibid para 52.
[87] ibid para 54.
[88] ibid para 56.

CHAPTER 49

NATIONAL CONSTITUTIONS AND THE RIGHT TO ASYLUM

STEPHEN MEILI

1. Introduction

Until recently, the constitutional right to asylum was a rather neglected backwater of international refugee law. Although the constitutions of 35 per cent of the world's countries, including some of the largest refugee-receiving nations, contain a right to asylum, those provisions have received scant attention from scholars, judges, or lawyers. This is due to a variety of factors, including the Refugee Convention's domination of the refugee law regime, the weakness of the judiciary in many of the countries whose constitutions contain a right to asylum, and the non-humanitarian motivations for inclusion of that right in many constitutions.

More recently, however, a combination of factors has breathed new life into the constitutional right to asylum in some countries. These factors include the limitations of the Refugee Convention, the rise in nationalism and anti-globalization, and the growing influence of refugee lawyers who are utilizing the constitutional right to asylum—together with other constitutionalized human rights—in domestic courts, particularly in Latin America. The constitutional right to asylum is surely not a panacea for the world's growing refugee problems, but it is an increasingly important part of the toolkit for creative lawyers trying to alleviate them.

This chapter analyses the constitutional right to asylum from a historical, doctrinal, and practical perspective. Section 2 discusses the evolution of that right, and how it has manifested itself in different countries and regions of the world over time. Section 3 discusses why the constitutional right to asylum has been neglected and ineffectual for most of the past several decades. Section 4 analyses recent strategic litigation in Latin

America that has successfully utilized the constitutional right to asylum and may provide a blueprint for the effective use of such provisions in other countries. The conclusion includes recommendations for lawyers or other advocates considering strategic litigation that utilizes the constitutional right to asylum.

2. The Evolution of a Constitutional Right to Asylum

In 1950, only 19 per cent of the world's constitutions contained a right to asylum.[1] In most of these cases, the right had been created in the immediate aftermath of the Second World War and was thus influenced by two geopolitical factors: in some cases, such as France and Italy, it was included as a sign of the gratitude that those countries felt towards other States that had accepted French and Italian refugees before and during the Second World War.[2] And in Soviet Bloc countries such as Poland, the right to asylum was conditioned on shared ideologies.[3] As Kowalczyk and Versteeg note, political and economic self-interest, as opposed to humanitarian concern, drove many States to include a right to asylum in their constitution.[4] These self-interested motivations included condemning foreign States, encouraging opposition groups in foreign States, attracting a younger workforce, and announcing good intentions with little or no interest in actually following through.[5]

By 2017, the percentage of countries with constitutions containing a right to asylum had risen to 35, with the greatest increase occurring during the 1990s.[6] By this time, the

[1] Lucas Kowalczyk and Mila Versteeg, 'The Political Economy of the Constitutional Right to Asylum' (2017) 102(5) Cornell Law Review 1219, 1260–1.

[2] See Hélène Lambert, Francesco Messineo, and Paul Tiedemann, 'Comparative Perspectives of Constitutional Asylum in France, Italy, and Germany: Requiescat in Pace?' (2008) 27(3) RSQ 16, 17, 18, 21–2.

[3] Kowalczyk and Versteeg (n 1) 1226, 1269. One example of such an ideologically framed constitutional right to asylum is contained in the 1952 version of the Polish Constitution: 'The Polish People's Republic grants asylum to citizens of foreign countries persecuted for defending the interests of the working people, for fighting for social progress, for activity in defence of peace, for fighting for national liberation or for scientific activity', The Constitution of the Republic of Poland (*Konstytucj Rzeczyposplitej Polskiej*) (2 April 1997) article 75. Another example is the right to asylum in the Constitution of the Islamic Republic of Iran (1989), which states, in article 155, that 'The Islamic Republic of Iran shall offer sanctuary to all those asking for political asylum, excepting those who are known, in accordance with the laws of Iran, to be traitors and criminals'. Kowalczyk and Versteeg also note the trend, since the Cold War era, away from limiting the right to asylum to persons whose ideologies were consistent with the host country. Kowalczyk and Versteeg (n 1) 1269–73.

[4] Kowalczyk and Versteeg (n 1) 1250–7. [5] ibid.

[6] Kowalczyk and Versteeg (n 1) 1260. In their survey of the right to asylum in various national constitutions, Foster and Klaaren identify four ways in which such a right is articulated: (1) a substantive right conferred upon the individual; (2) a right conditioned on subsequent domestic legislation; (3) a negative right (ie *not* to be deported); and (4) a right belonging to the State to be conferred at its discretion. Michelle Foster and Jonathan Klaaren, 'Asylum and Refugees' in Mark Tushnet, Thomas Fleiner, and Cheryl Saunders (eds), *Routledge Handbook on Constitutional Law* (Routledge 2012) 416–17.

nature of the constitutional right to asylum came to reflect the emphasis on human rights that had taken hold in many parts of the world in the intervening decades. As Kowalczyk and Versteeg observe, most of these constitutional provisions (as well as updated provisions that were initially included in constitutions after the Second World War) frame asylum as a human right, rather than limiting it to those persons who can demonstrate a well-founded fear of persecution on account of one or more of the five grounds enumerated in the Refugee Convention.[7] Thus, under most of the constitutions within which the right to asylum appears, it is theoretically available to those non-citizens whose human rights have been violated by their countries of origin. In this way, the constitutionalized right to asylum mirrors what has come to be known as the human rights approach to asylum law, which links asylum to the denial of human rights protections by one's home country or territory.[8] Indeed, this broad view of the notion of asylum (ie broader than the definition of a refugee under the Refugee Convention), is what Gil-Bazo envisions in asserting that asylum is a general principle of international law.[9]

3. The Potential and the Limitations of a Constitutional Right to Asylum

While international refugee law sets out the parameters for refugee status, it does not compel individual States to grant asylum to anyone. Such a grant, and the permanent immigration status it confers, is purely a matter of domestic law applied by sovereign States. In most cases, that domestic law is a statute that, at a minimum, incorporates the definition of a refugee under the Refugee Convention and the principle of *non-refoulement*.[10] In this way, domestic law transforms international refugee law into a pathway to permanent protection.

[7] See Refugee Convention; Kowalczyk and Versteeg also note the trend, since the Cold War era, away from limiting the right to asylum to persons whose ideologies were consistent with the host country. Kowalczyk and Versteeg (n 1) 1269–73.

[8] See James C Hathaway and Michelle Foster, *The Law of Refugee Status* (2nd edn, CUP 2014) 194. See also Deborah Anker, 'Refugee Law, Gender, and the Human Rights Paradigm' (2002) 15 Harvard Human Rights Journal 133, 143 (finding that the human rights approach assists both the refugee law and human rights law regimes). The human rights approach manifests itself most prominently through domestic court interpretation of undefined terms in the Refugee Convention, such as 'being persecuted'. To proponents of this approach, it is appropriate—and logical—to rely on human rights treaties because these treaties reflect a global consensus about the scope of persecutory harms. See Hathaway and Foster 194.

[9] María-Teresa Gil-Bazo, 'Asylum as a General Principle of International Law' (2015) 27 IJRL 3.

[10] *Non-refoulement* prohibits a country from returning a non-citizen to a territory where she is likely to face torture or cruel, inhuman, or degrading treatment or punishment. See Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, OUP 2007); James C Hathaway, *The Rights of Refugees under International Law* (CUP 2005).

For the most part, however, those domestic statutes do not create a right to either apply for or receive asylum; they merely set forth an administrative procedure through which someone fleeing persecution or other harm can apply for protection. And, of course, such statutes can be amended to make the process of applying for asylum more logistically difficult and the standards for granting asylum more restrictive.[11]

Constitutions, and the rights they afford, are more durable than statutes. While they are certainly not set in stone, their provisions are generally more impervious to regime changes and political whims than statutes. As Kowalczyk and Versteeg have stated, 'where a right to asylum is constitutionalized, [S]tates effectively restrict their ability to make their response to refugees dependent on prevailing political sentiments'.[12] And, as noted above, Gil-Bazo argues that the right to asylum enshrined in national constitutions is broader than refugee status under the Refugee Convention (and other international instruments) thus affording broader protection to those fleeing persecution and other forms of harm in their States of origin.[13]

Constitutionalized asylum law also often has the benefit of being linked to regional human rights instruments whose grounds for protection are more extensive than those of the Refugee Convention. Thus, for example, the constitutions of many Latin American States incorporate the Cartagena Declaration, which broadens the Refugee Convention's definition of a refugee to include:

> persons who have fled their country because their lives, safety, or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have severely disturbed public order.[14]

Similarly, the national constitutions of many African States incorporate the OAU Convention to include:

> every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.[15]

[11] In the face of the current crisis facing asylum seekers at the US–Mexico border, and in the interior of the US, President Trump has indicated that the problem could be eradicated quickly if Democrats in Congress would simply change the nation's immigration laws. Tim Mak, 'Trump Delays Immigration Raids, Giving Democrats "Two Weeks" to Change Asylum Laws', *NPR* (22 June 2019) <https://www.npr.org/2019/06/22/735083190/trump-delays-immigration-raids-giving-democrats-two-weeks-to-reform-asylum-laws?t=1,562,163,148,237> accessed 4 December 2019.

[12] Kowalczyk and Versteeg (n 1) 1248.

[13] See Gil-Bazo (n 9).

[14] Cartagena Declaration, conclusion III. See also See María-Teresa Gil-Bazo, 'Asylum in the Practice of Latin American and African States' UNHCR New Issues in Refugee Research, Working Paper No 249 (2013).

[15] OAU Convention, art 1(2).

As a result of these now-constitutionalized refugee definitions, individuals fleeing armed conflict, or the ravages of climate change are arguably entitled to asylum in many countries in Africa and Latin America. As with many constitutionalized human rights provisions, of course, the reality is much more limited than the words on constitutional parchment would suggest. Thus, very few countries have granted asylum based on these expanded definitions of a refugee. Nevertheless, recent evidence suggests that Mexico has granted asylum to a small number of individuals (ie just over 100) according to the Cartagena Declaration's expanded refugee definition. Most of these individuals are from Venezuela.[16]

The durability and breadth of a right to asylum in a national constitution is particularly important in today's geopolitical climate of nationalism, xenophobia, and anti-globalization, which has led to significant limitations on the rights of asylum seekers. At a time when many States scorn international constraints on their behaviour and question their obligation to protect refugees, constitutionalized asylum law would seem to be particularly vulnerable.[17] Ignoring—or altering—the rights of asylum seekers embedded in a national constitution presents more of a challenge, particularly in a country with a strong, independent judiciary.[18]

In addition, the constitutional right to asylum has the potential to assume a more meaningful role because of the increasingly apparent limitations of the Refugee Convention, which has for decades been the main source of protection for the world's refugees. These failings include—but are certainly not limited to—desperately underfunded humanitarian assistance programmes, nearly universal disregard for the socio-economic rights of refugees protected under international law, and inadequate and inconsistent refugee determination processes in various countries.[19] As a result, the world's refugees lack most of the legal, social, and economic guarantees to which they are entitled under international law.

Despite this potential, the constitutional right to asylum suffers from significant limitations. For example, Kowalczyk and Versteeg observe that constitutions can be

[16] Felipe Sánchez Nájera and Luisa Feline Freier, 'Expanded Refugee Protection for Some: Understanding the Application Patterns of the Cartagena Refugee Definition to Asylum Seekers in Mexico' (Fourth Annual Conference of the Refugee Law Initiative, University of London School of Advance Studies, 3 June 2019).

[17] Refugees have traditionally been amongst the most politically marginalized and powerless groups in any society. See Alison Brysk, *The Future of Human Rights* (Polity 2018) 10–11.

[18] An independent judiciary is consistently cited as one of the factors associated with improved human rights behaviour by States. See eg Wayne Sandholtz, 'Treaties, Constitutions and Courts: The Critical Combination' in Alison Brysk (ed), *The Politics of the Globalization of Law* (Routledge 2013) 29–46.

[19] Alexander Betts and Paul Collier, *Refuge: Transforming a Broken Refugee System* (OUP 2017) 7–8. The authors note that contrary to popular belief, most refugees around the world live in urban areas rather than in camps, in the Middle East and sub-Saharan Africa rather than in Europe, and are often left unsupported by their host countries. Under the Refugee Convention, refugees are entitled to the right to health care, education, employment, and other socio-economic benefits, but these often go unfulfilled. See also James L Carlin, 'Significant Refugee Crises Since World War II and the Response of the International Community' (1982) Michigan Yearbook of International Legal Studies 3, 3–5.

amended and that judges can defer to executive will.[20] Lambert, Messineo, and Tiedemann argue that because countries such as France, Germany and Italy have chosen to adjudicate asylum claims almost exclusively according to the Refugee Convention, constitutional asylum in those countries has become virtually meaningless.[21] In a similar vein, Gil-Bazo notes that because many countries have blurred the distinction between refugee status and asylum, constitutional asylum has come to be viewed as obsolete.[22]

In addition, most States include an 'escape clause' in their constitutionalized right to asylum, indicating that such a right will be interpreted according to national law.[23] Given that such laws can be more restrictive than the protections afforded by the Refugee Convention, a constitutional right to asylum may be of little use in these contexts.[24] Moreover, in some situations constitutional asylum is based on the same (limited) criteria as in the Refugee Convention.[25]

A constitutional right to asylum in some national contexts also suffers from the same source of ineffectiveness as other constitutionalized human rights: it is mere window dressing rather than a meaningful attempt to improve human rights outcomes for marginalized groups. States have many motivations for taking on human rights obligations that they have little intention of fulfilling. Much scholarly research has focused on the effectiveness (and lack thereof) of constitutionalized human rights law in particular.[26] The results of this research—much of it large-N analyses of statistically

[20] Kowalczyk and Versteeg (n 1) 1249–50.

[21] Lambert, Messineo, and Tiedemann (n 2) 16–17.

[22] Gil-Bazo (n 9) 4.

[23] My thanks to my University of Minnesota colleague Chris Roberts for this term. For example, the Constitution of Portugal states, in relevant part: 'The status of political refugees shall be defined by law.' Constitution of the Portuguese Republic (1976) article 22. Similarly, the Constitution of Poland states, in relevant part, 'Foreigners shall have a right of asylum in the Republic of Poland in accordance with principles specified by statute'. *Konstytucj Rzeczyposplitej Polskiej* (n 3) art 56.

[24] On the other hand, in some States, including Mexico, any 'escape clause' that is inconsistent with Mexico's obligations under international human rights law would be nullified. This is because article 1 of the Mexican Constitution stipulates that any limitation on the human rights included in the Constitution (such as the right to asylum) must originate in the Constitution itself: 'In the United Mexican States, all individuals shall be entitled to the human rights granted by this Constitution and the international treaties signed by the Mexican State, as well as to the guarantees for the protection of these rights. Such human rights shall not be restricted or suspended, except for the cases and under the conditions established by this Constitution itself.' Political Constitution of the United Mexican States (2015) (Mexican Constitution) art 1.

[25] For example, Hungary's Constitution of 2011 (Magyarország Alaptörvénye) art 65 states:

> Hungary shall grant asylum to all non-Hungarian citizens as requested if they are being persecuted or have a well-founded fear of persecution in their native countries or in the countries of their usual residence due to their racial or national identities, affiliation to a particular social group, or to their religious or political persuasions, unless they receive protection from their countries of origin or any other country.

[26] For a general discussion of this literature, see Stephen Meili, 'The Effectiveness of an Emerging Pathway of Rights: The Constitutionalization of Human Rights Law' in Alison Brysk and Michael Stohl (eds), *Contesting Human Rights: Norms, Institutions and Practice* (Edward Elgar 2019).

significant relationships between treaty ratification and State behaviour according to various benchmarks—is mixed.[27] Nevertheless, there are no quantitative studies of the relationship between the constitutionalized right to asylum and improved protections for asylum seekers and refugees.[28] Thus, we have no idea whether a constitutional right to asylum in a particular country of refuge makes it any more or less likely that a given asylum seeker will be granted asylum. Similarly, we do not know whether a constitutionalized right to asylum makes a particular country's asylum adjudication system more or less favourably disposed towards asylum seekers.

As the following section makes clear, however, there are signs that a constitutional right to asylum—especially when invoked in combination with other constitutionalized human rights law—has begun to have a positive impact on the rights of refugees, at least in Latin America.

4. The Constitutional Right to Asylum in Latin America

The constitutional right to asylum has been most aggressively utilized by practitioners in Latin America. For one, it is the region with the thickest concentration of such a right: with the exception of Chile, Panama, and Uruguay, the national constitutions in all countries in South America contain a right to asylum. This nearly universal adoption of the constitutional right to asylum in the region was likely due to the many exiles who sought asylum and other forms of protection from authoritarian regimes in the latter stages of the twentieth century. Indeed, democratic regimes in the region, seeking to distance themselves from their authoritarian past and hold State actors accountable, have incorporated entire human rights treaties, as well as specific human rights protec-

[27] One such study found a statistically significant association between the constitutionalization of two organizational rights (the rights to form political parties and unions) and improved human rights behaviour by States, but no such association with four individual rights (the rights to freedom of expression, association, religion, and movement). See Adam Chilton and Mila Versteeg, 'Do Constitutional Rights Make A Difference?' (2014) 60 American Journal of Political Science 575. One treaty protection that has been consistently shown *not* to be associated with improved State behaviour is the prohibition against torture, Meili (n 26) 129, 132–3.

[28] Kowalczyk and Versteeg (n 1) 1284 acknowledge this explicitly ('Although we do not provide an answer to the question whether the right to asylum is effective, the apparently self-serving motivations for including asylum rights are not necessarily detrimental for asylum seekers nor do they necessarily undermine the right'). See Stephen Meili, 'Constitutionalized Human Rights Law in Mexico—Hope for Central American Refugees' (2019) 32 Harvard Human Rights Law Journal 103.

tions such as the right to asylum, into their constitutions.[29] Another factor likely underlying the constitutionalization of human rights law in Latin America is the realization that domestic court judges in the region more frequently rely on international human rights law when it is incorporated into domestic law and particularly when it is incorporated into a nation's constitution.[30]

Despite its prevalence on paper, the constitutional right to asylum had been virtually dormant throughout Latin America until very recently. Within the past few years, however, restrictive State responses to refugee migration in Ecuador and Mexico have led lawyers in each of those countries to utilize the constitutional right to asylum—in conjunction with other constitutionalized human rights law—as part of strategic litigation on behalf of refugees. This section of the chapter reviews some of the key elements of that litigation and what it suggests about the circumstances under which such a right may become more significant in other parts of the world.

a. Ecuador

Article 41 of Ecuador's 2008 Constitution recognizes the right to asylum as well as the principle of *non-refoulement*. Moreover, its 'escape clause' stipulates that asylum be recognized 'in accordance with the law' but importantly adds to this, '*and international human rights instruments*'.[31] The latter part of that clause indicates that the broadened grounds for asylum contained in the Cartagena Declaration are now part of the Constitution.

[29] Daniel M Brinks and Abby Blass, *The DNA of Constitutional Justice in Latin America* (CUP 2018) 12 ('Latin America is one of the areas with the most active constitutional experimentation in the world'). This process of constitutionalizing human rights law is a subpart of a larger trend known as Transformational Constitutionalism (*Ius Constitutionale Commune en América Latina*) whose purposes include the diffusion of human rights standards in post-authoritarian Latin America. See Manuel Eduardo Góngora-Mera, 'The Block of Constitutionality as the Doctrinal Pivot of a Ius Commune' in Armin Von Bogandy, Eduardo Ferrer Mac-Gregor, Mariela Morales Antoniazzi, Flávia Piovesan, and Ximena Soley (eds), *Transformative Constitutionalism in Latin America* (OUP 2017) 235–6. There are many critics of this trend, including Roberto Gargarella, who has observed that its results have been disappointing because the constitutional reformers focused more on the creation of new rights rather than on the organization of power within society, which has made those rights virtually meaningless. Roberto Gargarella, 'Latin American Constitutionalism, 1810–2010: The Problem of the "Engine Room" of the Constitution' in Pedro Fortes, Larissa Boratti, Andrés Palacois, and Tom Gerald Daly (eds), *Law and Policy in Latin America: Transforming Courts, Institutions and Rights* (Palgrave Macmillan 2017) 213–16. In his view, such preferencing of rights over power has kept what he calls the 'engine room' of constitutions closed off, leaving the inequitable balance of power in the region unchanged. For a more in-depth analysis of the literature on the constitutionalization of human rights law in Latin America, see Meili (n 28).

[30] See Niels Goet and Ezequiel Gonzalez-Ocanto, 'International Law and Domestic Judicial Power: Strategic Citation in the Jurisprudence of Colombia's Constitutional Court' (Latin American Studies Association Annual Meeting, Barcelona, May 2018) 35–6. This preference for domesticized human rights law is not limited to Latin America. See eg Stephen Meili, 'Do Human Rights Treaties Help Asylum Seekers? Lessons from the United Kingdom' (2015) 48 Vanderbilt Journal of Transnational Law 123.

[31] Constitution of the Republic of Ecuador (2008) art 41, emphasis added.

This, and other constitutionalized human rights provisions, were utilized in recent litigation challenging a Presidential decree that severely limited the rights of asylum seekers in Ecuador, most of whom have been fleeing the armed conflict in neighbouring Colombia for the past few decades. That decree (No. 1182), issued in 2012 without legislative debate, reduced the time limit for applying for asylum in Ecuador from 90 days after arrival in the country to 15 days and reduced the time to appeal a rejected asylum claim from 15 days to three days.[32] It also narrowed the definition of 'refugee' under Ecuadoran law to exclude those fleeing generalized violence, such as the armed conflict in Colombia, thus effectively rescinding Ecuador's accession to the Cartagena Declaration.[33]

Pro bono lawyers at an NGO and a law school clinic challenged Decree 1182 in Ecuador's Constitutional Court. In a decision issued in August 2014, the court struck down most of the decree, reinstating the pre-existing deadlines as well as the broader scope of refugee status as stipulated under the Cartagena Declaration. The court's decision was based, in part, on its finding that returning refugees to a situation of armed conflict was an unconstitutional violation of the principle of *non-refoulement*, given that the Cartagena Declaration is incorporated into the Ecuadoran Constitution. The decision was also based on the principles of equality, due process, and non-discrimination, all of which are enshrined in the Ecuadoran Constitution. Thus, for example, the court reasoned that the shortened time limits created 'an unjustified difference' between deadlines relevant to asylum applications and those applicable to other administrative procedures under Ecuadoran law.[34]

The strategic litigation over Decree 1182, like the cases from Mexico reviewed below, demonstrates that the constitutionalized right to asylum has the most impact when it is combined with other constitutionalized human rights law. In this case, lawyers achieved a positive rights outcome by invoking specific constitutionalized human rights norms, such as due process, non-discrimination and *non-refoulement*, and by referencing specific human rights instruments, such as the ICCPR, the American Convention on Human Rights (ACHR)[35] and the Cartagena Declaration, which are incorporated into the Ecuadoran Constitution. Without the constitutional provisions that allowed for these human rights-based arguments, Decree 1182 would most likely still be in effect. But the constitutional right to asylum would not have been able to achieve that victory on its own.

[32] Stephen Meili, 'The Human Rights of Non-Citizens: Constitutionalized Treaty Law in Ecuador' (2017) 31 Georgetown Immigration Law Journal 347.

[33] ibid 371; Decree 1182 of 30 May 2012 (Ecuador) had its desired effect: both the number of asylum applications and the asylum grant rate dropped precipitously. In 2009, slightly over 34,300 asylum applications were filed, and the grant rate was 71.8 per cent. Between January and September 2013 (the year after Decree 1182 was issued) only 8,300 applications were filed, and the grant rate fell to 6.2 per cent.

[34] Sentencia N 002-14-Sin-CC, Case No 0056-12-IN y 0003-12-IA 14 August 2014, 49.

[35] American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (ACHR).

b. Mexico

As a prefatory note, strategic litigation is more challenging in Mexico than Ecuador for at least two reasons. First, Mexico does not have a Constitutional Court that, like the one in Ecuador, allows for original jurisdiction over legal challenges to State action on constitutional grounds. Secondly, Mexico's rules on judicial precedent are complex and restrictive. The only way a lower court case can become precedent is if (1) five appellate tribunals (the level between trial courts and the Supreme Court) have reached the same result in similar cases; or (2) a split in decisions between at least two appellate tribunals gives the Supreme Court the option to decide the case.[36] In addition, Mexican law does not allow class actions in the area of refugee law, which means that an individual refugee would need to endure the long delays and expense of protracted litigation in order for her case to establish precedent.

i. *Challenge to the 30-day Deadline for Filing Asylum Claims*

Under Mexico's refugee law, an asylum seeker must file her application for asylum within 30 days of entering the country.[37] This is an unreasonably brief application period. In addition to many of the typical hurdles obstructing asylum seekers in any country from lodging a claim soon after arriving in the country of refuge,[38] those seeking asylum in Mexico face the additional obstacle of the paucity of locations where they can actually file a claim. Comisión Mexicana de Ayuda a Refugiados (COMAR), the agency responsible for receiving and processing applications, has only four offices in the entire country, none of which are located near the southern border with Guatemala.[39]

Lawyers at a Mexico City-based NGO and university law clinic filed an *amparo* challenging the 30-day deadline.[40] In a decision issued in January 2019, an administrative court ruled that the deadline violates article 11 of the Mexican Constitution, which guarantees the right to asylum. In reaching this conclusion, the court held that

[36] See Ley de Amparo (Protection Act) (1967) (Mexico); Meili (n 26).

[37] See Ley Sobre Refugiados y Protección Complementaria Mexico, Diario Oficial de la Federación, 27-01-2011, últimas reformas DOF 30-10-2014, article 18 (Law on Refugee and Complementary Protections) <http://www.ordenjuridico.gob.mx/Documentos/Federal/pdf/wo57819.pdf> accessed 5 December 2019. The Refugee Convention contains no time limit within which an asylum seeker must file an application for asylum.

[38] These factors include lack of access to counsel, confusion about the asylum process in a new country, and psychological factors such as PTSD, which make it difficult for asylum seekers to recount the traumatic experiences that led them to flee their country of origin.

[39] Ana Campoy, 'The Key Reason Why Central Americans Don't Want Asylum in Mexico', *Quartz* (28 November 2018) <https://qz.com/1476490/why-central-americans-arent-applying-for-asylum-in-mexico/> accessed 4 December 2019.

[40] An *amparo* is a legal challenge to governmental action that allegedly has violated one or more constitutional rights of the aggrieved party. It is similar to a common law request for an injunction. See Rodrigo Camarena González, 'From *Jurisprudence Constante* to *Stare Decisis*: The Migration of the Doctrine of Precedent to Civil Law Constitutionalism' (2016) 7 Transnational Legal Theory 257.

the 30-day deadline unjustifiably and unreasonably limits this right, and has no support or constitutional foundation.[41] While the court noted that article 11 recognizes that domestic law shall regulate the conditions upon which asylum may be recognized in individual cases (ie Mexico's version of an 'escape clause'), such recognition must be in accordance with international law.[42] Since international law holds that an individual becomes a refugee at the time that she meets the definition of a refugee, rather than at the time that any particular country recognizes her as a refugee, any deadline for filing an application for asylum (and by extension refugee status) contravenes international law.[43]

The court also held that the 30-day deadline violates the principle of *non-refoulement*, which is embodied in article 11 of the Constitution. Here, the court reasoned that by denying an asylum application merely on the basis of failing to meet the application deadline, the policy risks returning a refugee to a situation where her life, integrity, and/or freedom will be at risk.[44]

In October 2019, the Supreme Court of Mexico reversed the lower court decision and declared the 30-day deadline for applying for asylum to be constitutional.[45] Despite this decision, the case is nevertheless hopeful for a number of reasons. First, it demonstrates that the Mexican Supreme Court is willing to engage with refugee and asylum matters, as there is very little Supreme Court jurisprudence in this area. Secondly, it suggests that, in some cases, lower court judges are willing to adopt an expansive view of the right to asylum, and more importantly, refugee status. The judge in this case held that the term 'refugee' attaches to a person whenever that person meets the relevant definition, rather than when a State officially determines that the individual has done so. Thirdly, the lower court relied on international human rights treaties (incorporated by article 1 of the Constitution) and the jurisprudence of the Inter-American Court of Human Rights. As this, and the other decisions reviewed in this chapter demonstrate, such reliance by Mexican domestic courts has become

[41] See Juicio de Amparo Indirecto 115/2018 (15 January 2019) (Jonathan Bass Herrera, Juez Segundo de Distrito del Centro Auxiliar de la Primera Región en Materia Administrativo) 39–43 (Decision 115/2018).

[42] ibid 39–44. [43] ibid 39–41.

[44] ibid 39–42. In reaching this conclusion, the court relied on the decision of the Inter-American Court of Human Rights in *Pacheo Tineo v Bolivia*, Inter-American Court of Human Rights Series C No 272 (25 November 2013) 42, where the court held that an erroneous or unfavourable decision on an asylum case could result in the risk of return of a person to a place where their life, safety and/or freedom are in danger. In addition, the court did not rule on several claims made by the applicant. These included the allegation that the 30-day deadline violates articles 14, 16, and 17 of the Constitution, which guarantee access to justice and due process. (See Decision 115/2018 (n 41) 39–44). In addition, the applicant had alleged that the 30-day deadline violates article 6 of the Constitution, which governs the right to access information (the applicant in this case was not informed of the process for filing an asylum application, as well as the 30-day deadline).

[45] See Amparo en Revisión, 353/2019 16 Oct 2019 (Ministro José Fernando Franco González Salas). In reaching this conclusion, the Supreme Court determined, amongst other things, that the deadline allowed for the immediate identification of the status of foreigners within Mexican territory, and protected refugees by minimizing their time in irregular status, which could be detrimental to their exercise of fundamental rights.

increasingly prevalent in recent years. In this case, it permitted the court to base its decision, in part, on *non-refoulement*, a bedrock principle of the international law of refugees.[46]

ii. *Deportation of Guatemalan Asylum Seeker*

In August 2017, Instituto Nacional de Migración (INM), the agency charged with enforcing Mexico's refugee law, arrested and detained a Guatemalan man who was fleeing drug violence in his home country. He was represented, without charge, by a law firm in Mexico City and applied for asylum. He did not remain in detention long: when he became increasingly worried about retribution from other detainees who knew he had identified drug dealers in Guatemala, he sought help from the officials running the detention centre. Rather than provide him increased protection, they suggested he abandon his asylum claim and return to Guatemala. He agreed and was deported to Guatemala, in October 2017, without notice to his attorneys. His lawyers do not know where he is, and the government refused their requests to view his file.

In March 2018, his lawyers filed an *amparo* claiming that their client's deportation constituted a forced disappearance by the Mexican government.[47] The *amparo* alleged several violations of the Mexican Constitution and the ACHR, including provisions related to due process and the right to seek asylum,[48] highlighting again the effectiveness of linking the right to asylum with other constitutionalized human rights provisions. His lawyers asserted that the lack of due process (including the failure to notify their client of the status of his case, to notify his lawyers that he was about to be deported, and the refusal to allow his lawyers to view his file) violated his right to asylum.[49] This claim illustrates that, in practical terms, the constitutional right to asylum is meaningless absent due process protections (such as the right to a hearing, access to counsel, etc) that provide it with real teeth.[50]

[46] Although, as suggested above, this decision has no precedential impact in and of itself, the government appealed it, perhaps indicating its concern that a series of similar results would afford it such impact.

[47] *Juicio de Amparo* 1452/2017 (30 April 2018) (Juan Pablo Gómez Fierro, Juez Cuarto de Distrito en Materia Administrativo) (Decision 1452/2017).

[48] The lawyers argued that the government had violated the following articles of the Mexican Constitution: article 1 (which incorporates all international treaties to which Mexico is a party); article 11 (right to seek and receive asylum and refugee status); article 14 (right to judicial process); articles 16 and 17 (right to due process and access to justice); and article 5 (the right to practise one's chosen profession). They also argued that the government had violated the following articles of the ACHR (n 35): article 8 (due process) and article 25 (judicial protection). See ibid 7.

[49] The linkage between due process and the right to asylum is reflected in the comment a Mexican lawyer made to the author during an interview about strategic litigation on behalf of refugees and asylum seekers in Mexico: 'It's not about refugee rights; it's about due process, all the time' Meili (n 26).

[50] Scholars have described the symbiotic relationship between procedural and substantive rights more generally, asserting that procedural rights are mere components of substantive rights lacking independent status. See Larry Alexander, 'Are Procedural Rights Derivative of Substantive Rights?' (1998) 17 Law and Philosophy 19.

In an April 2018 decision, an administrative judge granted nearly all of the claims in the *amparo*.[51] He held that the government violated the claimant's right to due process under both the Mexican Constitution and the ACHR in a number of ways.[52] Specifically, the court ruled that the government failed to advise the claimant that it was processing his asylum claim and that a decision on that claim was required within 45 days,[53] that it had failed to adequately protect the claimant from potential harm during his detention, and that it had failed to notify the claimant's attorneys of his release from detention and subsequent deportation.[54] Perhaps most significantly for purposes of this chapter, the judge ruled that these due process violations resulted in a violation of the claimant's right to seek asylum, which is guaranteed under both the Mexican Constitution and international law.[55]

This decision is not binding precedent at this point. Nevertheless, it is significant because it demonstrates that the right to asylum under the Mexican Constitution, when utilized in conjunction with due process protections, is capable of offering legal protection to asylum seekers.

iii. *COMAR's Delayed Processing of Asylum Claims*

As noted above, COMAR must make an initial decision on asylum claims within 45 days of its filing.[56] After an earthquake hit Mexico City in October 2017, COMAR declared that it was suspending its normal processing deadlines.[57] Its reasoning was that the earthquake had damaged the offices where its officers interview asylum applicants in the course of determining the validity of their claims.[58] Indeed, partly as a result of the earthquake, but also because of the significant increase in asylum applications filed by Venezuelan and Central American refugees in recent years, COMAR was failing to meet the 45-day deadline in most cases.[59]

[51] Decision 1452/2017 (n 47). [52] ibid 38–9.

[53] Under Mexican law, COMAR must render a decision on an asylum claim within 45 days of its filing. Law on Refugee and Complementary Protections (n 37) art 36.

[54] Decision 1452/2017 (n 47) 38–46.

[55] ibid 47. The judge had identified several sources of the right to asylum in international law, including the Refugee Convention, American Declaration of the Rights and Duties of Man, Res XXX, Final Act of the Ninth International Conference of American States reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System OAS/Ser L V/II.82 Doc 6 Rev 1, 1992, 17, ACHR (n 35) and the Cartagena Declaration, 27.

[56] See (n 53).

[57] Maya Averbuch, 'Mexico Can't Handle Your Tired, Poor, and Huddled Masses', *Foreign Policy* (30 July 2018) <https://foreignpolicy.com/2018/07/30/mexico-cant-handle-your-tired-poor-and-huddled-masses/> accessed 4 December 2019.

[58] ibid.

[59] ibid. See also Lily Folkerts, 'Behind the Caravan: Seeking Asylum Isn't Easy, Especially in Mexico' (Latin American Working Group, 29 May 2018) <https://www.lawg.org/mexico-and-its-asylum-and-immigration-policies-have-recently-received-much-attention-thanks-to-president-trumps-fixation-on-the-migrant-caravan-an-annual-demonstration-in-which-central-americans-garne/> accessed 4 December 2019.

Lawyers from a large Mexico City law firm, representing a Salvadoran mother and her three children on a pro bono basis, filed an *amparo* challenging COMAR's suspension of the required deadline. The lawyers claimed that COMAR's actions violated several provisions of the Mexican Constitution, including the right to asylum, the right to justice, and the right to due process.[60] They also argued that it violated several provisions of the AHCR.

In a decision issued in April 2018, an administrative judge ruled in favour of the claimants.[61] He held that COMAR's suspension of the statutorily mandated deadline denied the claimants their right to effective justice under the Mexican Constitution and the ACHR.[62] Moreover, the judge held that the right to international protection under both Mexican and international law is meaningless absent an effective procedure for the timely processing of asylum applications.[63] He also ruled that the 45-day deadline was necessary in order for the Mexican government (in this case acting through COMAR) to comply with the right to asylum under the Mexican Constitution.[64] In this way, the effective exercise of the constitutional right to asylum was predicated on a purely administrative requirement (a deadline for reaching a decision on an asylum claim). Once again, this case demonstrates the interplay between the substantive right to asylum and the procedural rights through which it is realized.

The judge in this case, like the judge in the case involving the detained man from Guatemala, ruled that the relevant due process protections were particularly crucial because asylum seekers are in a position of vulnerability.[65] Here, the judge was concerned about the heightened vulnerability of the claimants who were children.[66]

This decision, even though it lacks precedential authority at this point, is significant for at least two reasons relevant to this chapter. First, it demonstrates that the constitutional right to asylum can make a practical difference in the lives of asylum seekers, as it increases the likelihood that future asylum seekers will receive initial decisions more quickly. The decision does not, of course, guarantee favourable decisions on asylum claims and does not address the factual and legal standards by which COMAR should evaluate such claims. A more efficient decision-making process does not guarantee an increase in the asylum grant rate.

[60] Article 17 of the Constitution of Mexico states in relevant part: 'The Mexican Congress shall enact laws to regulate collective actions. Such laws shall establish the cases in which each law applies.' Article 14 of the Constitution reads, in relevant part: 'No one can be deprived of his freedom, properties or rights without a trial before previously established courts, complying with the essential formalities of the proceedings and according to those laws issued beforehand.'

[61] *Juicio de Amparo* 1700/2017 (13 March 2018) (Rodrigo de la Peza López Figueroa, Juez Noveno de Distrito en Materia Administrativa en el Distrito Federal) (Decision 1700/2017).

[62] The ACHR describes an effective remedy or recourse as one that protects against violations of one's fundamental rights, including violations committed by those acting under the colour of law. Loretta Ortiz Ahlf, 'Es el Amparo un Recurso Efectivo para la Proteccio'n de los Derechos Humanos?' in Eduardo Ferrer Mac-Gregor and Ruben Sanchez Gil (eds), *El Juicio de Amparo a 160 Anos de la Primera Sentencia*, (Universidad Nacional Autonoma de Mexico, Instituto de Investigaciones Juridicas 2011) 192.

[63] Decision 1700/2017 (n 61) 22.

[64] ibid.

[65] ibid 23. See also Decision 1452/2017 (n 47) 41.

[66] Decision 1700/2017 (n 63) 23.

Secondly, the decision is another example of how at least some judges in Mexico are willing to link due process rights with the constitutional right to asylum. The judge in this case ruled that the constitutional right to asylum requires the government to abide by certain minimum standards of due process, including the timely processing of asylum claims, without which such a right would be rendered meaningless. In so doing, the judge held State actors accountable for a violation of the constitutional right to asylum. And while that right—as well as the due process rights that support it—have been enshrined in international instruments such as the ACHR for some time, it is the Mexican Constitution (through strategic litigation initiated by Mexican lawyers) that has suddenly brought it to life. As such, the constitutional right to asylum—at least in Mexico—is no longer mere words on parchment.

5. Conclusion

For most of its history, the constitutional right to asylum has exemplified the contention of many observers that constitutionalized human rights serve as window dressing, designed only to improve a State's image without improving human rights outcomes, and sometimes even worsening them. Recent developments in Latin America, however, suggest that under the right set of circumstances, a constitutional right to asylum can actually foster positive outcomes. In the context of strategic litigation, these circumstances include a reasonably independent judiciary willing to strike down policies and laws issued by the other branches of government and an active civil society (including lawyers) who creatively navigate the legal and political landscape in order to achieve positive results for their clients.

The cases analysed in this chapter illustrate three methods of such creative lawyering. The first is to combine the right to asylum with other constitutionalized human rights provisions. For while the right to asylum has had some impact in and of itself, it has been even more meaningful when combined with other constitutionalized human rights provisions, most of which have nothing to do, *per se*, with refugees or asylum seekers (such as due process or prohibitions against discrimination). Thus, for example, while the administrative court ruled that Mexico's 30-day deadline for applying for asylum violates the right to asylum under the Constitution, it only did so, in part, because that article must be interpreted according to international law, which is incorporated into the Mexican Constitution under its article 1. For this reason, neither practitioners nor scholars should view (or utilize) the constitutional right to asylum in a vacuum; rather, they should view it as part of a package of rights that can complement one another for the benefit of refugees and asylum seekers.

A second means of effective utilization of the constitutional right to asylum is careful selection of the cases in which to invoke it. Two of the three cases analysed in this chapter (COMAR's suspension of the 45-day deadline for an initial decision and the deportation of the Guatemalan asylum seeker without notice to his counsel) resulted in courts ordering the government to return to the *status quo* (ie following statutory deadlines and other procedures for handling asylum applications). These decisions might be thought of as 'low-hanging fruit'; that is, they do not challenge the *status quo* or force the State to do anything the legislature has not already dictated or that those agencies have already agreed to. Such relatively 'easy' cases are few and far between, however. The more challenging cases, such as the challenge to the 30-day deadline in Mexico, present a more severe test of the strength of the constitutionalized right to asylum and other human rights. These kinds of cases challenge the core principles and practices of State refugee and asylum policy. If successful, they will force the government to take action that it would prefer to avoid, be it for ideological, political, or financial reasons.

A third effective strategic litigation strategy in this regard is the selection of sympathetic claimants. Thus, for example, the *amparo* challenging COMAR's delayed processing of asylum claims was brought on behalf of a mother and three children who had fled violence, sexual assault, and other forms of persecution in their home country.[67] Including children as claimants in strategic litigation increases the likelihood of success, possibly because of an intangible yet very real appeal to emotion, but also because children enjoy special protection in international human rights law. Moreover, empirical studies have demonstrated that, under certain circumstances, women have a better chance of obtaining asylum or complementary protection than men.[68] Given that children are often the most vulnerable victims of restrictive asylum and refugee policies, it is likely that they will remain at the forefront of strategic litigation in this area.

In sum, despite its long period of dormancy and the many structural and political limitations that impede its usefulness, the constitutional right to asylum may be poised for a re-birth. Indeed, at a time when some scholars question whether refugee law has outlived its usefulness, constitutional asylum may help to revive it.[69]

[67] See Meili (n 26). While it did not involve the constitutional right to asylum, another recent example of effective strategic litigation on behalf of children was the decision by a Mexican judge ordering that children travelling in a caravan from Central America to the United States be granted *prima facie* refugee status. See Juicio de Amparo Indirecto 86/2018 (9 November 2018).

[68] Heaven Crawley, *Refugees and Gender: Law and Process* (Jordan 2001) 81; Susan Kneebone, 'Women Within the Refugee Construct: "Exclusionary Inclusion" in Policy and Practice—the Australian Experience' (2005) 17 IJRL 7, 22; Meili (n 32).

[69] See David James Cantor, 'The End of Refugee Law?' (2017) 9(2) Journal of Human Rights Practice 203; Kirsten McConnachie, Richard Carver, and Martin Jones, 'The End of Refugee Protection?' (2017) 9(2) Journal of Human Rights Practice 175; Daniel Ghezelbash, *Refuge Lost* (CUP 2018).

CHAPTER 50

NON-REFOULEMENT

PENELOPE MATHEW*

1. Introduction

This chapter concerns the most fundamental of all obligations owed to refugees—that of *non-refoulement*. The *raison d'être* of the obligation—protection—continues to provoke debate about the validity of the lines drawn between refugees, other beneficiaries of the obligation, and other migrants, and the way the purported provider of surrogate protection[1]—the State—is implicated in the production of forced migration. That background or deep structure of the State system, critiqued in other chapters in this volume,[2] assists in explaining the phenomena explored in this chapter: the interaction between shrinking and expansive approaches to *non-refoulement*.

The chapter first outlines the sources of the obligation, noting the obligation's place in the Refugee Convention and other treaties as well as its status as customary international law, and the corresponding beneficiaries of the obligation (refugees, asylum seekers, and other non-nationals at risk of irreparable harm). The scope of the obligation is examined next, with emphasis on States' attempts to divest their responsibilities through legal fictions ('excision' of State territory or creation of international zones) and extraterritorial immigration enforcement.[3] Application of *non-refoulement* to embassies abroad is also discussed. The chapter closes with a discussion of the concept of constructive or disguised *refoulement*—that is, when a refugee or an asylum seeker spontaneously leaves the country of asylum as a result of his or her treatment in that country.

* The law in this chapter is valid as at the date of 1 January 2020. The author has referred to a few subsequent developments where possible. The author wishes to acknowledge Madison Hughes for her excellent assistance with footnoting.

[1] See James C Hathaway and Michelle Foster, *The Law of Refugee Status* (2nd edn, CUP 2014) chs 1, 4.

[2] In particular Chapter 2 in this volume.

[3] Discussed further in Chapter 27 in this volume.

2. Sources of the Obligation of *Non-refoulement*: Treaty Law

The cardinal obligation owed to refugees is the obligation of *non-refoulement* (literally meaning 'not to force back').[4] The Refugee Convention enshrines this obligation in article 33(1). Reservations may not be entered with respect to this provision.[5]

The obligation precludes 'chain' or indirect *refoulement*. A State may not send a refugee to another State which then returns the refugee to a place of persecution. This follows from the prohibition on *refoulement* 'in any manner whatsoever'.[6] However, the process of migration to a place of safety is not dealt with by the Convention, and the Convention does not expressly guarantee a right of entry to any particular State. As a consequence, the obligation of *non-refoulement* may be thwarted by the domestic legal framework governing migration (for example, requirements concerning visas) or more deliberately by various *non-entrée* measures.[7]

Since the adoption of the Refugee Convention, the obligation of *non-refoulement* has been included in regional instruments concerning refugees, including the OAU (now AU) Convention, the American Convention on Human Rights[8] and the Cartagena Declaration, as well as many human rights treaties. For example, article 3 of CAT, and article 16 of the International Convention for the Protection of All Persons from Enforced Disappearances[9] prohibit *refoulement*.

In other instruments, *non-refoulement* is an implicit obligation. The Human Rights Committee has found it attaches to the right to life and the prohibition on torture and related forms of ill-treatment,[10] while the European Court of Human Rights has also found it attaches to the prohibition on torture and related forms of ill-treatment[11] as well as flagrant violations of other rights contained in the European Convention for

[4] Hathaway notes the variations on the English translation of *non-refoulement*, including a commitment 'not to turn back': James C Hathaway, *The Rights of Refugees Under International Law* (CUP 2005) 316, citing Ad Hoc Committee on Statelessness and Related Problems, First Session, Summary Record of the Twentieth Meeting Held at Lake Success, New York (1 February 1950), UN doc E/AC.32/SR.20, 12 (statement by Mr Henkin, United States).

[5] Refugee Convention, art 42(1).

[6] Refugee Convention, art 33(1).

[7] James C Hathaway, 'The Emerging Politics of Non-Entrée' (1992) 91 Refugees 40.

[8] American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123.

[9] International Convention for the Protection of All Persons from Enforced Disappearances (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3.

[10] UN Committee on Human Rights, 'General Comment 31: The Nature of the General Legal Obligation Imposed on States Parties to the Convention' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies' UN doc HRI/GEN/1/Rev.9 (Vol I) (27 May 2008) 245–6 para 12.

[11] See *Soering v UK* (1989) 11 EHRR 439, para 88; *JK v Sweden* (2017) 64 EHRR 15, para 79. For discussion, see Erna Kristín Blöndal and Oddný Mjöll Arnardóttir, 'Non-refoulement in Strasbourg: Making Sense of the Assessment of Individual Circumstances' (2018) 5 Oslo Law Review 147.

the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights).[12] The Inter-American Court of Human Rights has similarly found that 'a flagrant violation of the basic guarantees of due process may result in the violation of the principle of *non-refoulement*'.[13] With respect to children, the Committee on the Rights of the Child has found that *non-refoulement* applies where there is a 'real risk of irreparable harm to the child', including where there is a threat to the survival and development of the child (articles 6 and 37 CRC),[14] while the Committee on the Elimination of All Forms of Racial Discrimination has referred to an implicit *non-refoulement* obligation attaching to article 5(b) of CERD.[15] Similarly, the Committee on the Elimination of Discrimination against Women has stated that a woman is not to be expelled to another State where 'her life, physical integrity, liberty and security of person would be threatened, or where she would risk suffering serious forms of discrimination, including serious forms of gender-based persecution or gender-based violence'.[16]

The incremental expansion of the rights to which *non-refoulement* attaches through the adoption of explicit treaty standards and judicial findings of implicit *non-refoulement* obligations raises a question as to whether *non-refoulement* attaches to all rights and what is the relevant threshold for its violation. States' acceptance of explicit *non-refoulement* norms for a relatively small number of rights suggests they recognize, rightly or wrongly, a hierarchy of rights. With respect to implicit *non-refoulement* obligations, courts and human rights treaty bodies appear to have followed suit.

Within the European human rights system, for example, rights identified as attracting a *non-refoulement* obligation include articles 4 (the prohibition on slavery and forced labour), 5 (liberty and security), 6 (fair trial), 7 (the prohibition on retrospective criminalization and punishment), 8 (privacy and family life) and 9 (freedom of thought, conscience, and religion). One may posit that *non-refoulement* follows from the *jus cogens* status and non-derogability of particular rights (the prohibitions on torture and

[12] Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 222. For a critical perspective, see Cathryn Costello, 'The Search for the Outer Edges of *Non-refoulement* in Europe: Exceptionality and Flagrant Breaches' in Bruce Burson and David James Cantor (eds), *Human Rights and the Refugee Definition: Comparative Legal Practice and Theory* (Brill 2016).

[13] *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, Advisory Opinion OC-21/14, Inter-American Court of Human Rights Series A No 21 (19 August 2014) para 230.

[14] UN Committee on the Rights of the Child, 'General Comment 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies' UN doc HRI/GEN/1/Rev.9 (Vol II) (27 May 2008) 449, para 27.

[15] UN Committee on the Elimination of Racial Discrimination, 'Consideration of Reports Submitted by States Parties Under Article 9 of the Convention: Concluding Observations of the Committee on the Elimination of Racial Discrimination—Tunisia', UN doc CERD/C/TUN/CO/19 (23 March 2009) para 15.

[16] UN Committee on the Elimination of Discrimination against Women, 'General Recommendation No 32,' UN doc CEDAW/C/GC/32 (14 November 2014) para 23.

slavery, for example). However, the list accepted so far by the European Court of Human Rights goes beyond the usual candidates for *jus cogens*, so that basis for a hierarchy of norms and consequences is not applicable. The explicit basis for the jurisprudence of the European Court of Human Rights is the fundamental value enshrined in article 3 (and article 2, commonly treated together with article 3) and the idea that torture is an irreparable harm, while 'flagrant breaches' of other rights are required for *non-refoulement* to apply. This suggests that something that nullifies the right in question completely is irreparable. The problematic nature of this test has been noted by commentators and practitioners alike.[17]

In addition to expansion of the *non-refoulement* obligation through treaty adoption and interpretation by the treaty bodies, a process of judicial dialogue[18] has extended the scope of the obligation. For example, with respect to health and the obligation of *non-refoulement*, the Inter-American Court of Human Rights has held that because of the connection between life, personality and health care, return that results in harm to or serious deterioration in the person's health, or where it could lead to the person's death, may violate the obligation of *non-refoulement*.[19] In order to determine whether the American Convention on Human Rights or the American Declaration of the Rights and Duties of Man[20] have been violated, 'the status of the health or the type of ailment that the person suffers would have to be taken into account, as well as the health care available in the country of origin and the physical and financial accessibility to this, among other aspects'.[21] The Inter-American Court drew on jurisprudence from the European Court of Human Rights in this respect.[22]

The European Court has since refined its own jurisprudence on this topic, finding that article 3 of the European Convention on Human Rights is triggered in

> situations involving the removal of a seriously ill person in which substantial grounds have been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of

[17] For discussion, see Costello (n 12) 205–7.

[18] For discussion of judicial dialogue, including dialogue between the European Court of Human Rights and the Inter-American Court of Human Rights, see Eduardo Ferrer Mac-Gregor, 'What Do We Mean When We Talk About Judicial Dialogue? Reflections of a Judge of the Inter-American Court of Human Rights' (2017) 30 Harvard Human Rights Journal 89.

[19] *Rights and Guarantees of Children in the Context of Migration* (n 13) para 229.

[20] American Declaration of the Rights and Duties of Man, OAS Res XXX adopted by the Ninth International Conference of American States (1948) reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System OEA/Ser L V/II.82 doc 6, rev 1 at 17 (1992).

[21] *Rights and Guarantees of Children in the Context of Migration* (n 13) para 229.

[22] ibid para 229, n 445. The Inter-American Court cited the European Court's decision of *D v UK* (1997) 24 EHRR 423.

> being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy.[23]

Interestingly, the judicial dialogue in this case was more of a monologue as the court wrestled with its own previous jurisprudence and that of the Court of Justice of the European Union—the Inter-American Court's decision is not mentioned.

3. Beneficiaries of the Obligation

The extension of *non-refoulement* to new contexts means that it offers protection to persons who do not meet the definition of a refugee—whether the definition in article 1A(2) of the Refugee Convention as modified by the 1967 Protocol, or the broader definitions contained in the OAU Convention and the Cartagena Declaration. In the case of Latin America, for example, the Inter-American Court has ruled that article 22(8) of the American Convention on Human Rights extends the obligation of *non-refoulement* to any non-national whose life, integrity or freedom is endangered.[24] As stated by that court, 'the content of the principle of *non-refoulement* has a particular sphere of application *rationae personae and materiae*' depending on the branch of international law concerned—refugee law, human rights law, the prohibition of torture or article 22(8) of the American Convention on Human Rights.[25]

This insight is important with respect to 'dangerous refugees' denied the protection of *non-refoulement* under article 33(2) of the Refugee Convention and persons who are excluded from refugee status under article 1F of the Refugee Convention. The Inter-American Court has stated that complementary protection (non-return and protection of basic rights) is appropriate in these circumstances.[26] Implicitly acknowledging the balancing act between the rights of the individual and the rights of the community, the court has said:

> [t]his complementary protection should recognize the basic rights of the persons protected. The State may limit the exercise of certain rights when granting this protection, provided that this is based on sound and objective reasons and does not violate the principle of non-discrimination.[27]

States will need to interpret the court's guidance, but the court has clearly indicated that leaving people in a rightless limbo is not appropriate.

[23] See *Paposhvili v Belgium*, App No 41738/10 (ECtHR, Grand Chamber, 14 December 2016) para 183.
[24] *Pacheco Tineo Family v Bolivia*, Inter-American Court of Human Rights Series C No 272 (25 November 2013) para 135.
[25] *Rights and Guarantees of Children in the Context of Migration* (n 13) para 234.
[26] ibid paras 237–40. [27] ibid para 240.

4. *Non-refoulement* in Customary International Law

Most commentators also agree that the prohibition on *refoulement* of refugees is customary international law. There are many indications of *opinio juris* on the part of States confirming this is so. For example, in the New York Declaration for Refugees and Migrants, all members of the United Nations (over 40 of which are not party to the Refugee Convention or its 1967 Protocol) stated that:

> We reaffirm respect for the institution of asylum and the right to seek asylum. We reaffirm also respect for and adherence to the fundamental principle of non-refoulement in accordance with international refugee law.[28]

There is also judicial authority for the proposition. In particular, the Inter-American Court of Human Rights has consistently held that the obligation of *non-refoulement*, as found in the Refugee Convention and Protocol, is customary international law.[29]

It is also generally accepted that the prohibition on *refoulement* to a place of torture or related ill-treatment is customary international law and *jus cogens*.[30] There is, however, debate concerning *non-refoulement* of refugees as *jus cogens*.[31] Costello and Foster examine the potential consequences of the *jus cogens* character of *non-refoulement*,

[28] New York Declaration for Refugees and Migrants, para 67.

[29] *The Institution of Asylum and its Recognition as a Human Right in the Inter-American System of Protection (Interpretation and Scope of Articles 4, 22.7 and 22.8 in relation to Article 1(1) of the American Convention on Human Rights)*, Advisory Opinion OC-25/18, Inter-American Court of Human Rights Series A No 24 (30 May 2018) (only available in Spanish, unofficial English translation available at Inter-American Court of Human Rights, 'Advisory Opinion OC-25/18 of 30 May 2018 Requested by the Republic of Ecuador' (*Refworld*, 30 May 2018) <www.refworld.org/cases,IACRTHR,5c87ec454.html> accessed 30 June 2019) para 179; *Rights and Guarantees of Children in the Context of Migration* (n 13) para 211; *Pacheco Tineo* (n 24) para 151.

[30] For discussion, see Nigel S Rodley and Matt Pollard, *The Treatment of Prisoners under International Law* (3rd edn, OUP 2009). They note several judgments of the ICTY, along with decisions of the European Court of Human Rights and the Inter-American Court of Human Rights holding that torture and related forms of ill-treatment are both custom and *jus cogens*: 76. For a recent affirmation by the Inter-American Court of Human Rights, see *Institution of Asylum* (n 29) para 181.

[31] For discussion see Cathryn Costello and Michelle Foster, 'Non-refoulement as Custom and *Jus Cogens?* Putting the Prohibition to the Test' (2015) 46 Netherlands Yearbook of International Law 273, 306–10. They conclude that the *non-refoulement* obligation contained in the Refugee Convention is 'ripe for recognition as *jus cogens*': 309. The International Law Commission's special rapporteur on the topic of peremptory norms of general international law (*jus cogens*) has noted 'ample support' for the principle of *non-refoulement* as *jus cogens*: International Law Commission, 'Fourth Report on Peremptory Norms of General International Law (*Jus Cogens*) by Dire Tladi, Special Rapporteur', UN doc A/CN.4/727 (31 January 2019) para 131. However, *non-refoulement* was not included in the recommended draft conclusion containing the non-exhaustive list of peremptory norms.

noting that, at the very least, it means States cannot rely on the exception to *refoulement* contained in article 33(2) of the Refugee Convention where the person concerned faces a risk of torture or related ill-treatment.[32]

5. Content and Scope of the Obligation of *Non-refoulement*

Two concepts are included in article 33 of the Refugee Convention, namely expulsion and return. Expulsion is also referred to in article 32 of the Convention, which prohibits expulsion of a refugee lawfully in State territory save on grounds of national security or public order, and only 'in accordance with due process of law'. Consequently, expulsion for the purposes of articles 32 and 33 certainly encompasses a formal procedure for persons already lawfully within territory.[33] However, it is clear that the framers did not want to limit article 33 in this way,[34] and the concept of return in article 33 of the Convention, as will be shown below, has a broader scope.

The concept of expulsion has received judicial and expert attention in recent years. Notably, in *Hirsi Jamaa v Italy* the European Court on Human Rights found that the prohibition on collective expulsion in article 4 of protocol 4 to the European Convention on Human Rights and the implicit prohibition on *refoulement* in article 3 of the European Convention applied to asylum seekers on the High Seas.[35] The International Law Commission has also examined the topic.

In the International Law Commission's effort to codify and progressively develop the law relating to expulsion of aliens, the scope of lawful expulsion appears both broader and narrower than that recognized in the Refugee Convention or international human rights law. In the Draft Articles on the Expulsion of Aliens (Draft Articles), the Commission has specified that the concept of expulsion applies to non-nationals within State territory,[36] 'with no distinction between the various categories of persons involved, for example, aliens lawfully present in the territory of the expelling State, aliens unlawfully present, displaced persons, asylum seekers, persons granted asylum and stateless persons'.[37] Expulsion is defined for the purposes of the Draft Articles as 'a formal act or conduct attributable to a State, by which an alien is

[32] Costello and Foster (n 31) 314.

[33] cf Cornelis Wouters, *International Legal Standards for the Protection from Refoulement* (Intersentia 2009) 50.

[34] Hathaway discusses the evolution of articles 32 and 33 and the view that article 32 was a supplement to article 33: James C Hathaway (n 4) 664.

[35] *Hirsi Jamaa and Others v Italy* (2012) 55 EHHR 21.

[36] International Law Commission, 'Draft Articles on the Expulsion of Aliens' in *Report of the International Law Commission on the Work of its 66th session*, UN doc 14/69/10 (2014) ch 4, draft article 1(1).

[37] Ibid Commentaries on Draft Article 1, para 2.

compelled to leave the territory of that State', but does not include non-admission of a non-national to State territory.[38] Pursuant to draft article 26, procedural rights apply, with the possible exception of non-nationals unlawfully on State territory for a brief duration. Thus for the purposes of the Draft Articles, a non-national unlawfully present in State territory is covered by the concept of expulsion, while a non-national seeking admission at the border is not. The International Law Commission (ILC) has specified that this is without prejudice to the prohibition on expulsion or *refoulement* of refugees—a move that has met with criticism, given the lingering debate concerning the reach of *refoulement*.[39]

Interpreting article 33 of the Refugee Convention in light of article 32, it can be inferred that, in the absence of the phrase 'lawfully present in state territory', article 33 extends *rationae personae* to *all* refugees within State territory, including those unlawfully present, as well as to those beyond State territory. Nevertheless, States have attempted to avoid the obligation of *non-refoulement* through legal fictions such as 'excision' of territory[40] or treatment of areas such as airports as 'international zones',[41] and by interception of asylum seekers beyond their borders.

Fictions such as excision have easily been dismissed by supranational human rights courts and tribunals. For example, the Inter-American Court in its advisory opinion on *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection* referred with approval to the Committee on the Rights of the Child's statement that 'State obligations cannot be arbitrarily and unilaterally curtailed either by excluding zones or areas from a State's territory or by defining particular zones or areas as not, or only partly, under the jurisdiction of the State'.[42]

The jurisprudence of supranational human rights courts should also have shifted the debate as to whether *non-refoulement* applies at the border or extraterritorially, but some States, in particular Australia and the United States, cling to the idea that article 33(1) is territorially bound. This outlying State practice threatens the proper functioning of the Refugee Convention, as the obligation of *non-refoulement* is key to other refugee rights.

[38] Ibid draft art 2(1).

[39] Ibid draft art 6. For discussion of the problems concerning this 'without prejudice' approach see Gerald L Neuman, 'Human Rights and the International Law Commission's Draft Articles on the Expulsion of Aliens' (2017) 30 Harvard Human Rights Journal 3, 12; Won Kidane, 'Missed Opportunities in the International Law Commission's Final Draft Articles on the Expulsion of Aliens' (2017) 30 Harvard Human Rights Journal 77, 81–3. Kidane also criticizes the melding of articles 32 and 33 in the ILC's approach: 81–3.

[40] Australia 'excised' certain territories from the migration zone following the arrival of the Norwegian freighter, the *Tampa*, which had rescued 433 asylum seekers from the Indian Ocean.

[41] For an example, see the French practice discussed in *Amuur v France* (1996) 22 EHRR 533 para 19. See also *ZA and Others v Russia*, App No 61411/15 (ECtHR, Grand Chamber, 21 November 2019). Regarding Hungary's actions with respect to transit zones along the Serbian-Hungarian border, see C-924/19 PPU and C-925/19 PPU (CJEU, 14 May 2020), and compare with *Ilias and Ahmed v Hungary*, App No 47287/15 (ECtHR, Grand Chamber, 21 November 2019).

[42] *Rights and Guarantees of Children in the Context of Migration* (n 13) para 220, citing UN Committee on the Rights of the Child (n 14).

6. Extraterritorial Scope of the Prohibition on *Refoulement*: Practice, Scholarship, and Case Law

Although the Refugee Convention does not contain an express right to entry or a right to be granted asylum (in the sense of refugee status and all consequent protections)[43] by any particular State, in practice the obligation of *non-refoulement* demands that a refugee be allowed to 'transgress an administrative border' of a country other than the persecutory country of origin.[44] Consequently, States have adopted many deflection strategies to avoid recognizing refugee status. Frequently, States have sought to externalize their border controls.[45] The avoidance strategies include visa controls and placement of airline liaison officers abroad. There is also at present a predilection for walls along borders, such as those built by US president Donald J Trump and Hungarian prime minister Viktor Orbán.

Another spectacular, if sometimes covert, example of States acting extraterritorially in an attempt to avoid the obligation of *non-refoulement* is interdiction at sea.[46] In Southeast Asia, for example, boat pushbacks were used to garner resettlement offers during the Indochinese refugee crisis in the 1970s and 1980s. The lack of a responsibility-sharing mechanism to ensure refugees are properly protected and supported is a legitimate complaint on the part of developing countries[47]—one that has

[43] The Inter-American Court has helpfully defined 'asylum' as 'the *protection* that a State offers to persons who are not its nationals when their life, personal integrity, security and/or freedom are or could be in danger, as a result of persecution for political offences, or for political reasons' (emphasis added): *Institution of Asylum* (n 29) para 66. Further, it has recognized that '[a]lthough the 1951 Convention does not explicitly establish the right of asylum as an explicit right, it is considered to be implicitly incorporated in its text, which contains the definition of a refugee, protection under the principle of *non-refoulement* and a catalogue of rights to which refugees have access' (footnote omitted): para 95. See also para 101.

[44] Gregor Noll, 'Seeking Asylum at Embassies: A Right to Entry under International Law?' (2005) 17 IJRL 542, 548. Similarly, the Committee against Torture has stated that '[a]ny person found to be at risk of torture if deported to a given State should be allowed to remain in the territory under the jurisdiction, control or authority of the State party concerned so long as the risk persists': UN Committee against Torture, 'General Comment 4 (2017) on the Implementation of Article 3 of the Convention in the Context of Article 22,' UN doc CAT/C/GC/4 (4 September 2018) para 12.

[45] For discussion, see Bill Frelick, Ian M Kysel and Jennifer Podkul, 'The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants' (2016) 4 Journal on Migration and Human Security 190.

[46] See Chapter 26 in this volume for the paradoxical situation in which refugees' interception at sea contributes to the phenomenon that asylum seekers are 'out of sight, out of mind', and yet are also highly visible—a 'border spectacle'.

[47] It should be noted that Malaysia, Thailand, and Indonesia are now classed as middle-income countries, however Indonesia is a lower-middle-income country characterized by high levels of poverty with around 9 per cent of the population living in absolute poverty, that is, under the national poverty line, which is set at around 82 US cents a day. The international poverty line is USD $2.00 per day, which sees a significant proportion of the Indonesian population living in poverty.

been responded to, at least in word, by the New York Declaration for Refugees and Migrants and subsequent Global Compact on Refugees.[48] However, it does not justify *refoulement*.

Pushbacks by Southeast Asian countries recurred during the Andaman Sea refugee crisis: Rohingya and Bangladeshis abandoned at sea by people smugglers during 2015 were initially turned away by the navies of Malaysia, Thailand, and Indonesia.[49] None of these three States are party to the Refugee Convention, and Malaysia is party to very few international human rights treaties, however, Indonesia and Thailand are party to a number of human rights treaties that prohibit *refoulement* and all are bound by customary international law. Eventually Indonesia and Malaysia agreed to permit disembarkation on condition that refugees would be resettled after a year.[50]

The United States' interception of Haitian asylum seekers in the 1990s led to a controversial decision by the US Supreme Court[51] that is relied upon to this day by governmental officials in some countries when seeking to justify their conduct. A prominent and long-standing example is Australia's 'Operation Sovereign Borders'. Operation Sovereign Borders is a militarized response to boat arrivals involving interception of boats at sea, along with offshore 'processing' (refugee status determination) on Nauru and Manus Island, Papua New Guinea.

It is well accepted by scholars that article 33 applies beyond State territory. Gammeltoft-Hansen offers a thorough analysis supporting the view that article 33 applies both at the physical border and beyond it.[52] Naturally, he begins with an examination of the text of the Refugee Convention in light of its object and purpose, as required by the standard rules of treaty interpretation reflected in articles 31 and 32 of the Vienna Convention on the Law of Treaties.[53]

The ordinary meaning of the term *refoulement* in French, and 'return', in English, encompass action taken at the border and beyond it. Further, unlike many refugee rights in the Refugee Convention that are premised upon a certain level of attachment to State territory, article 33(1) makes no mention of the territory of possible States of refuge, referring simply to a prohibition on expulsion or return ' "in any manner whatsoever" to the frontiers of territories where [the refugee's] life or freedom would be threatened'.[54]

[48] New York Declaration (n 28); Global Compact on Refugees.

[49] For discussion, see Amnesty International, 'Deadly Journeys: the Refugee and Trafficking Crisis in Southeast Asia' (Report, October 2015).

[50] The deadline passed with very few of the refugees resettled by third countries. See Madeline Gleeson, 'Unprecedented but Unfulfilled: Refugee Protection and Regional Responses to the Andaman Sea "Crisis" ' (2017) 38 Anthropologi Indonesia 6.

[51] *Sale v Haitian Centers Council*, 509 US 155 (1993).

[52] Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (CUP 2011).

[53] The relevant provisions of the Vienna Convention on the Law of Treaties codify customary international law applicable to the Refugee Convention (the Convention having been adopted prior to the Vienna Convention).

[54] See UNHCR, 'Submissions of the Office of the United Nations High Commissioner for Refugees Seeking Leave to Intervene as Amicus Curiae', Submission in *CPCF v Minister for Immigration and Border Protection* No S169/2014 (15 September 2014) para 9.

Noting, however, that the *travaux preparatoires* reveals some resistance to this interpretation, at least in cases of mass influx,[55] Gammeltoft-Hansen argues that the meaning of the words are in fact influenced by whether one adopts a territorialist or universalist premise.[56] Therefore, it is argued, one must move beyond the text to examine 'informal sources', namely relevant resolutions,[57] State practice[58] and other human rights treaties,[59] which have extended *non-refoulement* to instances where State jurisdiction is exercised.

Utilizing other human rights treaties as subsidiary means of interpretation, Gammeltoft-Hansen concludes that these 'give additional support to an interpretation extending the applicability *ratione loci* to state jurisdiction for [a]rticle 33'.[60] As treaties must be interpreted so as to be effective, extraterritorial migration control will engage the obligation of *non-refoulement* in situations in which 'states can be said to exercise a sufficient degree of power over either the refugee encountered or the geographic area in which control takes place'.[61] Further, he argues that

> [a] strong presumption prevails that any interdiction measure, even if not amounting to effective control over individuals or a geographical area, through the act itself would entail jurisdiction and thus an obligation on behalf of the acting state to respect basic rights under international refugee and human rights law.[62]

Extraterritorial migration control occurring within the territory of another sovereign State, he argues, may be a different matter.[63]

There is also an important procedural element to the obligation of *non-refoulement*. The Refugee Convention does not refer to refugee status determination (RSD), except in passing.[64] National determinations of status are accepted as declaratory, rather than constitutive.[65] However, in order for States to meet the obligations set out in the Refugee Convention, including that of *non-refoulement*, RSD is essential (which, of course, may occur on a *prima facie* basis). Boat pushbacks generally do not involve RSD, and even

[55] The idea that there is an exception to *refoulement* in cases of mass influx is highly controversial today. But see Hathaway (n 4) 355–63.

[56] Gammeltoft-Hansen (n 52) 51.

[57] Conclusions of the Executive Committee of the High Commissioner's Programme and the 'Declaration on Territorial Asylum', UNGA res 2312 (XXII) (24 December 1967) confirm that the obligation of *non-refoulement* applies at the border and beyond: Gammeltoft-Hansen (n 52) 69.

[58] On the paucity of practice accompanied by claims of international lawfulness, see Gammeltoft-Hansen (n 52) 74.

[59] ibid 68. [60] ibid 93. [61] ibid 98.

[62] ibid 125. [63] ibid 132–3.

[64] In particular article 9 of the Refugee Convention concerning provisional measures adopted during time of war or exceptional circumstances stipulates that provisional measures should only be taken pending determination of refugee status.

[65] As stated in the UNHCR Handbook, a refugee 'does not become a refugee because of recognition, but is recognized because he is a refugee': UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/1P/4/ENG/REV.4 (1979, reissued 2019) para 28.

where they have, the circumstances for RSD are likely to undermine its effectiveness.[66] Thus the Inter-American Court on Human Rights has concluded that interception at sea violates the principle of *non-refoulement* because the risks to individuals are not assessed.[67] Similarly, the Committee against Torture regards individual examination of cases as a preventative guarantee of the principle of *non-refoulement*.[68] As UNHCR submitted in its intervention as *amicus curiae* in an Australian High Court case involving the interception of Tamil asylum seekers, there is a 'duty of inquiry', that is, a State must 'establish, prior to returning a person to another country, that the person who they intend to return is not at risk of those harms that are covered by the *non-refoulement* obligation'.[69]

Controversially, in 1993, the US Supreme Court found that the relevant statute was not extraterritorial in reach.[70] The court bolstered this view with a strained interpretation of article 33 of the Refugee Convention to the effect that the exception in article 33(2) applied only to refugees within their territory, thus article 33(1) must also be so limited, along with two passages in the *travaux preparatoires* indicating that some States viewed article 33(1) as being limited to refugees on State territory.[71] The flawed assumption that returns can proceed in the absence, or on the basis, of inadequate RSD is central to the creation of a tension between the two paragraphs of article 33. As Wouters has written,

> applying Article 33(1) to refugees who are outside the host country's territory will involve the transportation of these refugees to the territory of the host State or the territory of a third country where the refugees will be received and their status assessed. Subsequently the question arises whether or not the refugee then poses a danger to the security of the territory he is in, in accordance with Article 33(2).[72]

The Inter-American Commission on Human Rights found that the United States had, *inter alia*, violated the right to seek and receive asylum in article 17 of the American Declaration of the Rights and Duties of Man[73] when it 'summarily interdicted and repatriated Haitian refugees to Haiti without making an adequate determination of

[66] The US 'process' concerning Haitians fleeing Haiti by boat was condemned as inadequate by the Inter-American Commission on Human Rights for this reason. See *Haitian Centre for Human Rights v United States* (*US Interdiction of Haitians on the High Seas*), Inter-American Commission on Human Rights Report No 51/96, Case 10.675 (13 March 1997) para 163. The Australian interceptions under Operation Sovereign Borders suffer from the same defects: Joyce Chia, Jane McAdam, and Kate Purcell, 'Asylum in Australia: "Operation Sovereign Borders" and International Law' (2014) 32 Australian Year Book of International Law 33.

[67] *Rights and Guarantees of Children in the Context of Migration* (n 13) para 220; *Institution of Asylum* (n 29) para 122.

[68] UN Committee against Torture (n 44) para 18(a).

[69] UNHCR (n 54) para 43.

[70] *Sale* (n 51).

[71] ibid 179–87.

[72] Wouters (n 33) 55.

[73] *Interdiction of Haitians on the High Seas* (n 66).

their status [and] without granting them a hearing to ascertain whether they qualified as "refugees".[74] This finding led to the Inter-American Court's later jurisprudence concerning the extraterritorial application of the obligation of *non-refoulement*, including at sea.[75]

Similarly, as previously noted, when applying article 3 of the European Convention on Human Rights in *Hirsi Jamaa v Italy*, a 2012 decision that involved interception on the High Seas by Italy, the European Court of Human Rights held that the provision applied extraterritorially.[76] The ruling has not prevented Italy from experimenting. Italy is now before the court in a case that concerns its cooperation with Libya, which 'pulled back' asylum seekers to Libya.[77] This case promises to explore an instance of 'contactless control',[78] whereby one State uses another to achieve *refoulement*.[79]

In *Hirsi Jamaa v Italy*, it was clear that the asylum seekers would be returned to Libya, where protection, including from chain *refoulement*, was lacking, whereas the advisory opinions of the Inter-American Court (not surprisingly given the advisory jurisdiction) do not appear to be concerned with return to a particular destination. However, without due process, it will not be possible to determine whether any country is safe for intercepted individuals. In *Hirsi*, the court found a violation of article 13 (the right to a remedy) in conjunction with article 3 (along with article 4 of Protocol 4) of the European Convention.[80] This tends to confirm that absence of process may, in and of itself, be a violation of the obligation of *non-refoulement*, whether the deflection strategy is implemented with, or without, a clear destination State or purported 'safe third country'.[81] This is important because some States simply divert boats in the absence of cooperation with a destination State, a notable example being Australia's Operation Sovereign Borders. On one occasion, it became clear that India, the intended destination State for a boatload of Sri Lankan asylum seekers, was not going to accept them, resulting in the prolonged holding of the asylum seekers on board the Australian vessel to which they had been transferred.[82] A majority in the ensuing case before the High Court found a right to enter India was not a necessary condition for the decision to direct the vessel there, and nor was it necessary to afford the asylum seekers procedural fairness.[83] This is inconsistent with international law.

[74] ibid para 163.

[75] *Rights and Guarantees of Children in the Context of Migration* (n 13) para 220; *Institution of Asylum* (n 29) para 122.

[76] *Hirsi* (n 35) para 137.

[77] *SS and Others v Italy*, App No 21660/18 (pending).

[78] See Chapter 26 in this volume.

[79] For further analysis of the application of the rules of State responsibility in cases of 'cooperative deterrence', see James C Hathaway and Thomas Gammeltoft-Hansen, '*Non-Refoulement* in a World of Cooperative Deterrence' 53(2) Columbia Journal of Transnational Law (2015) 234–84.

[80] *Hirsi* (n 35) para 205.

[81] For discussion of safe third countries, see Chapter 28 in this volume.

[82] For discussion of this incident, see Chia, McAdam, and Purcell (n 66).

[83] *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514.

7. *Non-refoulement* and Diplomatic Asylum

A variant of extraterritorial application of *non-refoulement*, which has occupied a grey or liminal space, involves embassies in third States (ie not the country of origin). This was the key issue at stake in the Inter-American Court's 2018 advisory opinion on the institution of asylum. The request for the advisory opinion was brought by Ecuador at the time that WikiLeaks founder Julian Assange (an Australian national) had requested and received asylum in the Ecuadoran embassy in London.[84] The court held that article 22(7) of the American Convention on Human Rights and article XXVII of the American Declaration of the Rights and Duties of Man enshrine the right to request and receive *territorial* asylum,[85] and that there is no regional customary norm concerning diplomatic asylum.[86] However, the court also found that the principle of *non-refoulement* (which is broader under the Inter-American system than the Refugee Convention)[87] may be applicable and impose certain obligations on the State in whose embassy a non-national has sought protection.[88]

The court stated that *non-refoulement* imposes positive obligations,[89] including an 'individualized risk assessment and appropriate protective measures, including measures against arbitrary detention'.[90] It also said that the person cannot be left in limbo. Grant of asylum is not necessarily required but diplomatic measures are necessary, such as a request that the territorial State grant a laissez-passer in order to protect the asylum seeker's rights.[91]

In a subsequent case, the European Court of Human Rights ruled that Syrian asylum seekers who had applied for visas from the Belgian Embassy in Lebanon were not within Belgium's jurisdiction for the purposes of Article 3 of the European Convention on Human Rights and declared the case inadmissible.[92] The Court considered that 'to find otherwise would amount to enshrining a near-universal application of the Convention on the basis of the unilateral choices of any individual, irrespective of where in the world they find themselves, and therefore to create an unlimited obligation on the Contracting States to allow entry to an individual who might be at risk of ill-treatment contrary to the Convention outside their jurisdiction'.[93]

[84] The court gave the opinion on the basis that this was not a disguised contentious case. The UK is, of course, not a part of the Inter-American human rights system.

[85] This followed from the fact that these provisions refer to receiving protection 'in a foreign territory' and diplomatic legations are not foreign territory: *Institution of Asylum* (n 29) paras 155, 156, and *Dispositif*, paras 2, 3.

[86] ibid paras 162, 163. [87] ibid para 186. [88] ibid para 188.

[89] ibid *Dispositif*, para 5. [90] ibid para 194. [91] ibid para 198.

[92] *M.N. and Others v Belgium*, App No 3599/18 (ECtHR, Grand Chamber, 5 May 2020).

[93] ibid para 123.

8. Constructive or Disguised *Refoulement*

A different strategy to the externalization of border control involves the effective internalization of the border by refugees and asylum seekers,[94] resulting in return on their own initiative. This is known as constructive or disguised *refoulement*.[95]

Spontaneous return is not *refoulement* if the decision to do so is voluntary, even where the circumstances in the country of origin remain such as to ground a well-founded fear of persecution. Voluntary repatriation, one of the three traditional durable solutions for refugees, is distinct from the situation of cessation of refugee status where the circumstances in the country of origin have fundamentally changed so that there is no well-founded fear of persecution.[96] However, there are often situations where the voluntariness of repatriation, including those conducted under the auspices of UNHCR, is questionable. As Long has noted,

> in many repatriations, including those to Afghanistan, South Sudan, and Angola, the interest of host and donor states in promoting return . . . continues to stretch the meaning of voluntariness to cover a number of persuasive and coercive tactics, from billboards and promotional T-shirts, through increasingly generous cash grants, to onerous processes of re-registration and increasingly public discussion of imminent cessation clauses.[97]

Meanwhile, in developed countries, policies that lead to the destitution of asylum seekers, have been quite common.[98]

In the United Kingdom, regulations denying income support to asylum seekers led to a case in which UNHCR argued that the situation was a case of constructive or disguised *refoulement*. In the event, the court decided the case for the asylum seekers on grounds other than constructive *refoulement*. However, Simon Brown LJ described the situation in terms that epitomize the phenomenon:

[94] This may be viewed as a variant of the embodied border. See Leila Marie Whitley, 'More than a Line: Borders as Embodied Sites' (DPhil thesis, Goldsmiths College, University of London 2015).

[95] As explained by the International Law Commission, translation of 'constructive' into other languages, particularly French, is difficult and might 'carry an undesirable positive connotation': Draft Articles (n 36) Commentaries on Draft Article 10, para 1.

[96] Refugee Convention, arts 1(C)(5), (6).

[97] Katy Long, *The Point of No Return: Refugees, Rights, and Repatriation* (OUP 2013) 147.

[98] For discussion of State practice diverging from the recast Reception Directive in the EU that may lead to destitution, see Asylum Information Database, 'Withdrawal of Reception Conditions of Asylum Seekers: An Appropriate, Effective or Legal Sanction?' (ECRE, July 2018). For a recent discussion of policy in the UK, see Lucy Mayblin, 'Imagining Asylum, Governing Asylum Seekers: Complexity Reduction and Policy Making in the UK Home Office' (2019) 7 Migration Studies 1. For discussion of recent Australian policy, see Refugee Council of Australia, 'Starving Them Out: How the Australian Government is Forcing People Seeking Asylum into Destitution' (Report, 26 March 2018).

> A significant number of genuine asylum seekers now find themselves faced with a bleak choice: whether to remain here destitute and homeless until their claims are finally determined or whether instead to abandon their claims and return to face the very persecution they have fled.[99]

Since then, there has been a small but growing body of jurisprudence acknowledging the concept of constructive or disguised *refoulement*.[100] The Committee against Torture has said in a General Comment that States should not 'compel' return through 'dissuasive measures or policies'.[101] The International Law Commission for its part has adopted a provision on 'disguised expulsions' in the Draft Articles.[102]

While the concept has received judicial and expert recognition, the requisite threshold is a matter for debate. The threshold adopted by the International Law Commission may be too stringent. Article 10(2) requires that States intend to cause return. This may be too high a threshold if it requires refugees and asylum seekers to prove intent, particularly when States may plausibly argue that they have other motivations for their behaviour. Faced with the Kenyan government's insistence that it did not intend to violate the *non-refoulement* principle by pursuing a policy of forced encampment of refugees, Judge DS Majana of the Kenyan High Court stated that 'violation of the principle may be indirect and may be the unintended consequence of a policy that does not, on its face, violate the principle'.[103]

In a case in which there was an effective finding of constructive or disguised *refoulement* (although the court did not use this terminology), *MS v Belgium*,[104] the European Court of Human Rights adopted a test of 'free consent' on the part of the individual to be returned. In this case, an Iraqi asylum seeker had been arrested for criminal association, fraud, and suspicion of links with Al-Qaeda and supply of documents allowing Islamists into Europe. He had been imprisoned and subjected to expulsion proceedings involving immigration detention and residence orders. Consequently, he decided to return home. The court said that

> [t]he applicant has been faced with the following choices: he could decide to stay in Belgium without any hope of obtaining, one day, the right to stay legally and without a real prospect of living freely; another option would be to return to Iraq, knowing of the risks of being arrested and subjected to ill treatment in prison; one

[99] *R v Secretary of State for Social Security, ex parte Joint Council for the Welfare of Immigrants* [1997] 1 WLR 275, 283–4.

[100] See eg *JA and Others v Director of Immigration* [2011] HKCFI 10, para 82; 'Individual Opinion of Committee Members Yuval Shany and Konstantine Vardzelashvili (concurring)' in *Warda Osman Jasin v Denmark* UN doc CCPR/C/114/D/2360/2014 (25 September 2015) app 2, 14, para 2.

[101] UN Committee against Torture (n 44) para 14.

[102] Draft Articles (n 36) art 10.

[103] *Kituo Cha Sheria and Others v Attorney General* [2013] eKLR, para 74.

[104] *MS v Belgium*, App No 50012/08 (ECtHR, 31 January 2012).

> last option would be to go to a third country, which is not practically feasible. The court is of the opinion that, in these circumstances, the conditions of 'free consent' were not met....[105]

If the concept of disguised or constructive *refoulement* is to be applied so as to prevent returns in cases like *MS*, it is arguable that the standard of proof or threshold for constructive *refoulement* where return has not yet occurred should be the same as the test applied in relation to the well-founded fear of persecution—is there a 'real chance' (or the equivalent test from other jurisdictions)[106] that a person will return if certain policies are pursued?[107] It is suggested that examination of the pressure applied through government policy and the individual vulnerabilities of the person concerned would be required. As I have written elsewhere, the concept of constructive *refoulement* could be particularly useful in cases where a putative 'safe third country' is involved. Constructive *refoulement* 'may work hand in hand with the concept of chain *refoulement* to prevent a sending state from relying on "protection elsewhere" when meaningful or effective protection is actually absent'.[108]

9. Conclusion

As the obligation of *non-refoulement* has expanded in reach, through the conscious law-making efforts of States in treaty creation, progressive judicial interpretation of the relevant instruments and affirmative *opinio juris* concerning its status as customary international law, States have often sought to avoid its application in practice. Some States have tried to avoid asylum seekers' presence on their territory—through interception at sea, for example—or to cause their return once they have arrived, sometimes through enforced destitution. As discussed above, significant judicial decisions of the Inter-American Court of Human Rights and the European Court of Human Rights have found that measures such as interception at sea breach the obligation of *non-refoulement*, given that States do not and cannot satisfy themselves as to the protection needs of the persons intercepted. The case law concerning constructive/disguised *refoulement* is still developing, however it is equally clear that States may violate the obligation of *non-refoulement* where asylum seekers are forced to return home because of policies of destitution.[109]

[105] ibid para 124 (unofficial translation by the author). The test has been applied again. See *NA v Finland*, App No 2524418 (ECtHR, 14 November 2019) para 60.

[106] The various tests are described in Hathaway and Foster (n 1) 113.

[107] See further, Penelope Mathew, 'Constructive Refoulement' in Satvinder Singh Juss (ed), *Research Handbook on International Refugee Law* (Edward Elgar 2019).

[108] Mathew (n 107) 217.

[109] cf *MSS v Belgium and Greece*, App No 30696/09 (ECtHR, Grand Chamber, 21 January 2011).

Researchers and practitioners may find it profitable to further explore the concept of constructive *refoulement*, particularly the questions concerning the standard of proof or threshold. Similarly, the issue of which rights attract the obligation of *non-refoulement* and the threshold for a violation of an implicit *non-refoulement* obligation are live questions. Given the inventiveness of States and their capacity to thwart asylum seekers' migration in areas beyond the public gaze, multidisciplinary research on the benefits of complementary migration pathways will be important given the limited nature of remedies for those who are returned to danger in spite of States' *non-refoulement* obligations.

CHAPTER 51

NON-PENALIZATION AND NON-CRIMINALIZATION

CATHRYN COSTELLO* AND YULIA IOFFE

1. Introduction

Refugees are often at the sharp end of migration controls. States and regions create a raft of legal and practical barriers to flight and onward travel in search of protection. While some aspects of immigration policies have become more liberal in the past decades, there is a widespread practice of containing would-be refugees in their home States and regions.[1] Refugee containment is the single dominant story in refugee studies since the end of the Cold War, as several other chapters in this *Handbook* attest.[2] Refugee containment means that when refugees do flee, in particular if they seek asylum in Europe, North America, or elsewhere in the Global North, they generally must use irregular means. Irregular travel is often dangerous as carrier sanctions in particular preclude access to safe, licit means of travel.

This facet of the contemporary predicament of refugees has been exacerbated by an increasingly criminal and punitive approach to dealing with irregular migration. Once a mere administrative matter, irregular migration and presence are now often made a crime in domestic laws, often with additional criminal offences such as for failure to cooperate in migration and asylum proceedings, or failure to have or produce identity documentation. In addition to criminalization, States also have meted out increasingly harsh treatment to those who breach their migration controls, irrespective of whether they are refugees or not. These practices have earned a new term, 'crimmigration', to convey how comprehensively criminal approaches to migration control have been

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[1] Hein de Haas and others, 'International Migration: Trends, Determinants, and Policy Effects' (2019) 45 Population and Development Review 885, 913.

[2] See Chapters 7 and 27 in this volume.

imbricated.[3] While Stumpf coined the term in the US context, this field of inquiry has burgeoned globally. Against this backdrop, this chapter examines the protections under international law which purport to secure refugees' right to seek asylum by protecting them from penalization.

The chapter begins by analysing article 31 of the Refugee Convention, the provision which purports to protect refugees from penalization for 'illegal entry and stay', drawing on our previous work[4] and that of other scholars.[5] The chapter argues that non-penalization reflects one of the objects and purposes of the Refugee Convention. Accordingly, it considers the distinct obligation on States to refrain from any acts frustrating the treaty's object and purpose. It then explores whether international human rights law substantively limits States' 'right' to criminalize irregular entry and stay, not only as regards refugees but of other migrants too, who either have good cause to breach immigration laws, or whose irregular migration is harmless and not blameworthy. Finally, it considers whether non-penalization of irregular entry or stay may be an emerging general principle of law.[6] We do not explore the right to seek asylum (in the UDHR) or the right to seek and be granted asylum in regional instruments, which may provide a further means to challenge immigration controls,[7] or indeed the right to leave any country.[8]

2. Article 31 of the Refugee Convention

a. An 'Object and Purpose' of the Refugee Convention

Article 31 reflects one of the objects and purposes of the Refugee Convention, namely, to ensure to 'refugees the widest possible exercise of . . . fundamental rights and freedoms'[9] by balancing their rights to protection with the rights of States to impose migration con-

[3] Juliet Stumpf, 'The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power' (2006) 56 American University Law Review 367.

[4] Cathryn Costello (with Yulia Ioffe and Teresa Büchsel), 'Article 31 of the 1951 Convention relating to the Status of Refugees', UNHCR Legal and Protection Policy Research Series, PPLA/2017/01 (July 2017).

[5] See eg Guy S Goodwin-Gill, 'Article 31 of the 1951 Convention relating to the Status of Refugees: Non-Penalization, Detention, and Protection' in Erika Feller, Volker Türk, and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (CUP 2003); Gregor Noll, 'Article 31 (Refugees Unlawfully in the Country of Refuge)' in Andreas Zimmermann (ed), *The 1951 Convention relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (OUP 2011).

[6] Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) art 38(1)(c).

[7] See eg Thomas Gammeltoft-Hansen and Hans Gammeltoft-Hansen, 'The Right to Seek—Revisited: On the UN Human Rights Declaration Article 14 and Access to Asylum Procedures in the EU' (2008) 10 EJML 439; see Chapter 48 in this volume.

[8] ICCPR, art 12. See also Dimitry Kochenov, 'The Right to Leave Any Country' in Richard Plender (ed), *Issues in International Migration Law* (Brill 2015); Elspeth Guild and Vladislava Stoyanova, 'The Human Right to Leave Any Country: A Right to be Delivered' [2018] European Yearbook on Human Rights 373.

[9] 'Considering that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms': Refugee Convention, preamble.

trols. The *travaux préparatoires* recognize that seeking protection may require refugees to breach domestic immigration rules.[10] The drafters observed:

> A refugee whose departure from his country of origin is usually a flight, is rarely in a position to comply with the requirements for legal entry (possession of national passport and visa) into the country of refuge. It would be in keeping with the notion of asylum to exempt from penalties a refugee, escaping from persecution, who after crossing the frontier clandestinely, presents himself as soon as possible to the authorities of the country of asylum and is recognized as a *bona fide* refugee.[11]

The discussion of non-penalization surfaced not only in the context of article 31, but also in the course of preparatory work on article 7 (exemption from reciprocity)[12] and article 9 (provisional measures).[13] Article 31 thus in itself reflects an 'object and purpose' of the Convention, which has an important bearing on the provision's interpretation, as the next section explains.

As parties to a treaty, the Contracting States to the Refugee Convention have an obligation not to defeat the instrument's object and purpose.[14] In the *Military and Paramilitary Activities Case*, the International Court of Justice (ICJ) opined that undermining a treaty's object and purpose was *independent* from a breach of the treaty's substantive provisions.[15] This means that a Contracting State to the Refugee Convention could act in a manner that is inimical to the object and purpose of the Convention, even when the act itself is not expressly prohibited by article 31.

Both articles 18[16] and 26[17] of the Vienna Convention on the Law of Treaties (VCLT) reflect customary international law. The drafters of the VCLT considered that States'

[10] See eg Ad Hoc Committee on Refugees and Stateless Persons, 'Status of Refugees and Stateless Persons: Memorandum by the Secretary-General', UN doc E/AC.32/2 (3 January 1950) ch XI, para 1.

[11] ibid para 2.

[12] The French representative stated that '[t]here was no doubt that refugees must not be penalized because they were refugees': Ad Hoc Committee on Refugees and Stateless Persons, Second Session, Summary Record of the Thirty-Fourth Meeting Held at the Palais des Nations, Geneva (14 August 1950), UN doc E/AC.32/SR.34, 16.

[13] The US representative observed: 'A country might have many provisions concerning aliens which were not based on security reasons alone, including confiscation measures, limitations on trade and so forth, and in such cases the *bona fide* refugee should not be penalized but be given the opportunity of showing his good faith' (ibid 19).

[14] Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT), arts 18, 26; also under customary international law (which the VCLT reflects): *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)* (Merits) [1986] ICJ Rep 14, 136–7, para 273 (*Military and Paramilitary Activities Case*).

[15] *Military and Paramilitary Activities Case* (n 14) 136–7, para 273; cf dissenting opinions of Judge Oda 249, para 79 and Judge Jennings 542, arguing that the object and purpose of a treaty cannot exist independently of its terms. See further Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2018) 484.

[16] Yearbook of the International Law Commission (ILC) (1966) Vol II, 202; *Certain German Interests in Polish Upper Silesia* (Merits) (1926) PCIJ Series A, No 7, 30. See also Lassa Oppenheim, *International Law: A Treatise*, vol I, Hersch Lauterpacht (ed) (8th edn, Longmans/Green 1955) 909.

[17] *Pulp Mills on the River Uruguay (Argentina v Uruguay)* [2010] ICJ Rep 14, 67, para 145. See also Jean Salmon, 'Article 26' in Olivier Corten and Pierre Klein (eds), *The Vienna Convention on the Law of Treaties* (OUP 2011) 662; Dörr and Schmalenbach (n 15) 475.

obligation to refrain from any acts frustrating the object and purpose of the treaty was 'clearly implicit in the obligation to perform the treaty in good faith'.[18] In fact, under article 18, the obligation not to defeat the object and purpose of a treaty exists prior to the treaty's entry into force, and continues after ratification under article 26 of the VCLT.[19]

Finally, under article 19 of the VCLT, reservations that are incompatible with a treaty's object and purpose are impermissible.[20] Several Contracting States have made reservations to article 31 of the Refugee Convention.[21] Since these reservations affect an essential element of the treaty—the protection of refugees from being penalized for violating domestic immigration law in order to seek asylum—they may be considered invalid.[22] This legal question warrants further doctrinal examination.

b. Elements of Article 31

Article 31 prohibits States from imposing 'penalties' on the grounds of illegal entry or presence of 'refugees' in their territory, as long as three conditions are met: 'directness' of flight, 'promptness' in notifying officials, and 'good cause' for entering without the requisite documents. This trio of interrelated conditions should be interpreted consistently, employing an individualized, subjective approach that takes into account the complexity of flight and a refugee's individual circumstances.

As we have argued elsewhere,[23] the term 'refugees' in article 31(1) should be interpreted broadly, and clearly includes asylum seekers, understood broadly to include all those in search of international protection.[24] There are also good legal reasons to regard refugees under expanded regional definitions as entitled to the protection in article 31.[25] As regards beneficiaries of subsidiary and other forms of protection, in many instances equality guarantees under international human rights law ought to ensure that they are also accorded the benefits of non-penalization. While State practice varies, including

[18] Yearbook of the ILC (n 16) 211 para 4; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* [1997] ICJ Rep 7, 78–9, para 142.

[19] Dörr and Schmalenbach (n 15) 485; *Gabčíkovo-Nagymaros Case* (n 18), dissenting opinion Judge Fleischhauer 206.

[20] VCLT (n 14) art 19.

[21] See the reservations made by Mexico, Papua New Guinea, and Botswana: UN Treaty Collection, 'Convention relating to the Status of Refugees' <https://treaties.un.org/Pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-2&chapter=5&Temp=mtdsg2&clang=_en> accessed 21 July 2019.

[22] See ILC, 'Guide to Practice on Reservations to Treaties', UN doc A/66/10/Add.1 (2011) guideline 3.1.5.

[23] Costello, Ioffe, and Büchsel (n 4) 10–17.

[24] An asylum seeker is 'any person who claims to be in need of international protection; consequently, that person is presumptively entitled to receive the provisional benefit of the no penalties obligation in Article 31 until s/he is found not to be in need of international protection in a final decision following a fair procedure': UNHCR, 'Summary Conclusions: Article 31 of the 1951 Convention' (2003) para 10(g).

[25] Cartagena Declaration, conclusion III(8); Marina Sharpe, 'The 1969 African Refugee Convention: Innovations, Misconceptions, and Omissions' (2012) 58 McGill Law Journal 95, 129–45.

national court decisions on this point,[26] in our view a wide interpretation of the personal scope of article 31 is crucial.

The protection offered by article 31(1) is against the imposition of 'penalties' where there is a connection between the penalties in question and illegal entry or presence ('on account of'). While the English language version of the Convention refers broadly to 'penalties', the French version speaks of '*sanctions pénales*', implying penal measures (that is, measures primarily in the criminal sphere). In English, by contrast, a 'penalty' may be criminal or civil (a contractual penalty, for example), or more broadly a measure with a disadvantageous impact. If there is a discrepancy between language versions, article 33(4) of the VCLT provides that 'the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted'. In view of the protective purpose of article 31, article 33(4) of the VCLT tends to support the interpretation based on the broader wording if this supports the object and purpose of the treaty,[27] a position supported both by Goodwin-Gill[28] and Hathaway.[29] This broad reading of 'penalties' also has support in the case law[30] and legislation of many States.[31] This broad interpretation of penalization means that article 31(1) also prohibits the prosecution of refugees on account of illegal entry and stay,[32] where bringing prosecutions itself has adverse effects, although there is conflicting national authority on this point.[33] Furthermore, if economic or social rights are denied on account of illegal entry or presence, this may also constitute a 'penalty' in breach of article 31.[34]

[26] The Supreme Court of Denmark held that article 31 was only applicable to asylum seekers and recognized Convention refugees, and not to beneficiaries of subsidiary and other protection: *Decisions 178/2011 and 179/2011* (3 February 2012) (Supreme Court of Denmark) (this account is based on the summary in English provided by Simon Hein Nielsen (on file with the authors)). See further Jens Vedsted-Hansen, 'Straf eller straffrihed for asylansøgeres anvendelse af falske rejsedokumenter' (2012) Ugeskrift for Retsvaesen 360 (UfR online U.2012B.360).

[27] See Dörr and Schmalenbach (n 15) 649.

[28] Goodwin-Gill (n 5) 412.

[29] James C Hathaway, *The Rights of Refugees under International Law* (CUP 2005) 411–12.

[30] See eg *B010 v Canada (Citizenship and Immigration)*, 2015 SCC 58, [2015] 3 SCR 704, where the Canadian Supreme Court firmly rejected the government's argument that article 31(1) only related to criminal penalties, instead holding that it applied to a procedural detriment (in that case, inadmissibility) imposed on the asylum seeker.

[31] See eg legislation in Argentina, Bolivia, Brazil, Chile, Costa Rica, Nicaragua, and Uruguay which defines the protection against penalization as covering both criminal and administrative sanctions: Ley No 26.165 Ley General de Reconocimiento y Protección al Refugiado 2006, art 40 (Argentina); Ley de Protección a Personas Refugiadas 2012, art 7 (Bolivia); Ley No 9.474 1997, art 10 (Brazil); Ley No 20.430 2010, art 8 (Chile); Reglamento de Personas Refugiados 2011, art 137 (Costa Rica); Ley No 655 de la Protección a Refugiados 2008, art 10 (Nicaragua); Ley No 18.076 del Refugiado 2006, art 15 (Uruguay). For a more detailed analysis, see Costello, Ioffe, and Büchsel (n 4) 33.

[32] Costello, Ioffe, and Büchsel (n 4) 34–7.

[33] See *BW9266* [2012] 10/04365 (Supreme Court of the Netherlands); *BY4310* [2013] 11/01046 (Supreme Court of the Netherlands) (the account of the Dutch case law and translation of the original Dutch text into English are from Isa van Krimpen 'Article 31 of the Refugee Convention: Summary of Dutch Caselaw' (24 March 2017) (on file with the authors)); cf *R v Uxbridge Magistrates Court, ex parte Adimi* [1999] EWHC Admin 765, [2000] 3 WLR 434, para 43 (*Adimi*); *SXH v The Crown Prosecution Service* [2017] UKSC 30.

[34] Costello, Ioffe, and Büchsel (n 4) 37.

Some States routinely detain asylum seekers who enter irregularly. If such detention can be characterized as a 'penalty' (punitive in character), then it is incompatible with article 31.[35] In order to establish whether detention is punitive, its purpose and character must be considered, including by ascertaining State's intent and objective in resorting to detention, as well as its effect.[36] If detention is used as a deterrent, then it violates article 31(1),[37] since its objective is similar to that of penal law. By contrast, recourse to non-punitive detention is limited by article 26 of the Refugee Convention on free movement.[38] Article 26 must be read in light of the prohibition on arbitrary detention in international human rights law, and so proscribes any automatic detention of asylum seekers or refugees, and also establishes important legal limits on the duration and conditions of detention.[39]

Article 31(1) protects refugees from being penalized 'on account of their illegal entry or presence'. The textual interpretation of the phrase 'on account of', a rather loose expression,[40] indicates that some causal connection between the penalty imposed and the illegal entry or presence must be demonstrated, but it applies not only to crimes encompassing illegal and entry or stay in themselves.[41] In particular, crimes relating to the use of false documents fall within the ambit of article 31(1), although some States wrongly exclude them from its scope.[42] To the extent that States seek to punish refugees for smuggling themselves or others into their territories, article 31(1) is applicable.[43] By contrast, it does not extend to other persons who assist refugees to enter a State for the purposes of seeking asylum, whether that assistance is framed as smuggling or otherwise. Article 31 is, however, legally relevant to understand what scope States have to criminalize such assistance. For example, the Supreme Court of Canada in its 2015 ruling in *Appulonappa* took article 31 into account in determining the proper scope of smuggling prohibitions, supporting its legal conclusion that the Canadian domestic prohibitions were 'overbroad'.[44]

As mentioned at the outset, article 31's protection against penalization is limited, reflecting a compromise between the refugee's right to seek asylum and the State's right

[35] ibid 38. See further UNHCR, 'Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention' (2012). See also Chapter 52 in this volume.

[36] cf Australian practice, where the mandatory indefinite scheme of immigration detention was not considered punitive despite its punitive effect, because the official purpose of the scheme was 'administrative'. See eg *Al-Kateb v Godwin* (2004) 219 CLR 562. The case was not concerned with the interpretation of article 31 however.

[37] UNHCR, 'Note on International Protection', UN doc A/AC.96/643 (9 August 1984) para 29; UNHCR Detention Guidelines (n 35) guidelines 3–4.

[38] Noll (n 5) 1263. See also Galina Cornelisse, *Immigration Detention and Human Rights: Rethinking Territorial Sovereignty* (Martinus Nijhoff 2010) ch 7.

[39] For an analysis and critique of these standards in international human rights law, see Cathryn Costello, 'Human Rights and the Elusive Universal Subject: Immigration Detention under International Human Rights and EU Law' (2012) 19 Indiana Journal of Global Legal Studies 257.

[40] 'On account (also upon account)' means 'for the sake of, in consideration of; by reason of, because of': *Oxford English Dictionary* (OUP online).

[41] Costello, Ioffe, and Büchsel (n 4) 38. [42] ibid 38–41.

[43] James C Hathaway, 'Prosecuting a Refugee for "Smuggling" Himself' (2014) University of Michigan Public Law Research Paper Series No 429, 4. See further Costello, Ioffe, and Büchsel (n 4) 41–2.

[44] *R v Appulonappa* 2015 SCC 59 [2015], 3 SCR 754, para 73 (Canada).

to impose border controls. Non-penalization only applies to those who come 'directly', present themselves 'without delay', and have 'good cause' for their illegal entry or stay. Directness is the most controversial element: 'coming directly from *a territory*' suggests that there is no requirement for a refugee to come directly from the country of origin or residence, provided that the territory is one where the person's life or freedom is threatened. The preparatory work confirms that the drafters envisaged the possibility that refugees might experience such threats at any point in their journey in search of protection.[45] In fact, the *travaux préparatoires* reveal that the 'directness' condition was only added to address a particular concern of the French delegation. They wished to exclude from article 31(2) a narrow category of refugees already afforded international protection in another State, but who still attempted to enter illegally.[46] The drafters also acknowledged that refugee flight may be perilous and non-linear because of the difficulties facing refugees arriving in a State 'which did not display a generous attitude'.[47] As a result, article 31 cannot be considered to require a person to seek international protection at the first effective opportunity.[48] As such, it is evident that the provision does not provide a basis for safe third country practices.[49] Indeed, to the contrary, it is based on the realization that refugees often transit through a number of countries before they find protection. It follows that an individualized, subjective approach, taking into account the reality of flight and individual circumstances, ought to be applied to the condition of directness. Some domestic courts, including in the United Kingdom,[50] the Netherlands,[51] New Zealand,[52] Germany,[53] and Finland,[54] indeed adopted such an

[45] UN Ad Hoc Committee on Refugees and Stateless Persons, 'Decisions of the Committee on Statelessness and Related Problems Taken at the Meetings of 2 February 1950', UN doc E/AC.32.L.26 (2 February 1950).

[46] 'In order to illustrate his own point, he would give a concrete example—that of a refugee who, having found asylum in France, tried to make his way unlawfully into Belgium. It was obviously impossible for the Belgian Government to acquiesce in that illegal entry, since the life and liberty of the refugee would be in no way in danger at the time': Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 'Summary Record of the Thirteenth Meeting' (10 July 1951), UN doc A/CONF.2/SR.13, 14–15 (Mr Colemar, France).

[47] Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 'Summary Records of the Fourteenth Meeting' (10 July 1951), UN doc A/CONF.2/SR.14, 4. See also Goodwin-Gill (n 5) 192.

[48] See UNHCR Executive Committee Conclusion No 15 (XXX), 'Refugees without an Asylum Country' (1979) paras (iii)–(iv).

[49] See generally Chapter 28 in this volume.

[50] *Adimi* (n 33) para 18 (Brown LJ); *R v Mateta* [2013] EWCA Crim 1372, [2014] 1 WLR 1516, para 21(iv) (Leveson LJ).

[51] *BO1587* [2011] 09/02303, para 2.4.3 (Supreme Court of the Netherlands); *BQ7762* [2011] 09/03918 (Supreme Court of the Netherlands); *BV7412* [2012] 10/05212 (Supreme Court of the Netherlands).

[52] *Hassan v Department of Labour* (2007) CRI 2006-485-101 (High Court of New Zealand); *R v Zanzoul (No 2)* (2006) CA297/06, para 30 (Court of Appeal of New Zealand).

[53] 2 BvR 450/11 (8 December 2014) (Federal Constitutional Court of Germany) (the account here is based on the abstract of the German Federal Constitutional Court's order of 8 December 2014, 2 BvR 450/11, [GER-2015-1-001], and the translation of the original provided by Teresa Büchsel (on file with authors) para 32.

[54] *Decision KKO:2013:21* (5 April 2013) (Supreme Court of Finland), See EDAL, 'Finland: Supreme Court, 5 April 2013, KKO:2013:21 Summary' <http://www.asylumlawdatabase.eu/en/case-law/finland-supreme-court-5-april-2013-kko201321> accessed 21 July 2019.

approach by developing a sophisticated individualized assessment. This assessment introduces a number of elements for the term 'coming directly', including the length of stay in the intermediate country, the reason for delay, and whether or not the refugee sought or found protection *de jure* or *de facto*.[55]

The second condition set out in article 31 is that refugees should present themselves to the authorities 'without delay'. The term 'without delay' is not synonymous with 'immediately', and its ordinary meaning does not require setting a rigid time limit. In fact, the ICJ has interpreted the term (albeit in a different context),[56] reiterating that 'neither the terms of the [Vienna] Convention as normally understood, nor its object and purpose, suggest that "without delay" is to be understood as "immediately"'.[57] The court underlined that the determination of whether conduct was undertaken 'without delay' should be made on the basis of individual circumstances.[58] According to UNHCR, the proper interpretation of 'without delay' in article 31 is a 'matter of fact and degree',[59] depending on 'the special situation of asylum seekers, in particular the effects of trauma, language problems, lack of information, previous experiences which often result in a suspicion of those in authority, feelings of insecurity'.[60] When it comes to domestic case law, two strands of interpretation have emerged. The first strand supports a flexible, individualized approach,[61] which in our view is appropriate. In contrast, the second strand interprets 'without delay' unnecessarily restrictively, imposing short and inflexible time limits.[62]

The criterion of 'good cause' for illegal entry is also sufficiently flexible to allow the individual circumstances of refugees to be taken into account.[63] Being a refugee is, in itself, a sufficiently 'good cause'.[64] Domestic practices again reflect two conflicting trends. Some courts have recognized that the 'good cause' condition is satisfied where refugees fail to avail themselves of protection opportunities out of misapprehension or fear, including a perception that it may be hazardous to claim asylum at border-crossing points.[65] By contrast, other courts have taken a less protective view, for instance, treating

[55] *Adimi* (n 33) para 18 (Brown LJ).

[56] *Jadhav Case (India v Pakistan)* (Merits) [2019] ICJ Rep 1, para 113. The case concerned the treatment of an Indian national under the Vienna Convention on Consular Relations, who was detained, tried, and sentenced to death by a military court in Pakistan. See Victor Kattan, 'Jadhav Case (India v Pakistan)' (2020) 114 AJIL 281.

[57] *Jadhav Case* (n 56) para 113, referring to *Avena and Other Mexican Nationals (Mexico v United States of America)* (Merits) [2004] ICJ Rep 12, 48 para 85.

[58] *Jadhav Case* (n 56) para 113.

[59] UNHCR (n 24) para 10(f).

[60] UNHCR, 'Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers' (26 February 1999) para 4.

[61] See eg *HR-2014-01323-A*, Case No 2014/220 (24 June 2014) (Norwegian Supreme Court). See also annotation by Eirik Bjorge, '*A v Public Prosecuting Authority (Norwegian Organisation for Asylum Seekers intervening)*' (2018) 175 International Law Reports 643.

[62] 2 BvR 450/11 (n 53). UNHCR, 'Comments by the UNHCR Regional Representation for the Baltic and Nordic Countries on the Finnish Ministry of Justice's Proposal for Amendments to the Criminal Code's Provision on Arrangement of Illegal Immigration' (28 March 2013) para 16.

[63] Goodwin-Gill (n 5) 9.

[64] Noll (n 5) 1260; Costello, Ioffe, and Büchsel (n 4) 30.

[65] Costello, Ioffe, and Büchsel (n 4) 31; Case No 2014/220 (n 61).

the failure to apply for asylum at the point of arrival at an airport as evidence that there was no 'good cause' for the irregular entry.[66]

c. Implementation of Article 31

States often violate their obligations under the Refugee Convention and other human rights treaties, and article 31 appears to be particularly prone to misinterpretation and misapplication. Undoubtedly, there are some examples of good practice in terms of incorporation of article 31 into domestic legislation, as in South America.[67] For instance, national legislation in both Argentina[68] and Brazil[69] is framed in similar terms to article 31, specifying that both administrative and criminal sanctions are precluded. However, overall, refugee rights and realities diverge starkly when it comes to non-penalization for illegal entry.

First, some States and scholars, in particular in Europe, have read the 'coming directly' condition not only to limit the scope of article 31, but also to legitimize country of first asylum and safe third country practices.[70] As explained above, this is a profound misinterpretation of article 31, undermining the object and purpose of the Convention.

Secondly, many States do not implement article 31 properly, or in some cases at all.[71] For example, some domestic measures afford the protection of non-penalization only to a narrow category of offences. In the US, refugees are only protected from having certain civil penalties imposed, but are routinely prosecuted for various immigration offences, which is in violation of article 31 and other provisions of international refugee and human rights law.[72] Similarly in the UK, the domestic implementation of article 31 is too narrow. Its lack of protective effect has led UNHCR to argue that the manner of drafting and interpretation of the domestic provision has left refugees worse off.[73] The legislation does not include many common migration control-related

[66] Costello, Ioffe, and Büchsel (n 4) 31–2; 2 BvR 450/11 (n 53).

[67] Costello, Ioffe, and Büchsel (n 4) 55.

[68] Ley No 26.165 (n 31) art 40 (Argentina).

[69] Lei No 9.474 (n 31) art 10 (Brazil).

[70] Kay Hailbronner, 'The Concept of "Safe Country" and Expeditious Asylum Procedures: A Western European Perspective' (1993) 5 IJRL 31, 58–9; Morten Kjaerum, 'The Concept of Country of Asylum' (1992) 4 IJRL 514, 515. The 'safe third country' notion has been incorporated into EU law and the domestic law of some European States. Council Directive 2013/32/EU of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection (recast) [2013] OJ L180/60, arts 33, 38; Germany, Asylum Act (AsylVfG) (2 September 2008) sections 26a, 18(2); France, Code de l'entrée et du séjour des étrangers et du droit d'asile (CESEDA) (22 February 2005) Article L.723–11.

[71] See Costello, Ioffe, and Büchsel (n 4) 40–1, 49, 53–4, 58. See eg practice in Sweden, France, Ireland, the UK, the US, Australia, and others.

[72] Emily Puhl, 'Prosecuting the Persecuted: How Operation Streamline and Expedited Removal Violate Article 31 of the Convention on the Status of Refugees and 1967 Protocol' (2015) 25 Berkeley La Raza Law Journal 87; Evan J Criddle, 'The Case against Prosecuting Refugees' (2020) 115 Northwestern University Law Review 717.

[73] UNHCR, 'UNHCR Intervention before the House of Lords in the Case of *Regina (Respondent) and Fregenet Asfaw (Appellant)*' (28 January 2008) para 7.

offences. The EU has also failed to implement article 31 within its own legal system. In *Qurbani*, for instance, the Court of Justice of the EU (CJEU) declined to provide interpretative guidance to a national court on the meaning of article 31, on the basis that article 31 did not fall within the scope of EU law, despite the fact that EU asylum law must be compatible with the Refugee Convention in general.[74] This ruling is unpersuasive and ought to be interpreted narrowly. As Holiday has suggested, article 31 is pertinent to the interpretation of many provisions of EU law, so falls properly within the CJEU's jurisdiction.[75]

Thirdly, prosecutorial authorities are often unaware of the provision, and may wrongly prosecute refugees. The contrast between the UK and Norwegian experience provides an illustration. In spite of (limited) domestic incorporation of article 31 and many high-level court rulings, the UK continued to prosecute many asylum seekers and refugees, arguably illegally. Many convicted refugees successfully had their cases overturned, after assessment by the body charged with dealing with miscarriages of justice, the Criminal Cases Review Commission.[76] This remedy often came years after their initial convictions. Strategic litigation attempted unsuccessfully to establish that prosecutions should not be brought in the first place,[77] but the Supreme Court rejected the argument narrowly on the facts.[78] In contrast, in Norway, a 2014 Supreme Court judgment established that the penalties imposed on a refugee who presented a forged document at the airport were not permitted by article 31.[79] In response, the Director of Public Prosecutions initiated reopening of cases against asylum seekers who had been penalized for having entered Norway irregularly, and suspended their gaol sentences.[80] The crucial point is that non-penalization requires that asylum seekers and refugees not be prosecuted, which means that article 31 must be understood and implemented within prosecutorial institutions.

Fourthly, there are many contexts where, despite article 31's incorporation in domestic law, other deficiencies in the asylum process render it ineffective. All too often, refugees are detained on arrival and deprived of effective access to asylum procedures. The protections of article 31 remain distant, as these presumptive refugees must wait long periods in order to even lodge an asylum claim.

[74] Case C-604/12 *v Minister for Justice, Equality and Law Reform* (CJEU, 8 May 2014), para 27, citing *X, Y, and Z*, para 39 and the case law cited there. For more detailed analysis of EU law in this context, see Costello, Ioffe, and Büchsel (n 4) 60–3.

[75] Yewa Holiday, 'Penalising Refugees: When Should the CJEU Have Jurisdiction to Interpret Article 31 of the Refugee Convention?' (*EU Law Analysis Blog*, 19 July 2014) <http://eulawanalysis.blogspot.com/2014/07/penalising-refugees-when-should-cjeu.html> accessed 25 March 2020.

[76] Mai Sato, Caroline Hoyle, and Naomi-Ellen Speechley, 'Wrongful Convictions of Refugees and Asylum Seekers: Responses by the Criminal Cases Review Commission' (2017) 2 Criminal Law Review 106; Yewa Holiday, Elspeth Guild, and Valsamis Mitsilegas, 'The Court of Appeal and the Criminalisation of Refugees' (*Criminal Case Review Commission*, 2018) 31–2 <https://ccrc.gov.uk/research-at-the-ccrc/published-research-on-the-ccrc/> accessed 14 May 2020.

[77] *SXH* (n 33). See further UNHCR, '*SXH (Somalia) v Crown Prosecution Service*: Case for the Intervener' (6 July 2016).

[78] *SXH* (n 33).

[79] Case No 2014/220 (n 61) paras 23–4.

[80] Riksadvokaten (2014) 2014/00167-009 AB6007 274.

3. The Criminalization of Irregular Migration under International Human Rights Law

Beyond article 31 of the Refugee Convention, this section looks to international human rights law as a potentially wider source of protection. In particular, this section examines whether the criminalization of irregular migration itself may be regarded as a human rights violation, thereby opening up a new avenue for legal research and advocacy. This section suggests that international human rights law may provide arguments to challenge the criminalization of refugees and others whose irregular migration is harmless or blameless, or who have good cause to breach migration controls.

There are strong arguments that, from an ethical standpoint, many of the current laws criminalizing migration are a misuse of the criminal law, being out of keeping with the proper scope of the criminal law in States that value the rule of law and individual liberties. Given the criminal law's stigmatic, punitive character, there is a consensus in liberal political and legal theory that its use should be limited. On this basis, an important body of scholarship in criminal law theory critiques the criminalization of migration as a distortion of the proper role of criminal law.[81] These authors generally argue that immigration law is itself often arbitrary, in that it excludes those with the strongest ethical and legal claim to admission, including refugees, and so criminalization of immigration itself is arbitrary. Another important line of argument focuses on the harmless and blameless nature of many immigration crimes. In general, criminal law theorists point out that irregular migration is not a crime entailing harm to others in the usual sense, but rather is a regulatory crime, whose suitability for criminalization is in doubt. There are often strict liability offences that bear down on those who are not blameworthy.

In some contexts, national constitutional law may be invoked to constrain the scope of criminalization. For instance, Criddle has powerfully argued that under the US Constitution's Eighth Amendment,[82] criminalization of refugees for irregular entry ought to be regarded as unconstitutional. The argument draws on constitutional jurisprudence that has precluded the criminalization of other blameless individuals, such as addicts and the homeless, where their predicaments lead them unavoidably to breach the criminal law.[83]

[81] Ana Aliverti, 'The Wrongs of Unlawful Immigration' (2017) 11 Criminal Law and Philosophy 375; Alessandro Spena, 'A Just Criminalization of Irregular Immigration: Is It Possible?' (2017) 11 Criminal Law and Philosophy 351; Cathryn Costello, 'Victim or Perpetrator? The Criminalised Migrant and the Idea of "Harm" in the Labour Market Context' in Alan Bogg, Jennifer Collins, Mark Freedland, and Jonathan Herring (eds), *Criminality at Work* (OUP 2020) 309.

[82] Constitution of the United States of America, Eighth Amendment: 'Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted'.

[83] Criddle (n 72) 725, 761–2.

We suggest that international human rights law ought also to be read to limit criminalization. In general, international human rights law defers to States' rights to control the entry and residence of non-nationals. Indeed, many significant critiques of human rights law have argued that this deference to the 'statist migration control assumption' generates an unprincipled, unstable jurisprudence when migration control is invoked to limit human rights, including on detention, deportation, and non-discrimination.[84] Nonetheless, some authoritative interpretations of international human rights law criticize the criminalization of migration, including by the Inter-American Court of Human Rights (IACtHR), several Special Rapporteurs, and other human rights bodies.[85] In some instances, human rights institutions make general critiques of the impact of criminalization, for instance, that '[m]igration management based on criminal law tends to disregard a human rights dimension of migration'.[86] This section seeks to go beyond these general claims to begin to identify some principled material limits to criminalization.

Under the ECHR, the criminal law is tamed by various human rights provisions, such as the right to a fair trial and respect for the right to liberty. However, clear substantive limits on recourse to the criminal law have not emerged, although if conduct that is protected by the ambit of a substantive right is criminalized, that criminalization violates the right in question.[87] An important body of commentary on the ECtHR identifies a tendency to emphasize the 'sword' function of human rights law—that it sometimes *requires* criminalization in order to protect rights, over its 'shield function'—that it demands a limit on recourse to criminal law.[88]

[84] Cathryn Costello, *The Human Rights of Migrants and Refugees in European Law* (OUP 2015) 10–11, 316; Marie-Bénédicte Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (OUP 2015) 503–5.

[85] *Vélez Loor v Panama*, Inter-American Court of Human Rights Series C No 218 (23 November 2010) para 169; UNGA, *Report of the Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante*, UN doc A/65/222 (3 August 2010) para 19; Human Rights Council, *Report of the Special Rapporteur on the Human Rights of Migrants, François Crépeau*, UN doc A/HRC/20/24 (2 April 2012) para 13; Human Rights Council, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development: Report of the Working Group on Arbitrary Detention*, UN doc A/HRC/7/4 (10 January 2008) para 53; Human Rights Council, *Report of the Working Group on Arbitrary Detention*, UN doc A/HRC/13/30 (15 January 2010) para 58; New York Declaration for Refugees and Migrants, paras 33, 56; OHCHR, 'Administrative Detention of Migrants' (Migration Discussion Papers, undated) 13; Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), 'General Comment No 2 on the Rights of Migrant Workers in an Irregular Situation and Members of Their Families', UN doc CMW/C/GC/2 (28 August 2013) para 24; CMW and Committee on the Rights of the Child, 'Joint General Comment No 4/23 on State Obligations regarding the Human Rights of Children in the Context of International Migration in Countries of Origin, Transit, Destination and Return', UN doc CMW/C/GC/4-CRC/C/GC/23 (6 November 2017) para 7; Council of Europe Commissioner for Human Rights, 'Criminalisation of Migration in Europe: Human Rights Implications' (4 February 2010) 1.

[86] UNGA (n 85) para 19.

[87] The European Court of Human Rights found criminalization of male same-sex activity/acts to be a violation of the right to private life under article 8 of the ECHR. See *Dudgeon v UK* (1982) 4 EHRR 149, paras 41, 63; *Norris v Ireland* (1988) 13 EHRR 186, paras 46–7; *Modinos v Cyprus* (1993) 16 EHRR 485, paras 24–5; *ADT v UK* (2000) 31 EHRR 803, paras 38–9.

[88] See in particular Françoise Tulkens, 'The Paradoxical Relationship between Criminal Law and Human Rights' (2011) 9 Journal of International Criminal Justice 577; Laurens Lavrysen and Natasa Mavronicola (eds), *Coercive Human Rights: Positive Duties to Mobilise the Criminal Law under the ECHR* (Hart 2020).

In contrast, the IACtHR has established just such limits. For example, in *Vélez Loor v Panama*, the court cited with approval a statement by the Working Group on Arbitrary Detention[89] that 'criminalizing an irregular entry into a country goes beyond the legitimate interest of States to control and regulate illegal immigration and leads to unnecessary detention'.[90] The court set out clear material limits on the punitive power of the State, observing that: 'In a democratic society punitive power is exercised only to the extent that is strictly necessary to protect fundamental legal rights from serious attacks that may impair or endanger them. The opposite would result in the abusive exercise of the punitive power of the State'.[91] The court held accordingly that the use of detention in the immigration context was a violation of human rights, in so doing construing the States' power to detain in a markedly narrower way than the European Court of Human Rights.[92] But even beyond the issue of detention, the court, most importantly, limited the use of the criminal law in this context.

The IACtHR approach was also endorsed by the former UN Special Rapporteur on the Human Rights of Migrants, François Crépeau, who stressed that irregular entry or stay should never be considered criminal offences, as they 'are not *per se* crimes against persons, property or national security'.[93] This logic seems to align with the criminal law theory approach, which requires a behaviour (irregular migration) to be sufficiently harmful and wrongful to be treated as a crime.

4. A General Principle of Non-penalization?

Aside from the treaty obligations under international refugee law and international human rights law, this section explores whether non-penalization of refugees and some other migrants for illegal entry or presence may be an emerging general principle of law, in the sense of article 38(1)(c) of the ICJ Statute. General principles perform several functions, such as to fill legal gaps, to serve as sources of rights and obligations, and to aid interpretation and reinforce legal reasoning.[94] Despite controversy and uncertainty

[89] Human Rights Council 2008 (n 85) para 53.
[90] *Vélez Loor* (n 85) para 169, citing ibid para 53.
[91] *Vélez Loor* (n 85) para 170.
[92] For an illuminating comparison, see Dembour (n 84) ch 11.
[93] Human Rights Council 2012 (n 85) para 13.
[94] ILC, 'Report on the Work of the Seventy-First Session', UN doc A/74/10 (2019) ch IX para 232. See also Bin Cheng, *General Principles of Law: As Applied by International Courts and Tribunals* (Stevens 1953) 390; Fabián Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals* (Brill 2008) 16, 20; Mads Andenas and Ludovica Chiussi, 'Cohesion, Convergence and Coherence of International Law' in Mads Andenas, Malgosia Fitzmaurice, Attila Tanzi, and Jan Wouters (eds), *General Principles and the Coherence of International Law* (Brill 2019) 10; Miles Jackson, 'State Instigation in International Law: A General Principle Transposed' (2019) 30 European Journal of International Law 391, 397.

about the content and origin of such general principles,[95] a widely accepted view amongst the scholars is that general principles may be derived not only from national legal systems but also formed within the international legal system.[96] The ICJ often refers to general principles that do not find a parallel in domestic laws.[97] We argue that there is an emerging general principle of non-penalization formed within the international legal system.

To ascertain whether a general principle of non-penalization formed within the international legal system exists, the requirement of recognition must be met.[98] Such recognition 'could take place by deduction or abstraction from existing rules of conventional and customary international law, or through acts of international organizations, such as resolutions of the General Assembly', indicating general acceptance by States.[99] Simma and Alston have discussed and encouraged the use of general principles derived from international law in the human rights context.[100] They describe the process of determining the existence of such general principles as 'a decidedly consensual process, giving "a sufficient expression in legal form" to the underlying humanitarian considerations'.[101] The origin of the principle of non-penalization can be found in the international legal system, which implies that the States recognize and accept the existence of this principle in their international relations.

Article 31 of the Refugee Convention reflects a widely accepted recognition that refugees should not be penalized when they have good cause to breach immigration laws. As discussed above, there is some support for non-penalization in international human rights law.[102] In addition, the international instruments in relation to both smuggling and trafficking assume that migrants should not be the main object of criminalization. Specifically, article 5 of the UN Smuggling Protocol shields irregular migrants from criminalization merely for seeking or gaining illegal entry with the assistance of smugglers.[103] This provision is important, in that migrants who have recourse to

[95] Alain Pellet and Daniel Müller, 'Article 38' in Andreas Zimmermann and Christian J Tams (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn, OUP 2019) 924, para 255; Catherine Redgwell, 'General Principles of International Law' in Stefan Vogenauer and Stephen Weatherill (eds), *General Principles of Law: European and Comparative Perspectives* (Hart 2017) 5.

[96] ILC, *First Report on General Principles of Law by Marcelo Vázquez-Bermúdez*, *Special Rapporteur*, UN doc A/CN.4/732 (5 April 2019) paras 22, 231–2, 253.

[97] In its Advisory Opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* [1951] ICJ Rep 15, 23, the ICJ noted that 'the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation'. See also *Corfu Channel Case (UK v Albania)* (Merits) [1949] ICJ Rep 4, 22; Giorgio Gaja, 'General Principles of Law', *Max Planck Encyclopedia of Public International Law* (May 2013) para 17; Giorgio Gaja, 'General Principles in the Jurisprudence of the ICJ' in Andenas, Fitzmaurice, Tanzi, and Wouters (n 94) 39–41.

[98] ILC (n 96) paras 234–5; Gaja 2019 (n 97) 41.

[99] ILC (n 96) para 234.

[100] Bruno Simma and Philip Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens and General Principles' (1992) 12 Australian Yearbook of International Law 82, 102.

[101] ibid 107.

[102] See n 85.

[103] Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 28 January 2004) 2241 UNTS 507, art 5. See Global Compact for Migration, para 25; see also Chapter 29 in this volume.

smugglers may not be refugees, or even fleeing at all. Smuggling includes most forms of assistance in irregular border crossings. And yet, international law focuses on those who enable irregular migration, rather than those who engage in it, an acknowledgement that irregular migrants are not engaged in harmful or blameworthy conduct. The international instruments on trafficking reflect this approach,[104] albeit less clearly, although the case for the non-criminalization of victims of trafficking is even stronger. Schloenhardt and Markey-Towler persuasively argue that the principle of non-criminalization of victims of trafficking in persons has also been developing.[105] This argument is supported by the pronouncements of a number of international institutions.[106] Together, these provisions reflect a consensus of sorts that while States may be obliged to use the criminal law to seek to limit irregular migration, they should not criminalize migrants in so doing.

A further possibility, in need of further research, is whether there may be stronger regional principles of non-penalization. In South America, it appears States have prioritized non-penalization in their domestic law.[107] In his first report on general principles of law, the Special Rapporteur for the International Law Commission included the possibility of general principles of law with a regional scope of application.[108] Therefore, the move towards non-criminalization in South America in regional fora[109] and domestic

[104] Council of Europe Convention on Action against Trafficking in Human Beings (adopted 16 May 2005, entered into force 1 June 2007) CETS 197, art 26; Council Directive 2011/36/EU of 5 April 2011 on Preventing and Combating Trafficking in Human Beings and Protecting Its Victims [2011] OJ L101/1 (EU Trafficking Directive) art 8; ASEAN Convention against Trafficking in Persons, especially Women and Children (adopted 21 November 2015, entered into force 8 March 2016) (ASEAN Convention) art 14(7) <https://www.asean.org/wp-content/uploads/2015/12/ACTIP.pdf> accessed 20 May 2020. See Chapter 30 in this volume.

[105] Andreas Schloenhardt and Rebekkah Markey-Towler, 'Non-Criminalisation of Victims of Trafficking in Persons: Principles, Promises, and Perspectives' (2016) 4 Groningen Journal of International Law 11.

[106] Global Compact for Migration, para 26(g); Working Group on Trafficking in Persons, 'Non-Punishment and Non-Prosecution of Victims of Trafficking in Persons: Administrative and Judicial Approaches to Offences Committed in the Process of Such Trafficking', UN doc CTOC/COP/WG.4/2010/4 (9 December 2009) paras 5–6; OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking Commentary,* UN doc HR/PUB/10/2 (2010) principle 7, 129–40; UN Office on Drugs and Crime, 'Model Law against Trafficking in Persons' (2009) art 10; Organization for Security and Co-operation in Europe, Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, *Policy and Legislative Recommendations: Towards the Effective Implementation of the Non-Punishment Provision with Regard to Victims of Trafficking* (OSCE 2013).

[107] See n 31, 67–9. See also Diego Acosta, *The National Versus the Foreigner in South America: 200 Years of Migration and Citizenship Law* (CUP 2018) 122–3; Diego Acosta, 'Regional Governance of Migration in South America' in Anna Triandafyllidou (ed), *Handbook of Migration and Globalisation* (Edward Elgar 2018) 73.

[108] ILC (n 96) paras 33, 137, 261.

[109] See Mercosur and Associate States Meeting of Ministers of the Interior, 'Regional Position Ahead of the Global Forum on Migration and Development' (XXV Specialised Migration Forum (MERCOSUR/RMI/DI N 01/08) Buenos Aires, 10 June 2008); 'Bogotá Declaration' (4th Andean Community's Migration Forum, Bogotá, 10 May 2013); 'Asunción Declaration' (The South American Conference on Migration, Asunción, 5 May 2006). See also Draft Inter-American Principles on the Human Rights of Migrants, Refugees and Other Persons in the context of Mixed Migration Movements, Principle 48 (on file with the authors).

legislation could be relevant to the emergence of a non-penalization principle of regional scope. Since the question whether such regional general principles exist remains doctrinally unresolved,[110] it would be premature to consider non-penalization of illegal entry and stay a regional South American general principle of law, but this matter warrants further research.

5. Conclusion

This chapter has explored non-penalization for illegal entry and stay under article 31 of the Refugee Convention, and in the broader context of protection against penalization and criminalization in international human rights law. It argued that there is an emerging general principle of law relating to non-penalization of refugees and other vulnerable migrants. The doctrinal arguments in this chapter range from the well-settled (the interpretation of article 31 of the Refugee Convention espoused) to more speculative (a general principle of non-penalization). They all stand in stark contrast to the expansion of punitive and criminal measures towards individuals who cross borders in search of protection. This gap between legal protections and punitive practice demands new thinking about how to make refugee and human rights law more effective. One important strategy is to draw in more actors, both locally and transnationally—refugees, their NGO allies, prosecutors, courts, and legislators—in order to temper the executive excesses of criminalization and penalization of those in search of refuge and protection. It is our hope that some of the legal and ethical arguments in this chapter may inform such actions.

[110] ILC (n 94) ch IX paras 240, 253.

CHAPTER 52

THE RIGHT TO LIBERTY

EVE LESTER*

1. Introduction

The quintessential predicament of refugees, asylum seekers, and stateless persons in search of international protection (hereafter 'protection-seekers'), is that they are often forced to arrive at, or enter, a territory without prior authorization or without otherwise complying with immigration formalities.[1] In a growing number of States, it is a predicament that heightens their vulnerability to immigration detention. Often arbitrary, the use of immigration detention as a border control measure may impede an individual's right to seek asylum,[2] arguably a principle of customary international law,[3] and may expose her to the risk of *refoulement*,[4] including 'constructive *refoulement*'.[5] As such, alongside the catalogue of human rights issues to which the practice commonly gives rise, immigration detention can jeopardize some of international refugee law's most fundamental principles; indeed in some instances this is arguably its very purpose.

Since the end of the Cold War, the scale of immigration detention has grown alarmingly. Accurate data is difficult to obtain, but conservatively, many hundreds of

* For friendship and fresh insights, my sincere thanks to Mariette Grange and Jothie Rajah, as well as Nick Poynder, who represented the Cambodian author, in *A v Australia* (n 73). I am also grateful to the editors and workshop participants for helpful suggestions on an earlier draft.

[1] The Equal Rights Trust, *Unravelling Anomaly: Detention, Discrimination and the Protection Needs of Stateless Persons* (2010).

[2] UDHR, art 14.

[3] Subrata Roy Chowdhury, 'A Response to Refugee Problems in Post-Cold War Era: Some Existing and Emerging Norms of International Law' (1995) 7 IJRL 100, 102.

[4] *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, paras 459–70.

[5] Refugee Convention, art 33(1). On 'constructive *refoulement*', see Chapter 50 in this volume. *MS v Belgium,* App No 50012/08 (ECtHR, 1 January 2012); 'UNHCR Monitoring Visit to Manus Island, Papua New Guinea 23 to 25 October 2013' (26 November 2013) 7; Penelope Mathew, 'Constructive *Refoulement*' in Satvinder Singh Juss (ed), *Research Handbook on International Refugee Law* (Edward Elgar 2019) 207.

thousands of non-citizens in at least 1,249 locations in 129 countries are subject to immigration detention.[6] A significant percentage of these non-citizens fall under the rubric of international refugee law. An extensive literature documents its corrosive impact on mental and physical health, particularly where it is prolonged, or conditions are otherwise intolerable.[7]

This chapter explores how immigration detention has become such an intractable problem, international standards notwithstanding. It recognizes that while non-compliant State practice does not, as a matter of law, dilute those standards, in effect it undermines them through a collective, if disparate, inclination towards non-compliance and a (sometimes wilful) retreat behind sovereignty's 'corporate' veil. Before outlining my approach, I make three preliminary observations regarding the meaning of 'detention'; the relationship between the rights to liberty and freedom of movement; and the chapter's relevance to refugee camps.

UNHCR defines 'detention' in the context of refugee protection as 'the deprivation of liberty or confinement in a closed place which an asylum-seeker is not permitted to leave at will, including, though not limited to, prisons or purpose-built detention, closed reception or holding centres or facilities'.[8] Relatedly, 'immigration detention' describes an administrative form of detention applied as part of a State's suite of border control measures to non-citizens seeking, or subject to, a migration-related goal. It describes the use of detention (a) where the State seeks to prevent an unauthorized entry; (b) pending the outcome of a migration- or protection-related claim; or (c) in anticipation of, or to effect, removal or deportation. Such detention is best understood as a status detention, whose primary logic of power is diffuse in the sense of applying to categories of people rather than being individually targeted. Thus, where a State seeks to derive its legitimacy to control and deter unsolicited or unwanted migration from its capacity to protect the (way of) life of its people, immigration detention's purpose may be characterized as 'a model biopolitical project'.[9] In contrast, and despite there being some countries where irregular entry or presence is (still) a criminal offence,[10] detention of non-citizens as a custodial sanction arising under criminal law is beyond

[6] Global Detention Project (GDP), 'Detention Centres' (2020) <https://www.globaldetentionproject.org/detention-centres/map-view> accessed 4 March 2020; UNHCR, 'Beyond Detention: A Global Strategy to Support Governments to End the Detention of Asylum-Seekers and Refugees 2014–2019' (Progress Report, 2016) 6, 20, 37.

[7] Stephanie J Silverman and Evelyne Massa, 'Why Immigration Detention is Unique' (2012) 18 Population, Space and Place 677, 677–8; Cathryn Costello, 'Immigration Detention: The Grounds Beneath Our Feet' (2015) 68 Current Legal Problems 143, 147; Manfred Nowak, *Report of the Independent Expert leading the United Nations Global Study on Children Deprived of Liberty*, UN doc A/74/136 (11 July 2019) para 26.

[8] UNHCR, 'Detention Guidelines: Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention' (2012) 9.

[9] Anne Orford, 'Biopolitics and the Tragic Subject of Human Rights' in Elizabeth Dauphinee and Cristina Masters (eds), *The Logics of Biopower and the War on Terror: Living, Dying, Surviving* (Palgrave Macmillan 2007) 205, 210.

[10] Cathryn Costello, Yulia Ioffe, and Teresa Büchsel, 'Article 31 of the 1951 Convention Relating to the Status of Refugees', UNHCR Legal and Protection Policy Research Series, PPLA/2017/01 (2017) 7–10.

the scope of this chapter.[11] Nevertheless, it is important to acknowledge that the deportation of protection-seekers who are ex-prisoners may constitute *refoulement*[12] and is a significant issue in some States.[13]

The right to freedom of movement enshrined in the ICCPR (article 12) and the Refugee Convention (article 26)[14] applies respectively to 'everyone' and 'refugees' *lawfully in* the territory of a Contracting State. While the meaning of 'lawfully' does not necessarily equate with its meaning in the domestic law of the putative country of asylum,[15] the present focus is on detention of those who that country regards as *unlawful* or *unauthorized*. As such, the most relevant provision in the Refugee Convention is article 31, which prohibits the imposition of penalties on refugees on account of their unlawful entry or presence in the country of asylum.[16] Read together, articles 26 and 31 remind us that, as a matter of law, immigration detention should be exceptional. Thus, although the rights to freedom of movement and to liberty sit along a continuum and within the same conceptual frame, and determining the difference between them may be a matter of degree and intensity rather than one of nature and substance,[17] this chapter's contextual emphasis along this continuum is on people held in closed environments.

My focus in this chapter on the right to liberty means that restrictions on freedom of movement which do not constitute a deprivation of the right to liberty are beyond its scope.[18] I recognize that detention takes place in diverse locations, whether at land and sea borders; in airport transit zones; on islands; on boats; in closed refugee camps; extraterritorially; and even in one's own home (house arrest).[19] In this regard, I thus recognize that deprivation of liberty is qualitatively different to other freedom of movement restrictions. Nevertheless, I acknowledge that confinement to a refugee camp may rise to the level of 'detention', and that different levels of confinement may be applied simultaneously in the same location.[20] Likewise, I view 'open prison' confinement to an island as capable of constituting a deprivation of liberty, even if that island is an entire nation-State.[21]

[11] Working Group on Arbitrary Detention (WGAD), 'Revised Deliberation No 5 on Deprivation of Liberty of Migrants', UN doc A/HRC/39/45 (Advance Edited Version, 7 February 2018) paras 9, 10.

[12] See Chapter 50 in this volume.

[13] On expulsion, see Ulrike Davy, 'Article 32' in Andreas Zimmermann (ed), *1951 Convention relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (OUP 2011) 1277.

[14] Reinhard Marx, 'Article 26' in Zimmermann (n 13) 1147.

[15] Alice Edwards, 'Article 17' in Zimmermann (n 13) 951, 963–6; see by analogy, C–534/11 *Arslan v Czech Republic* (ECJ, 30 May 2013); cf *Musa v Malta* (2015) 60 EHRR 23, para 97.

[16] See Chapter 51 in this volume.

[17] *Guzzardi v Italy* (1981) 3 EHRR 333, para 92–3.

[18] See Chapter 14 in this volume.

[19] UNHCR (n 8) 9.

[20] Council of Europe Committee for the Prevention of Torture, 'Preliminary Observations Made by the Delegation of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) which visited Greece from 10 to 19 April 2018' (CPT/Inf (2018) 20, Council of Europe 1 June 2018).

[21] *Guzzardi* (n 17); Azadeh Dastyari, 'Detention of Australia's Asylum Seekers in Nauru: Is Deprivation of Liberty by Any Other Name Just as Unlawful?' (2015) 38 UNSW Law Journal 669, 679–80.

This chapter has four substantive sections. Section 2 situates the use of immigration detention in global and historical context. Section 3 provides an overview of key aspects of the international legal framework. Section 4 considers two factors shaping State practice that are crucial to contemporary understandings of, and justifications for, immigration detention. Finally, Section 5 suggests the Global Compact for Migration as a lens through which future research might usefully tackle the problem of immigration detention.

2. Some History and Context

Immigration detention's historical and geopolitical context helps us to understand its emergence and to think more deeply about the socio-political dynamics that have enabled it to become so widespread. Three aspects of this context considered in this section enable us to analyse critically the assumptions that underlie both international standards and State practice.

a. A Hallmark of the Rule of Law

The prohibition against arbitrary detention has long been a crucial safeguard against authoritarian rule and abuse of power—a hallmark of the rule of law. Prominent precursors to the human right to liberty,[22] wherein arbitrary detention was outlawed and due process rights embedded, include the Magna Carta (1215),[23] the writ of *habeas corpus*,[24] the French Declaration of the Rights of Man and the Citizen (1789),[25] and the US Constitution and Bill of Rights (1791).[26] Pre-eminent commentaries likewise underscore the great importance of the preservation of liberty.[27] For example, Blackstone recognizes that imprisonment without due process represents a 'dangerous engine of arbitrary government'.[28] Importantly, such commentaries do not limit the prohibition against arbitrary detention to citizens, raising the question of how early international legal theory conceptualized the foreigner and her right to liberty.

[22] H Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (5th edn, OUP 2014), 151, 278; cf Christopher Weeramantry, *Justice without Frontiers: Furthering Human Rights* (Martinus Nijhoff 1997).

[23] Magna Carta 1297 (Cha 9 25 Edw 1 cc 1 9 29).

[24] Habeas Corpus Act 1679 (31 Cha II c 2).

[25] Adopted by the National Assembly during the French Revolution on 26 August 1789 and reaffirmed by the constitution of 1958.

[26] Ratified by the Congress of the United States on 15 December 1791, as amended.

[27] 1 Bl Comm 135–7; Baron de Montesquieu, *The Spirit of Laws* vol I (P Dodesley, R Owen 1794) book XI, ch 6, 165–7.

[28] 1 Bl Comm (n 27).

b. The Foreigner, Sovereignty, and the Right to Liberty

As an expression of the sovereign power of exclusion, immigration detention represents the flipside of modern international law's failure to recognize a foreigner's right to enter the territory of another State. In this sense, immigration detention is assumed by many States to be a necessary and therefore inevitable incident of sovereignty. This assumption imagines two things: first, that the absence of a foreigner's right to enter was ever thus; and secondly, that the figure of the foreigner was herself always and already an outsider, presumptively hostile to the State.

A genealogy of the foreigner–sovereign relation in early international law reminds us that, in contrast to the non-European 'barbarian' outsider, the figure of the 'foreigner' was conceptualized as a European insider—whether colonizer, trader, or (intra-European) exile.[29] Aligned with sovereign interests, this foreigner was a figure of privilege and power. Not subject to the vagaries of unfettered powers of exclusion, international law instead conferred on him (and I use the male pronoun advisedly) a host of self-proclaimed rights. These rights enabled him, *inter alia*, to assert the right to enter and reside in the territory of another State.[30]

Later, as a consequence of new migrations and changing political-economic dynamics, the nineteenth-century 'foreigner' became a mutable figure engendering increasingly restrictive migration laws.[31] These dynamics were deeply racialized and were reinforced by judiciaries in lockstep with legislative and societal expectations, producing juridical taxonomies that constructed the foreigner as an outsider subject to unfettered powers of exclusion.[32]

In the common law world, a potent combination of judicial precedent and instrumentalist use of international legal theory embedded the assumption that there is an unfettered power of exclusion,[33] an assumption that is historically produced rather than grounded in universal truths.[34] This assumption has also influenced civil law traditions[35] and to some extent supranational legal systems.[36] So, while there are good reasons to view this assumption with circumspection,[37] it has enabled an unfettered

[29] Eve Lester, *Making Migration Law: The Foreigner, Sovereignty and the Case of Australia* (CUP 2018) 51–80.

[30] ibid 59, 65. [31] ibid 81–111. [32] ibid 94–107.

[33] James AR Nafziger, 'The General Admission of Aliens under International Law' (1983) 77 AJIL 804; Lester (n 29) 109.

[34] Jens Bartelson, *A Genealogy of Sovereignty* (CUP 1995) 13.

[35] Bas Schotel, *On the Right of Exclusion: Law Ethics and Immigration Policy* (Routledge 2012).

[36] *Ilias v Hungary,* App No 47287/15 (ECtHR, Grand Chamber 21 November 2019); cf *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, Advisory Opinion OC-21/14, Inter-American Court of Human Rights (19 August 2014). On the divergent approach in Latin America, see David James Cantor, Luisa Feline Freier, and Jean-Pierre Gauci (eds), *A Liberal Tide? Immigration and Asylum Law and Policy in Latin America* (Institute of Latin American Studies, School of Advanced Study, University of London 2015) 3–4.

[37] Galina Cornelisse, *Immigration Detention and Human Rights: Rethinking Territorial Sovereignty* (Brill 2010); Violeta Moreno-Lax, 'Beyond *Saadi v UK*: Why the "Unnecessary" Detention of Asylum Seekers is Inadmissible under EU Law' (2011) 5 Human Rights and International Legal Discourse 166; Costello (n 7).

power of exclusion to inveigle its way into the making of international human rights and refugee law.[38]

c. Making International Human Rights and Refugee Law

The coalescence of States post-Second World War appeared to signal a new orientation in international lawmaking. Yet despite a broad post-Second World War commitment to human rights, records of negotiations around the Charter of the United Nations (UN Charter)[39] and the UDHR, reveal the determination of a number of States to resist intrusion on the claim that sovereignty confers an absolute power to exclude aliens and the limits of international lawmaking.

Delegates insisted that immigration law and policy fell within the domestic jurisdiction of States and should therefore be insulated from international scrutiny.[40] Additionally, drafters of the Refugee Convention foresaw detention of enemy alien refugees during wartime (article 9),[41] and still permitted the use of border control measures, including detention, as long as such measures were not punitive (article 31).[42] Thus, while the right to seek asylum is sometimes framed as sovereignty's exception, its non-binding form affirms that the struggle to shake (judicial interpretations of) State practice free of the (misplaced) assumption that States can assert complete control over cross-border movement persists.[43] In many ways, immigration detention epitomizes this point of contestation, often assumed to be sovereignty's lawful and necessary corollary. Yet, how it has played out in practice is more about geopolitics than law.

d. The Cold War

During the Cold War, detention of non-citizens *qua* 'friendly aliens' generally took place for the purposes of removal rather than exclusion and was less widespread.[44] One notable (and salutary) exception was the detention of some 45,000 Indochinese 'boat

[38] Rayner Thwaites, *The Liberty of Non-Citizens: Indefinite Detention in Commonwealth Countries* (Hart 2014); Daniel Ghezelbash, *Refuge Lost: Asylum Law in an Interdependent World* (CUP 2018); Lester (n 29) 14–17; Eve Lester, 'Internationalising Constitutional Law: An Inward-Looking Outlook' (2016) 42 Australian Feminist Law Journal 321; see also *Nottebohm Case (Liechtenstien v Guatemala)* (2nd Phase Judgment) [1955] ICJ Rep 4.

[39] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter).

[40] Lester (n 38) 338–40; Daniel Wilsher, *Immigration Detention: Law, History, Politics* (CUP 2011).

[41] Wilsher (n 40) 127.

[42] ibid 128–31, 134–6.

[43] Lester (n 38) 14; *Saadi v United Kingdom* (2008) 47 EHRR 17; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1; *Jennings v Rodriguez*, 138 S Ct 830 (2018).

[44] Wilsher (n 40) 121.

people' in Hong Kong, then a British colony.[45] A seemingly ahistorical harbinger of laws and policies that are now a constant theme in public policy debates on unsolicited migration,[46] it was also reminiscent of the racialized histories and political-economic interests and priorities embedded in both sovereignty doctrine and refugee law.[47]

One of the main explanations for lower levels of immigration detention during the Cold War is that contemporary barriers to entry (policies of *non-entrée*) that characterize State responses to unsolicited migration had not yet supplanted prevailing barriers to exit.[48] The Indochinese example reminds us that this shift had both racial and ideological dimensions. As Chimni reminds us, during the Cold War, conceptualizations of the refugee were first and foremost of someone who was 'white, male and anti-communist'.[49] Thus, the refugee was positioned ideologically—and racially—as welcome and worthy of freedom. So, despite exceptions[50] and immigration detention already having been in use in some States for decades and more,[51] refugees bypassing barriers to exit were celebrated; their liberated bodies viewed as triumphant symbols of freedom and of democracy's victory over totalitarianism.

e. A 'New Wall Order'

After the wall of communism crumbled (literally and figuratively), the heady early days of the post-Cold War era were short-lived. The ensuing 'global refugee crisis' of the 1990s, the so-called 'War on Terror' and mass displacement following the Arab Spring begot new walls of exclusion. New 'wall discourses' in effect normalized the otherwise exceptional and dehumanizing use of myriad physical, technological, or symbolic exclusion measures,[52] now central to the 'new wall order'.

In recent years, and integral to the same dynamic, we have also seen the proliferation of externalized migration controls designed to deny protection-seekers and other

45 Harriet Samuels, 'The Detention of Vietnamese Asylum Seekers in Hong Kong: *Re Pham Van Ngo and 110 Others*' (1992) 41 ICLQ 422, 426.

46 Judith Kumin, 'Orderly Departure from Vietnam: Cold War Anomaly or Humanitarian Innovation?' (2008) 27(1) RSQ 104, 105; Teun A van Dijk, 'Political Discourse and Racism: Describing Others in Western Parliaments' in Stephen H Riggins (ed), *The Language and Politics of Exclusion: Others in Discourse* (Sage 1997) 31, 44–5.

47 Pia Oberoi, *Exile and Belonging: Refugees and State Policy in South Asia* (OUP 2006); Laura Madokoro, *Elusive Refuge: Chinese Migrants in the Cold War* (Harvard University Press 2016); Naoko Shimazu, *Japan, Race and Equality* (Routledge 1998); see Chapter 2 in this volume.

48 Eve Lester, 'Australian Responses to Refugee Journeys: Matters of Perspective and Context' in Jordana Silverstein and Rachel Stevens (eds), *Refugee Journeys: Histories of Resettlement, Representation and Resistance* (ANU Press 2021) 23, 41–2. On the right to leave, see Jane McAdam, 'An Intellectual History of Freedom of Movement in International Law: The Right to Leave as a Personal Liberty' (2011) 12 Melbourne Journal of International Law 27.

49 BS Chimni, 'The Geopolitics of Refugee Studies: A View from the South' (1998) 11 JRS 350.

50 Kumin (n 46); van Dijk (n 46).

51 Wilsher (n 40) x; Lester (n 29) 154–5.

52 Andréanne Bissonnette and Élisabeth Vallet (eds), *Borders and Border Walls: In-Security, Symbolism, Vulnerabilities* (Routledge 2020).

migrants access to territory, and deflect responsibility—*de facto* or *de jure*—for their protection.[53] In this context, immigration detention, as it is practised (or procured) by some States, functions as both a last (and externalized first) line of defence in the project of exclusion. Data-mapping suggests that patterns of immigration detention intensify with proximity to the Global North, where neighbouring States are pressured to stop onward movement,[54] revealing an Orwellian style of sovereign relativism that has 'commercialized' and 'diffused' the sovereignty of weaker 'client' States,[55] with devastating effects.[56]

This overview makes visible how much law's context shapes its terms, enabling us to think more carefully about what law and policymakers do and why they do it.[57] So, while the analysis of law's enduring strengths, weaknesses, and possibilities is crucial, it is not a purely doctrinal inquiry.

3. International Standards

Immigration detention practices have metastasized, and raw numbers have grown exponentially in recent decades. Often detained without (meaningful) access to counsel or judicial processes, people seeking protection (including children) have been arbitrarily detained, including on the high seas[58] or in extraterritorial locations.[59] Detention may be for indefinite or prolonged periods.[60] Sometimes, its brevity may be what compromises access to protection.[61] Detention may be 'groundless', in the sense that detention for 'administrative convenience' includes no legal requirement that the detention decision be individualized, or based on generalized assumptions about flight risk.[62] It

[53] Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (CUP 2011) 7–8, 31–2; Madeline Gleeson, *Offshore: Behind the Wire on Manus and Nauru* (NewSouth 2016); Annick Pijnenburg, 'From Italian Pushbacks to Libyan Pullbacks: Is *Hirsi 2.0* in the Making in Strasbourg?' (2018) 20 EJML 396.

[54] GDP (n 6). Hindpal Singh Bhui, Mary Bosworth, Andriani Fili, and Gavriella Morris, 'Monitoring Immigration Detention at the Borders of Europe: Report on Turkey and Greece 2018' (Oxford Centre for Criminology 2019); Andreas E Feldman and Helena Olea, 'New Formulas, Old Sins: Human Rights Abuses against Migrant Workers, Asylum Seekers and Refugees in the Americas' (2005) 28(11) Beyond Law 66, 80.

[55] Gammeltoft-Hansen (n 53) 31–32; Michael Welch, 'Economic Man and Diffused Sovereignty: A Critique of Australia's Asylum Regime' (2014) 61(1) Crime, Law and Social Change 81.

[56] Pijnenburg (n 53) 404–5, 413; Behrouz Boochani, *No Friend But The Mountains: Writing from Manus Prison* (Picador 2018).

[57] Margaret Davies, *Asking the Law Question* (Law Book Company 2008) 1.

[58] *Sale v Haitian Centers Council* 509 US 155 (1993); *CPCF* (n 4); Pijnenburg (n 53) 397.

[59] Pijnenburg (n 53) 397.

[60] *Al-Kateb v Godwin* (2004) 219 CLR 580; *Jennings* (n 43); *FKAG et al v Australia*, UN doc CCPR/C/108/D/2094/2011 (26 July 2013). See also Thwaites (n 38).

[61] Mary Bosworth and Marion Vannier, 'Comparing Immigration Detention in Britain and France: A Matter of Time?' (2016) 18 EJML 157.

[62] Costello (n 7).

may be automatic and therefore 'decision-less',[63] meaning that there is no administrative decision to detain and therefore nothing to review.

In detention, individuals may experience violence,[64] including sexual and gender-based violence and abuse,[65] and harsh and unsanitary conditions, including chronic overcrowding.[66] Even in States where detention numbers are comparatively low,[67] State practice may still be problematic. For example, for 'sans papiers' or where UNHCR-issued documentation is not recognized or respected, protection-seekers live in constant fear of the cycle of arrest and detention.[68]

a. The International Legal Architecture

The rights to freedom of movement and to liberty are fundamental and complementary human rights. Together, they underscore the principle that there should be a presumption against detention. To this end, international human rights law provides that restrictions on freedom of movement and the exceptional use of detention are permissible only when they take place on grounds prescribed, and in accordance with procedures authorized, by law.[69] This provides a critical safeguard against arbitrary detention,[70] requiring that it be in pursuit of a legitimate aim, necessary, reasonable, and proportionate in all the circumstances of the (individual) case,[71] and subject to meaningful, enforceable, and independent periodic review.[72] These standards apply to any person subject to detention of any kind. Self-evidently, therefore, they apply to immigration detainees.[73]

States are also obliged to ensure that detention provisions and procedures comply with requirements of legal certainty.[74] Detention failing to meet these standards is arbitrary, even if lawful in domestic law.[75] In this regard, while reservations have been

[63] Lester (n 29) 227–30.

[64] OHCHR, '"Detained and Dehumanised": Report on Human Rights Abuses against Migrants in Libya' (2016).

[65] Shana Tabak and Rachel Levitan, 'LGBTI Migrants in Immigration Detention: A Global Perspective' (2014) 37 Harvard Journal of Law and Gender 1.

[66] Council of Europe (n 20) para 16.

[67] On the effects of intra-regional economic blocs, see Chapter 14 in this volume.

[68] UNHCR, 'Submission by the UNHCR for the OHCHR Compilation Report—Universal Periodic Review: Republic of the Congo, 3rd Cycle, 31st Session' (July 2018) 5.

[69] ICCPR, arts 9(1), 12(1); UN Human Rights Committee, 'General Comment No 15: The Position of Aliens Under the Covenant' para 5, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN doc HRI/GEN/1/Rev.9 (Vol I) (27 May 2008) 191–3.

[70] ICCPR, art 9(1); cf ECHR, art 5.

[71] *Van Alphen v The Netherlands*, UN doc CCPR/C/39/D/305/1988 (23 July 1990) para 5.8.

[72] *A v Australia*, UN doc CCPR/C/59/D/560/1993 (30 April 1997) para 9.4; cf *Jennings* (n 43) distinguishing *Zadvydas v Davis*, 533 US 678 (2001).

[73] UN Human Rights Committee, 'General Comment No 18: Non-Discrimination' para 1 in *Compilation of General Comments* (n 69); UN Human Rights Committee (n 69).

[74] *H L v United Kingdom* (2005) 40 EHRR 32, para 114; *Amuur v France* (1996) 22 EHRR 533, para 53.

[75] *A v Australia* (n 72); *A v United Kingdom* (2009) 49 EHRR 29, para 164.

expressed about automatic or mandatory immigration detention in some contexts,[76] it has been condemned in others.[77] And while 'three-walled prison' arguments characterizing immigration detention as 'voluntary'—whether in airports or border transit zones, on islands, or on account of non-cooperation with the authorities—have found traction in some jurisdictions,[78] including at a regional level,[79] such arguments have not held sway at an international level.[80]

Here we see that, although international law does not *per se* prohibit immigration detention, it should be regarded as subject to constraints ordinarily applicable to other forms of detention. This makes sense when we consider detention's inherent harm.[81] Indeed, as the Working Group on Arbitrary Detention (WGAD) has emphasized, arbitrary detention can never be justified and its prohibition should be regarded as absolute, suggesting that 'it is a non-derogable norm of customary international law, or *jus cogens*.'[82] In international law, immigration detention should therefore be the exception not the rule; that is, a measure of last resort only to be used in an individual case if less coercive and intrusive alternatives are unsuitable.[83] Regarding children, some have gone further, stating unequivocally that immigration detention of children is prohibited;[84] that is, it can never be in a child's best interests.[85]

76 *Thimothawes v Belgium,* App No 39061/11 (ECtHR, 4 April 2018) para 73; *Jama v Malta,* App No 10290/13 (ECtHR, 26 November 2015) para 146. On children, *Kanagaratnam v Belgium* (2012) 55 EHRR 26, para 80.

77 UN Human Rights Committee, 'Concluding Observations on the Sixth Periodic Report of Australia', UN doc CCPR/C/AUS/CO/6 (1 December 2017) paras 37–8.

78 *Chu Kheng Lim* (n 43); *Al-Kateb* (n 60); *Shaughnessy v United States ex rel Mezei* 345 US 206 (1953); *Amuur* (n 74); Lester (n 29) 198–200; cf *A v Secretary of State for the Home Department* [2005] UKHL 71, [2006] 2 AC 221.

79 *Ilias* (n 36); cf eg *Mikolenko v Estonia,* App No 10664/05 (ECtHR, 8 September 2009); *Amuur* (n 74); *Khlaifia v Italy,* App No 16483/12 (ECtHR Grand Chamber, 15 December 2016); dissenting opinion of Judge Bianku, joined by Judge Vučinič, in *Ilias* 75–81.

80 WGAD, 'UN Human Rights Experts Suspend Hungary Visit After Access Denied', *OHCHR* (15 November 2018) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23879&LangID=E> accessed 12 January 2021.

81 Costello (n 7) 146; Mary Bosworth, 'Can Immigration Detention Centres be Legitimate? Understanding Confinement in a Global World', in Katja Franko Aas and Mary Bosworth (eds), *Borders of Punishment: Migration, Citizenship and Social Exclusion* (OUP 2013) 149.

82 WGAD (n 11) para 8.

83 *C v Australia*, UN doc CCPR/C/76/D/900/1999 (13 November 2002) para 8.2; UNHCR (n 8); Council Directive 2013/33/EU of 26 June 2013 Laying Down Standards for the Reception of Applicants for International Protection (recast) [2013] OJ L180/96, arts 8(2), 11(2).

84 WGAD (n 11) para 11; see also Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), 'Joint General Comment No 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No 23 (2017) of the Committee on the Rights of the Child on State Obligations regarding the Human Rights of Children in the Context of International Migration in Countries of Origin, Transit, Destination and Return', UN doc CMW/C/GC/4-CRC/C/GC/23 (16 November 2017) paras 5, 9, 10, 12 ; cf Claire Nolasco Braaten and Daniel Braaten, 'Suffer the Little Children to Come: The Legal Rights of Unaccompanied Alien Children under United States Federal Court Jurisprudence' (2019) 31 IJRL 55.

85 CRC, art 3(1); Nowak (n 7) para 56; Committee on the Rights of the Child, 'General Comment No 14 on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (art 3, para 1)' UN doc CRC/C/GC/14 (29 May 2013) para 69; CMW (n 84) para 9.

The right of immigration detainees to humane treatment and respect for their inherent dignity is clearly stated in treaty and soft law forms.[86] It includes the prohibition on torture, cruel, inhuman, or degrading treatment or punishment.[87] Where States practise arbitrary or unlawful detention, the risk of other human rights violations is heightened. Furthermore, where a State does so knowingly and/or with wilful disregard for international standards, detention's inherent harm suggests that arbitrary or unlawful detention would itself constitute inhuman or degrading treatment.[88]

b. Jurisprudential Developments in Immigration Detention

Targeted international scrutiny of States' immigration detention practices is a relatively recent development. While such scrutiny is largely attributable to new mechanisms for prosecuting complaints,[89] it also highlights how the problem has grown. These developments have played an important part in shaping the scope and content of the right to liberty writ large, and particularly of non-citizens.

We cannot canvas here all jurisprudence relevant to immigration detention. However, several observations can be made about jurisprudential developments. First, much of the jurisprudence is post-Cold War, and has therefore been skewed by a context dominated by policies of *non-entrée* implemented (or procured) by countries of the Global North. This has shifted the focus away from the higher ideological purpose of liberation from oppression, to one revealing the oppressive (and racialized) underbelly of State sovereignty.

Secondly, we need to distinguish jurisprudence emerging through the UN architecture and the mix of robust and permissive standards and interpretations that have emerged at regional level, predominantly in Europe and the Americas.[90] In this connection, there is evidence that the high levels of judicial deference that have entrenched immigration detention at a national level,[91] have been echoed by some regional mechanisms.[92] Thus, for example, a Euro-specific (if not Euro-centric) position that elasticizes the requirement of 'necessity' to authorize immigration detention for 'administrative convenience' without examining individual circumstances has created

86 ICCPR, art 10(1).

87 ICCPR, art 7; see also CAT, arts 2, 16; CRC, art 37(a); Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3, art 15(1). On ECHR, art 3, *Tatishvili v Greece,* App No 26452/11 (EctHR Grand Chamber, 31 July 2014); *Ahmed v Malta,* App No 55352/12 (ECtHR, 23 July 2013); *Popov v France* (2016) 63 EHRR 8; *Mayeka v Belgium* (2008) 46 EHRR 23; *Muskhadzhiyeva v Belgium,* App No 41442/07 (EctHR, 19 January 2010).

88 *FKAG* (n 60) para 9.8.

89 Optional Protocol to the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171; Wilshire (n 40) 121.

90 Costello (n 7) 170–1.

91 Carrie Rosenbaum, 'Immigration Law's Due Process Deficit and the Persistence of Plenary Power' (2018) 28 Berkeley La Raza Law Journal 119; Lester (n 29) 129–30.

92 Wilshire (n 40) 140.

a split between EU and international jurisprudence regarding the permissibility of immigration detention.[93] However, even international standards have been critiqued for their ambiguity and taking interpretations of detention's 'necessity' beyond the non-punitive spirit of the Refugee Convention.[94]

Finally, since immigration detention is in essence biopolitical, often arising from a State's general policy to prevent certain categories of people from entering, residing or remaining in its territory, detention policies and practices often overlook or resist the international legal requirement to individualize the assessment.[95]

c. Expanding International Refugee Law's Contextual Vision

UNHCR was the first international agency to turn its attention to the problem of immigration detention, producing standards and guidelines under its protection and supervisory mandates.[96] It has indicated that detention is 'inherently undesirable',[97] should 'normally be avoided',[98] and may only be resorted to if less coercive and intrusive alternatives have been found not to be suitable in an individual case.[99] Although these standards have a refugee law specificity, much of UNHCR's soft law guidance applies *mutatis mutandis* to other migrants.[100] As such, it is capable of providing important support, elaboration, and guidance to those falling under the wider rubric of international human rights law.[101] So, while on its face the wider population of immigration detainees is beyond the scope and reach of international refugee law, there are good reasons for international refugee law to have a broader, deeper and more nuanced wider contextual vision that recognizes its scope for informing standards applicable to the immigration detainee population[102] and the risks of not doing so. This approach also ensures that analyses do not fetishize categorization on the basis of migration status.[103]

[93] WGAD (n 11) para 23; UN Human Rights Committee, 'Concluding Observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland and Overseas Territories of the United Kingdom of Great Britain and Northern Ireland', UN doc CCPR/CO/73/UK (6 December 2001) 16; Moreno-Lax (n 37); Costello (n 7) 145–6; *FKAG* (n 60) para 9.3.

[94] Wilshire (n 40) 134–8.

[95] Helen O'Nions, 'No Right to Liberty: The Detention of Asylum Seekers for Administrative Convenience' (2008) 10 EJML 149; see Chapter 51 in this volume.

[96] 'Statute of the Office of the United Nations High Commissioner for Refugees', UNGA res 428(V), art 8 (14 December 1950); Refugee Convention art 35.

[97] UNHCR, 'Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers' (February 1999) para 1.

[98] UNHCR Executive Committee Conclusion No 44 (XXXVII) 'Detention of Refugees and Asylum-Seekers' (1986) para b.

[99] UNHCR (n 8) guideline 4.3; Lawyers Committee for Human Rights, 'Interim Report on the Pilot Parole Project of the Immigration and Naturalization Service' (November 1990).

[100] UNHCR (n 8) 8; cf ECHR, art 5(1)(f). See also UNHCR, 'Monitoring Immigration Detention: Practical Manual' (2014); Immigration Detention Standards Navigator, available at <https://bonigi-monitoring.com>. cf ECHR, art 5(1)(f).

[101] Kate Jastram and Marilyn Achiron, *Refugee Protection: A Guide to International Refugee Law* (UNHCR and Inter-Parliamentary Union 2001) 18.

[102] UNHCR 2014 (n 100). [103] See Section 5.a.

4. Rationalization

Despite a comprehensive international legal framework governing immigration detention, a striking dissonance remains between international standards and State practice. While State practice varies, its influence transcends jurisdictional boundaries, with cross-contaminating ripple effects that are far-reaching. As a State practice, immigration detention has 'emerged infectiously',[104] not least through mutually reinforcing copycat laws, policies, and practices.[105] A flagship tool of exclusion, it is used predominantly—although not only—by (or for) rich countries in the Global North, which are increasingly adept at using criminalizing and securitizing discourses to rationalize a hitherto exceptional measure.[106]

As a carceral border control measure, immigration detention's 'success' lies not in its impact but in the narratives that rationalize its use, not least as a ('non-punitive') deterrent.[107] As several scholars have noted, however, there is a dearth of empirical evidence of its effectiveness as a deterrent,[108] and abundant evidence of its damaging effects.[109] Nevertheless, emboldened by a striking judicial reticence in some jurisdictions to engage critically with immigration detention's claimed purpose, States continue to assume immigration detention to be a necessary part of border control, as a matter of sovereign right and indeed obligation.

This section considers two discursive themes through which States rationalize their use (and extraterritorial procurement) of immigration detention: criminalization and securitization. Conceptualized as 'exceptional', we see that immigration detention and attendant human rights violations have undergone a process of 'normalization'—even 'trivialization'.[110] Despite its purpose deficit[111] and evidence of its catastrophic human effects,[112] the institutional (and public) tolerance of immigration detention raises the biopolitical spectre of racialized anxieties about the threat of the 'other' as providing its ultimate underpinning.

[104] Vitit Muntabhorn, 'The Global Compacts and the Dilemma of Children in Immigration Detention' (2018) 30 IJRL 668.

[105] Ghezelbash (n 38).

[106] Wilsher (n 40) xxi.

[107] Samuels (n 45); René Lima-Marín and Danielle C Jefferis, 'It's Just Like Prison: Is a Civil (Nonpunitive) System of Immigration Detention Theoretically Possible?' (2019) 96 Denver Law Review 955.

[108] Bosworth (n 81) 153; Alice Edwards, 'Back to Basics: The Right to Liberty and Security of Person and "Alternatives to Detention" of Asylum-Seekers, Refugees, Stateless Persons and Other Migrants', UNHCR Legal and Protection Policy Research Series, PPLA/2011/01.Rev.1 (2011) 1.

[109] Bosworth (n 81) 153; Silverman and Massa (n 7); Costello (n 7).

[110] Moreno-Lax (n 37) 168.

[111] Bosworth (n 81); Lima-Marín and Jefferis (n 107); Costello (n 7).

[112] UN Support Mission in Libya and OHCHR, '"Detained and Dehumanised": Report on Human Rights Abuses against Migrants in Libya' (13 December 2016); Gleeson (n 53); Council of Europe (n 20); OHCHR, 'Bachelet Appalled by Conditions of Migrants and Refugees in Detention in the US' (8 July 2019).

a. Criminalization

Although in some States 'illegal' (that is, unauthorized) migration is (still) a criminal offence, in practice one of the most significant ways in which irregular migration and the right to seek asylum are criminalized is through the arbitrary use of immigration detention—which is civil in nature—for deterrent or punitive purposes. Although an administrative form of detention, such use effectively imposes quasi-criminal sanctions for conduct that is not inherently criminal in character and often without safeguards regarded as integral to criminal justice systems.[113] Pervasive discourses of illegality have the effect of criminalizing unsolicited migration, arguably '[biting] most sharply at the asylum end of the immigration continuum'.[114] Immigration detention therefore holds a central and symbolic place within the broader phenomenon of using criminalizing discourses to denigrate migrants' motives. While reinforcing populist perceptions of criminality and deviance, *non-entrée* policies are discursively framed as measured expressions of the sovereign power of exclusion.[115] Crucially, it is the *administrative* character of immigration detention measures that insulates them from scrutiny, exacerbating the detainee's uncertainty about whether she is getting closer to a future she seeks or fears. Entangled in this uncertainty, the possibility of indefinite detention causes particularly high levels of anxiety.[116] In the result, discourses of deviance at once criminalize immigration detainees, deem them unworthy even of due process safeguards, and crush hope.

Although States commonly deny a punitive purpose to immigration detention,[117] in the absence of any other clear purpose, staff and detainees who operationalize and experience it are left to discern its purpose.[118] As Bosworth notes, while immigration detention's 'why' eludes them, they try to do so with both 'confusion and ambivalence', making sense of it by relying on parallels with the prison.[119] Significantly, many of those charged with overseeing detention 'compare themselves to prison officers'—or have backgrounds as prison officers—and find it 'hard to identify a vocabulary for understanding their work and its rationale in terms that [are] not penal'.[120] Unsurprisingly, therefore, 'prison cultures' are generated in administrative detention environments where power differentials heighten vulnerability to, and therefore the likelihood of, humiliation and abuse.[121]

[113] UN Human Rights Council, *Report of the Working Group on Arbitrary Detention*, UN doc A/HRC/13/30 (15 January 2010) para 58; WGAD (n 11) paras 9, 10; cf *Khlaifia* (n 79) para 89. See also *Juridical Condition and Rights of Undocumented Migrants*, Inter-American Court of Human Rights, Advisory Opinion OC-18/03 (17 September 2003) para 15 (concurring opinion of Judge AA Cançado Trindade).

[114] Catherine Dauvergne, 'The Troublesome Intersections of Refugee Law and Criminal Law', in Aas and Bosworth (n 81) 76, 77; Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (CUP 2008).

[115] Lester (n 29) 36.

[116] Hindpal Singh Bhui, 'Introduction: Humanizing Migration Control and Detention', in Aas and Bosworth (n 81) 1, 7.

[117] Refugee Convention, art 31 proscribes punitive detention.

[118] Bosworth (n 81).

[119] ibid 151.

[120] ibid 157.

[121] François Crépeau, *Report of the Special Rapporteur on the Human Rights of Migrants on His Mission to Australia and the Regional Processing Centres in Nauru*, UN doc A/HRC/35/25/Add.3 (24 April 2017) 13, 15.

b. Securitization

National security considerations are not new to international refugee and human rights law.[122] However, historically they were both limited and exceptional. More recently, the post-Cold War 'refugee crisis' of the 1990s and later the 11 September attacks that heralded the beginning of the so-called 'War on Terror' has enabled securitization discourses to assume a new prominence, acquiring a centrality in the development and rationalization of migration control measures.[123] Like criminalization discourses, securitization discourses have become part of both immigration detention's rationalization and its operationalization.[124] The social construction of unsolicited migration as a security question combined with immigration detention's symbolic power as a technology of control means security considerations have become embedded in immigration detention's institutional logic.[125]

The context of the 'War on Terror' also evokes an analogous form of detention—that of wartime internment as a security measure. In the context of immigration detention, legitimising discourses reminiscent of wartime purposes of protection and prevention from threat and hostility serve concurrent goals of cultivating fear and then appeasing the fearful. As such, an understanding of the history of internment of 'enemy aliens' during wartime and its securitized underpinnings may therefore help explain the rapid expansion of the use of immigration detention as a peacetime form of containment.[126] Reflecting on this history of internment, we can see that securitization discourses and anxious nationalism may construct 'friendly' foreigners as people in relation to whom there is a 'perpetual hostility', that is, as 'enemy aliens'.[127]

This trajectory reveals how such discourses construct a 'myth of invasion', presenting unauthorized migration as a threat, and transforming protection-seekers and many other non-citizens, hitherto 'friendly aliens' as a matter of law, into 'enemy aliens' framed as a threat to sovereignty.[128] These discourses have produced an environment in which

[122] ICCPR, arts 12(3), 13; Refugee Convention arts 9 (provisional measures), 28 (travel documents), 32 (expulsion), 33 (*non-refoulement*); OAU Convention arts VI (travel documents), II (settlement away from borders).

[123] Beth A Simmons, 'Border Rules' (2019) 21 International Studies Review 256, 257; Jef Huysmans, 'The European Union and the Securitization of Migration' (2000) 38 Journal of Common Market Studies 751; Emma Haddad, *The Refugee in International Society: Between Sovereigns* (CUP 2008) 194.

[124] Crépeau (n 121) 8, 13.

[125] Huysmans (n 123) 756; Philippe Bourbeau, *The Securitization of Migration: A Study of Movement and Order* (Routledge 2011).

[126] Wilsher (n 40) xi; Kirsten McConnachie, 'Camps of Containment: A Genealogy of the Refugee Camp' (2016) 7 Humanity: An International Journal of Human Rights, Humanitarianism, and Development 397.

[127] On the elision of friendly and enemy aliens, see *Fong Yue Ting v United States* 14 US 698 (1893); Wilsher (n 40) 148.

[128] Hein de Haas, 'The Myth of Invasion. The Inconvenient Realities of African Migration to Europe', (2008) 29 Third World Quarterly 1305.

immigration detention has been able to flourish, legitimizing the use of (structurally and physically) violent measures that suppress the humanity of the 'other'.[129] Thus, international standards notwithstanding, the dominance of these discourses ensures that the primary logic of immigration detention remains biopolitical, obfuscating its deliberate harm.[130] It is little wonder that the WGAD has called for it to be gradually abolished.[131]

5. Looking Ahead

In September 2016, in the face of unprecedented levels of migration, the UN General Assembly unanimously adopted the New York Declaration for Refugees and Migrants. The New York Declaration emerged from a Summit that sought to recognize all refugees and migrants as rights holders and to condemn acts and manifestations of racism, xenophobia, and other forms of intolerance. The Declaration reaffirmed the importance of the international refugee regime and contained wide-ranging commitments by UN Member States to strengthen and enhance mechanisms to protect people on the move, whether refugees or migrants. It paved the way for two new global compacts in 2018, respectively covering refugees, and safe, orderly, and regular migration.

Although in this volume it may seem counterintuitive to turn to the Global Compact for Safe, Orderly, and Regular Migration (GCM), rather than its refugee counterpart, the Global Compact on Refugees (GCR), on the question of immigration detention there are good reasons for doing so in terms of both content and application. The GCM lays out 23 objectives, one of which addresses the right to liberty in detail, committing States to 'use immigration detention only as a measure of last resort and work towards alternatives' and spelling out eight ways of realizing that commitment.[132] The GCM position on detention is also consistent with both international refugee and human rights law standards as well as UNHCR's strong institutional commitment to steer State practice 'beyond detention'.[133] Furthermore, the GCM, which clearly extends to protection-seekers with irregular migration status and affirms the social and political reality that clear distinctions between refugees and other migrants cannot always be drawn,[134] provides a lens through which to consider several avenues for tackling the problem of immigration detention.

129 Bhui (n 116) 4. 130 Costello (n 7) 146.

131 UN Human Rights Council (n 113) para 58.

132 GCM, objective 13; cf GCR, para 60, committing to 'support' '[t]he development of non-custodial and community-based alternatives to detention, particularly for children'.

133 UNHCR (n 6).

134 Gabriela Rodríguez Pizarro, *Report of the Special Rapporteur on the Human Rights of Migrants*, UN doc E/CN.4/2000/82 (6 January 2000) para 30.

a. (Mis)using Fragile Legal Identities

States that detain non-citizens commonly justify doing so through the (mis)use of fragile legal identities. The construction of these identities may exploit charged terms such as 'infiltrators' that fuel fear and hostility,[135] as well as binary distinctions between, say, the 'real' or 'genuine' refugee and the 'illegal' migrant or 'bogus' asylum seeker. Thus, immigration detention is excused or explained on the basis of ascribed identities that imply deviance and criminality. This phenomenon has been described as a kind of 'categorical fetishism'[136] whereby people are shoehorned into particular categories; and then, *as a category* their rights are determined or dismissed. The effect of this is profound. As Crawley and Skleparis argue, '[t]his is not merely an issue of semantics. Categories have consequences';[137] and in this context, it is people in power who choose, use, and impose both the categories *and* consequences.

Even where legal texts are seemingly neutral, the distinctions and categorizations upon which law insists cannot be regarded as innocent.[138] Given that immigration detention is a prime site for categorical fetishism, the GCM lens underscores the imperative to consider the broader issue of immigration detention, not just its application to protection-seekers. This approach recognizes the commonalities, vulnerabilities, and intersectionality of the refugee and migrant experience, and averts the intellectual risk of sanctioning (even tacitly) detention of some non-citizens by privileging the rights and needs of others based on assumptions about worthiness. In this connection, it is salutary to recall that the Refugee Convention itself conceptualized and (mis)used fragile legal identities through which the 'worthy' refugee was a European 'insider'.[139]

b. A Paucity of Data

As an area of public administration, immigration detention is often practised in a manner that is opaque,[140] even secretive.[141] A paucity of data creates an overarching contextual challenge in the examination of State practice. Statistical data that disaggregates detained protection-seekers from other immigration detainees is notoriously difficult to obtain. Even where statistics are available, they are often politicized and

[135] Reuven(Ruvi) Ziegler, 'No Asylum for "Infiltrators": The Legal Predicament of Eritrean and Sudanese Nationals in Israel' (2015) 29 Journal of Immigration, Asylum and Nationality Law 172.

[136] Heaven Crawley and Dimitris Skleparis 'Refugees, Migrants, Neither, Both: Categorical Fetishism and the Politics of Bounding in Europe's "Migration Crisis" ' (2018) 44 Journal of Ethnic and Migration Studies 48, 59.

[137] ibid.

[138] Peter Fitzpatrick, 'Racism and the Innocence of Law' (1987) 14(1) Journal of Law and Society 119.

[139] Chimni (n 49) 351; Oberoi (n 47); Madokoro (n 47); see also Chapter 2 in this volume.

[140] UNHCR (n 6) 20.

[141] Matthew Flynn, 'Bureaucratic Capitalism and the Immigration Detention Complex' (June 2015) Global Detention Project Working Paper No 9 <https://www. globaldetentionproject.org/wp-content/uploads/2016/06/Matt_Flynn_GDP_Paper_2015.pdf> accessed 13 March 2020.

unreliable. Whether the resultant data deficit is the product of purposeful reticence or lack of capacity,[142] these failures mean that detailed statistics cannot be readily or usefully disaggregated, analysed, and compared,[143] even regarding children.[144] This data deficit has both legal and political implications, inhibiting comprehensive and evidence-based policy review and development, and undermining transparency and accountability. It is therefore incumbent civil society, including on the academy, to undertake research that recognizes the need for, and collects, clear and accurate data that can be readily disaggregated. Given its objective to '[c]ollect and utilize accurate and disaggregated data as a basis for evidence-based policies', the GCM is an appropriate lens through which to do so.[145]

c. A Possible Research Trajectory

While there may be undulations in the intensity (and harshness) of State practice, looking ahead there are few indications that immigration detention will cease to be a serious legal and public policy issue in the coming decades. Processes of legal investigation through strategic research and litigation, including through avenues such as the law of tort, continue to hold the promise of justice. Legal claims that unsettle assumptions that detention and related border control policies represent 'the last major redoubt of unfettered national sovereignty'[146] are indispensable.

However, while it is crucial to hold States to account by better identifying, understanding, harnessing, and strengthening international standards, the enduring gap between those standards and State practice means that it is not enough to do so. To help bridge that gap, we need to take the further step of trying to understand how and why immigration detention has become so widely (mis)used and unexceptional.

The GCM offers a trajectory along which constructive research opportunities lie for strengthening law, policy, and practice. It recognizes immigration detention to be an area where migrants and refugees face many common challenges and similar vulnerabilities.[147] It also makes visible the extent to which criminalizing and securitizing discourses are at the heart of immigration detention's policy rationale.[148] In this connection, three areas for academic research merit more focused multidisciplinary attention: expanding the use of alternatives to detention in the face of immigration detention's purpose deficit; addressing the data deficit as a way of enhancing accountability for its

[142] O'Nions (n 95). [143] UNHCR (n 6) 20.

[144] Eleonora Del Gaudio and Stephen Phillips, 'Detention of Child Asylum Seekers in the Pursuit of State Interests: A Comparison of the Australian and EU Approaches' (2018) 36 Nordic Journal of Human Rights 1, 12–13.

[145] GCM, objective 1.

[146] Brian Opeskin, 'Managing International Migration in Australia: Human Rights and the "Last Major Redoubt of Unfettered National Sovereignty"' (2012) 46 International Migration Review 551; Cornelisse (n 37) 246.

[147] GCM, para 3; New York Declaration, para 6. [148] GCM, objective 10(g).

human effects; and strengthening cross-sectoral and collaborative forms of participatory and longitudinal research so that the voices of those with lived experience of immigration detention are better able to inform policy.[149]

6. Conclusion

As States use increasingly cynical means to avoid compliance with their international obligations, whether through the deployment of legal fictions or more audacious measures, it is imperative that we think about and beyond immigration detention. For, despite reasonably robust international standards, a growing body of (sometimes damning) regional and international human rights jurisprudence, and increased attention on this issue on the part of UN special mechanisms and regional mechanisms, the deep cruelty of immigration detention remains a festering sore. Understanding law and its possibilities remains crucial. However, paying attention to its justifications and rationalizations, its history and context, and the voices of those it affects, will reveal more about what law is and does, and the mischiefs of which it is capable, than doctrinal analysis can do alone.

[149] Bosworth (n 81); Lima-Marín and Jefferis (n 107).

CHAPTER 53

THE RIGHT TO WORK

CATHRYN COSTELLO AND COLM Ó CINNÉIDE*

1. Introduction

Article 23(1) of the UDHR provides that 'Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment'. This composite right, whose distinctive facets are protected by a range of binding treaties, may be characterized as the 'right to decent work'. In this chapter, references to the 'right to work' connote this composite right.[1] The right cuts across the traditional bifurcation between civil and political, and socio-economic rights, and is also informed by core International Labour Organization (ILO) labour standards.[2]

To explore its application to asylum seekers and refugees, Section 2 analyses the right under international human rights law of global scope, in particular under the International Covenant on Economic, Social and Cultural Rights (ICESCR).[3] While that instrument is often perceived as being normatively weak, due in part to a misunderstanding about the 'progressive realization' standard, we highlight States' immediate

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[1] See in general the essays in Virginia Mantouvalou (ed), *The Right to Work: Legal and Philosophical Perspectives* (Hart 2015).

[2] See e.g. ILO Convention No 122 Employment Policy (adopted 9 July 1964, entered into force 5 July 1966) 569 UNTS 65. The first evocation of the right to work in the ILO context in 1937 related to women's right to work: ILO, 'Resolution concerning Women Workers' (2–23 June 1937), cited by Angelika Nußberger, 'International Protection of the Right to Work', Max Planck Encyclopedia of Public International Law (March 2007).

[3] Other pertinent provisions, not examined due to limitations of space, include CEDAW, art 11(1)(a); CERD, art 5(e)(i); CRC, art 32; Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3, arts 11, 25, 26, 40, 52, and 54; and Convention on the Rights of Persons with Disabilities (adopted 13 December 2016, entered into force 3 May 2008) 2515 UNTS 3, art 27.

'minimum core' obligations under the right to work. Section 3 examines the right under African, Inter-American, and European regional human rights mechanisms. Some deprivations of the right to work may entail breaches of regional treaties, both directly (for example, under article 15 of the African Charter of Human and Peoples' Rights, the right to work) or indirectly (for example, under article 8 ECHR, on life or article 3 ACHR, the right to juridical personality). Restrictions on the right to work may also contribute to violations of absolute rights, such as the prohibitions on inhuman and degrading treatment, or forced labour.

Taking this normative backdrop into account, we examine in Section 4 two possible means of securing this right. First, we analyse domestic litigation, with illustrations from four domestic systems—South Africa, Hong Kong, the UK, and Ireland. Secondly, we examine how the right has been 'leveraged' transnationally in recent initiatives to encourage States hosting many refugees to grant the right to work, looking at processes focusing on Turkey, Jordan, and latterly Ethiopia. We note that while these processes, and the Global Compact on Refugees (GCR) with its focus on 'self-reliance', may increase access to work for *some* refugees, their overall impact on access to decent work is as yet questionable.[4]

Before we turn to the doctrinal material, it is important to highlight the bleak situation that confronts asylum seekers and refugees. Both Mathew[5] and Zetter and Raudel[6] document the widespread limitations on asylum seekers' and refugees' right to work globally. Most refugees are in the Global South, where their access to work is often greatly limited by practices ranging from outright bans to highly restrictive permit systems. In the Global North, bans on asylum seekers working are relatively common, often combined with restrictions on place of residence and free movement (which in themselves hinder access to work). Moreover, when asylum procedures are protracted and/or fail to recognize refugees or siphon them into insecure statuses, the formal right of access to work enjoyed by recognized refugees is rendered ineffective.

Globally, welfare payments and/or humanitarian assistance are often imagined to compensate for this lack of legal access to work. However, these funds, even if they are available, rarely provide an adequate standard of living, so asylum seekers and refugees must find some way to earn their living—usually in the 'informal sector'. This term encompasses diverse forms of work, and in many States, the informal sector accounts

[4] We draw in particular on Jennifer Gordon, 'Refugees and Decent Work: Lessons Learned from Recent Refugee Jobs Compacts' (2019) Employment Working Paper No 256, 2 <http://www.ilo.org/wcmsp5/groups/public/—ed_emp/—ifp_skills/documents/publication/wcms_732602.pdf> accessed 30 June 2020.

[5] Penelope Mathew, *Reworking the Relationship between Asylum and Employment* (Routledge 2002); Asylum Access and Global Refugee Work Rights Coalition, 'Global Refugee Work Rights Report' (2014) Report <https://asylumaccess.org/wp-content/uploads/2014/09/FINAL_Global-Refugee-Work-Rights-Report-2014_Interactive.pdf> accessed 30 June 2020.

[6] Roger Zetter and Héloïse Raudel, 'Refugees' Right to Work and Access to Labor Markets' (2016) KNOMAD Study <https://www.knomad.org/publication/refugees-right-work-and-access-labor-markets-assessment-part-1> accessed 30 June 2020.

for most work.[7] The informal sector is generally underregulated and exploitative, reflecting gendered and racialized hierarchies (as does formal work). Yet, the 'informal sector' may also include self-employment and commercial activities that offer better conditions than 'formal' employment, in particular if 'formality' connotes working under highly restrictive migration statuses.[8] These generally entail increased dependency on employers, in-built risks of exploitation, and even forced labour.[9] Gaining a deeper understanding of 'informal' work is an urgent task for those who seek to advocate and work for better refugee work rights.[10] Finally, this chapter focuses on the rights of adults. Child labour is often prevalent amongst refugee communities when other economic opportunities are foreclosed, and raises distinctive human rights issues in need of deeper scholarly attention, which are beyond the scope of this chapter.[11]

2. The Right to Work in International Human Rights Law

a. The Dual Value of the Right to Work

The right to work has both instrumental and intrinsic value. Its instrumental value lies in the fact that work enables individuals to participate in social, economic, and political life, and crucially to earn a livelihood. Work is also intrinsically valuable, as people derive dignity and self-worth from their engagement with other people and their environments through work. Both aspects are widely recognized. The UN Committee on Economic, Social and Cultural Rights (CESCR) General Comment 18 acknowledges that work is both 'essential for realizing other human rights' and 'an inseparable and inherent part of human dignity'.[12]

The 'dual value' of this right is practically important, in particular for asylum seekers and refugees subject to prohibitions on working. States sometimes attempt to argue that providing financial support justifies work restrictions. However, while such financial assistance may provide a livelihood, it does not address the denial of the dignity-enhancing role of work. This is a key aspect of the right, so as is discussed further below,

[7] ILO, 'Women and Men in the Informal Economy: A Statistical Picture' (3rd edn, 2018) Report <https://www.ilo.org/global/publications/books/WCMS_626831/lang—en/index.htm> accessed 30 June 2020.

[8] On the links between migration status and labour exploitation, see generally Cathryn Costello and Mark Freedland, *Migrants at Work* (OUP 2015).

[9] Cathryn Costello, 'Migrants and Forced Labour: A Labour Law Response' in Alan Bogg, Cathryn Costello, ACL Davies, and Jeremias Prassl (eds), *The Autonomy of Labour Law* (Hart 2014) 189.

[10] See generally Diamond Ashiagbor (ed), *Re-Imagining Labour Law for Development: Informal Work in the Global North and South* (Hart 2019).

[11] Manfred Liebel, 'Economic and Labor Rights of Children' in Jonathan Todres and Shani M King (eds), *The Oxford Handbook of Children's Rights Law* (OUP 2020).

[12] CESCR, 'General Comment No 18: The Right to Work, Article 6 of ICESCR', UN doc E/C.12/GC/18 (6 February 2006) (General Comment No 18).

even if the right to an adequate livelihood (article 11 ICESCR) is guaranteed, States are obliged to respect the intrinsic value of access to dignified work.

b. The Substantive Scope of the Right to Work in ICESCR

The affirmation of the right to decent work in article 23(1) UDHR finds binding expression in several international human rights treaties, most notably articles 6 and 7 ICESCR. Article 6 provides that individuals should enjoy free choice of labour ('work which he freely chooses or accepts'), and obliges States parties to take 'appropriate steps to safeguard this right' in order to achieve 'steady economic, social and cultural development and full and productive employment' under 'conditions safeguarding fundamental political and economic freedoms'. Article 7 ICESCR specifies the right to 'just and favourable conditions of work'. In interpreting article 6, the CESCR has emphasized that while it does not create a right to obtain employment as such, it 'affirms the obligation of States Parties to assure individuals their right to freely chosen or accepted work', encompassing the right 'not to be deprived of work unfairly' or to be 'forced in any way whatsoever to exercise or engage in employment'.[13] Furthermore, '[w]ork as specified in article 6 of the Covenant must be decent work', which 'provides an income allowing workers to support themselves and their families' and must be compatible with the 'physical and mental integrity' of the worker.[14] The Committee interprets ICESCR as requiring States to secure the 'following interdependent and essential elements' of the right to work,[15] namely (i) *availability*, in the sense that States parties must establish specialized services to assist and support individuals in finding employment;[16] (ii) *accessibility*, in the sense that States must prohibit discrimination in access to employment, and also implement national policies to promote equal access to the labour market;[17] and (iii) *acceptability*, in the sense that States must take steps to protect the rights of workers to enjoy just and favourable conditions of work, and to protect vulnerable categories of workers against exploitation—including by reducing 'to the fullest extent possible the number of workers outside the formal economy'.[18]

These obligations are often wrongly written off as 'soft'. However, article 2(1) ICESCR obliges States to give effect to their obligations under the Covenant 'individually and through international assistance and cooperation . . . to the maximum of [their] available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means'. Article 2(2) builds on this general requirement by requiring States parties to guarantee the Covenant rights 'without discrimination', while article 4 provides that any limitations on the enjoyment of these rights must be 'compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society'. The reference to 'progressive realization' is often wrongly taken to dilute the ICESCR duties generally, but

[13] ibid para 4. [14] ibid para 7. [15] ibid para 12. [16] ibid para 19.
[17] ibid para 12. [18] ibid para 10.

legally, some obligations thereunder are of immediate effect, and subject to non-regression.[19] Obligations of immediate effect relate to the 'minimum core' of the rights, which in relation to the right to work include (i) ensuring non-discriminatory access to employment, (ii) taking measures to avoid labour exploitation, and (iii) adopting national employment strategies targeting 'disadvantaged and marginalized individuals and groups'.[20] This set of minimum core entitlements recognizes the intrinsic value of work, and is the minimum level of action that States are obliged to undertake under the Covenant.[21]

c. The Personal and Geographic Scope of the Right to Work in ICESCR

Article 6 ICESCR applies to 'everyone'. Its universal personal scope is buttressed by the non-discrimination guarantee in article 2(2), part of the 'minimum core'. Accordingly, as the CESCR has noted, article 6 and other ICESCR rights apply 'to everyone including non-nationals, such as refugees, asylum seekers, stateless persons, migrant workers, and victims of international trafficking, regardless of legal status and documentation'.[22] In its General Comment 23, the CESCR affirmed that article 7 ICESCR is a 'right of everyone, without distinction of any kind', specifically mentioning 'workers in the informal sector, migrant workers, workers from ethnic and other minorities, . . . refugee workers and unpaid workers'.[23] The Committee further explicitly acknowledged the vulnerability of refugees due to their 'often precarious legal status', accordingly asserting that States should 'enact legislation enabling refugees to work and under conditions no less favourable than for nationals'.[24] Notably, this 'national treatment' standard is higher than the requirement under the Refugee Convention. This reasoning applies equally to article 6 ICESCR.

However, there is a complicating factor. While article 2(2) enshrines non-discrimination, article 2(3) provides that '[d]eveloping countries, with due regard to human rights and their national economy, may determine to what extent they would

[19] See generally CESCR, 'General Comment No 3: The Nature of States Parties' Obligations', UN doc E/1991/23 (14 December 1990); Magdalena Sepúlveda Carmona, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (Intersentia 2003); Economic and Social Council, 'The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights', UN doc E/CN.4/1987/17, annex (8 January 1987) (Limburg Principles).

[20] General Comment No 18 (n 13) para 31.

[21] See Colm ÓCinnéide, 'The Right to Work in International Human Rights Law' in Mantouvalou (n 1) 99.

[22] CESCR, 'General Comment No 20, Non-Discrimination in Economic, Social and Cultural Rights', UN doc E/C.12/GC/20 (2009) para 30.

[23] CESCR, 'General Comment No 23 (2016) on the Right to Just and Favourable Conditions of Work (Article 7 of the International Covenant on Economic, Social and Cultural Rights)', UN doc E/C.12/GC/23 (27 April 2016) para 5.

[24] ibid para 47 (e).

guarantee the economic rights recognized in the present Covenant to non-nationals'. The term 'developing countries' here is not defined, however, its usage within the UN offers clarity.[25] Article 2(3) thus appears at first glance to permit the States that host most refugees to deny their economic rights. However, we do not share the view that the provision is really 'potentially fatal…for the overwhelming majority of refugees',[26] when interpreted correctly. As a general matter, article 2(3) is a potential exception to the general prohibition on non-discrimination in article 2(2), and should be interpreted narrowly.[27]

To rely on article 2(3), States must have 'due regard to human rights', and so may not rely on article 2(3) to breach any non-economic rights under the Covenant, or indeed other human rights treaties. While the 'right to work' is clearly an 'economic right',[28] article 2(3) does not provide a basis for any work rights restrictions that may also entail breaches of, say, the right to be free from slavery or forced labour, or other non-economic rights.[29] Article 2(3) cannot be used to limit rights under other human rights treaties, including the right to work under regional treaties.[30] Secondly, the provision requires 'due regard' to the 'national economy'. To establish a rational degree of connection between a work rights restriction and the 'national economy', States would need to demonstrate that excluding non-nationals is economically beneficial. However, labour market exclusions generally are not. They risk creating a shadow workforce in the informal sector, ripe for exploitation, undercutting local workers' rights in the affected sector. Far from bringing benefits to the national economy, work rights restrictions are often counterproductive.[31] Notably, it appears that no State has explicitly invoked the provisions of article 2(3) to justify discrimination against non-nationals.[32] Finally, in light of the ambiguities of the text, we may also have regard to the *travaux préparatoires*,[33] which reveal that article 2(3) was inserted to ensure that formerly colonized States could take action to prevent non-nationals playing a dominant role in their economic life.[34] In other words, article 2(3) was intended to permit newly independent States to limit the role of a formerly dominant colonial elite, rather than to target a vulnerable population.

[25] Ben Saul, David Kinley, and Jaqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases and Materials* (OUP 2014) 214–17.

[26] Chapter 9 in this volume.

[27] Limburg Principles (n 20) para 43.

[28] See Saul, Kinley, and Mowbray (n 26) 217.

[29] See Section 3.c.ii for ECHR discussion.

[30] Sepúlveda Carmona (n 20) 415, noting that States may not rely on article 2(3) to limit the right to work under article 15 of the African Charter of Human and Peoples' Rights.

[31] See generally Michael Clemens, Cindy Huang, and Jimmy Graham, 'The Economic and Fiscal Effects of Granting Refugees Formal Labor Market Access' (2018) Centre for Global Development Working Paper <https://www.cgdev.org/sites/default/files/economic-and-fiscal-effects-granting-refugees-formal-labor-market-access-brief.pdf> accessed 30 June 2020.

[32] Saul, Kinley, and Mowbray (n 26) 217.

[33] Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 32.

[34] Saul, Kinley, and Mowbray (n 26) 215. See also EVO Dankwa, 'Working Paper on Article 2(3) of the International Covenant on Economic, Social and Cultural Rights' (1987) 9(2) Human Rights Quarterly 230.

Our conclusion on the general applicability of article 6 ICESCR to refugees and asylum seekers on a non-discriminatory basis means that bans and other significant restrictions on asylum seekers and refugees working are arguably in breach, unless they can be shown to be objectively justified under article 4.[35] While article 4 permits some limitations on rights, they must be 'compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society'.[36] Given that non-discriminatory access to work is part of the 'minimum core' of the right to work, and so essential to human dignity, States should have to show compelling justification for denying asylum seekers and refugees access to employment. Similarly, State failures to protect refugees and asylum seekers against labour exploitation will also *prima facie* breach the 'minimum core' requirements of article 6, as will their exclusion from national employment plans: again, any limitation of these core rights should have to be supported by compelling justification.

It is noteworthy that only two States parties to the ICESCR have entered reservations relating to the scope of article 6 ICESCR—France and the UK.[37] However, such reservations must be interpreted narrowly, and subject to the overall object and purpose of ICESCR to protect human dignity.[38] As such, the UK reservation is dubious, as restrictions on their access to work will have little or no tangible impact on the 'employment opportunities' of workers in general.

The CESCR gives effect to these obligations in its monitoring via States' periodic reports, and of late individual complaints.[39] The Committee increasingly expresses concern about high unemployment amongst refugees, calling on States to take concrete and specific measures.[40] It also calls on States to remove work bans on asylum seekers, to expedite asylum processing, and to take measures to eliminate discrimination in work against refugees and asylum seekers.[41] This jurisprudence remains a work in progress. Uncertainty persists as to the exact scope of State obligations to those with irregular

[35] General Comment No 18 (n 13) para 31.

[36] See generally Amrei Müller, 'Limitations to and Derogations from Economic, Social and Cultural Rights' (2009) 9(4) Human Rights Law Review 557.

[37] France declared that article 6 should not be interpreted as 'derogating from provisions governing the access of aliens to employment', while the UK reserved 'the right to interpret article 6 as not precluding the imposition of restrictions, based on place of birth or residence qualifications, on the taking of employment in any particular region or territory for the purpose of safeguarding the employment opportunities of workers in that region or territory'.

[38] Ineta Ziemele and Lasma Liede, 'Reservations to Human Rights Treaties' (2013) 24(4) European Journal of International Law 1135.

[39] Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (adopted 10 December 2008, entered into force 5 May 2013) UN doc A/RES/63/117.

[40] See eg CESCR, 'Concluding Observations: Azerbaijan', UN doc E/C.12/1/Add.104 (14 December 2004) para 17; CESCR, 'Concluding Observations: Denmark', UN doc E/C.12/1/Add.102 (14 December 2004) paras 15, 26.

[41] See eg CESCR, 'Concluding Observations: Slovakia', UN doc E/C.12/SVK/CO/3 (14 November 2019) paras 20–1; CESCR, 'Concluding Observations: Israel', UN doc E/C.12/ISR/CO/4 (12 November 2019) paras 22–3; CESCR, 'Concluding Observations: Belgium', UN doc E/C.12/BEL/CO/5 (26 March 2020) paras 22–3.

migration status, and where, for instance, unregistered asylum seekers and unrecognized refugees fall in that discussion.[42]

d. The Right to Work under the Refugee Convention

The Refugee Convention contains detailed provisions on work, reflecting its aim to create a legal status for millions of refugees left in limbo in Europe at the time of its drafting. Its rights catalogue is wide, including the right of association and to form trade unions (article 15), access to wage-earning employment (article 17), liberal professions (article 19), public relief (article 23), protection of labour legislation and social security (article 24), and the issuance of travel documents (article 28). Famously, Henkin, as US representative in the drafting process, stated that 'without the right to work all other rights were meaningless. Without that right no refugee could even become assimilated within his country of residence.'[43] This section is brief, as these provisions are examined thoroughly elsewhere.[44] We share Edwards' conclusion that 'the right to work under Article 6 ICESCR is arguably wider in scope than the [Refugee] Convention'.[45] Crucially, under article 5 of the Refugee Convention, refugees will usually be entitled to benefit from the higher standards under ICESCR.

Notwithstanding their centrality, the work-related rights reflect the compromises of the drafting process, in particular the assumption that an immediate work right for refugees was not feasible given the post-war devastation of European economies. Article 17 on 'wage-earning employment' is applicable to 'lawfully staying' refugees, with the standard of treatment set as 'the most favourable treatment accorded to nationals of a foreign country in the same circumstances'.[46] In contrast, article 18 on 'self-employment' is applicable to the wider category of refugees, those 'lawfully in' the territory, but at a lower standard of protection, namely that applicable to 'aliens generally in the same circumstances', as is article 19 on 'liberal professions'.

'Lawfully staying' in article 17 on employment connotes a stronger 'degree of attachment' than 'lawfully in' in article 18 on self-employment, to borrow Hathaway's phrase.[47] In the French text, 'lawfully staying' is 'résident reguliѐment'. Once a refugee

[42] See generally Colm ÓCinnéide, 'The Human Rights of Migrants with Irregular Status: Giving Substance to Aspirations of Universalism' in Sarah Spencer and Anna Triandafyllidou (eds), *Migrants with Irregular Status in Europe: Evolving Conceptual and Policy Challenges* (Springer 2020).

[43] UN Ad Hoc Committee on Refugees and Stateless Persons, 'Summary Record of the Thirty-Seventh Meeting' (16 August 1950), UN doc E/AC.32.SR.37, 12 (Mr Henkin, US).

[44] James C Hathaway, *The Rights of Refugees under International Law* (CUP 2005) 730–86; Mathew (n 6); Alice Edwards, 'Part 4 Gainful Employment' in Andreas Zimmermann, Jonas Dörschner, and Felix Machts (eds), *The 1951 Convention relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (OUP 2011); University of Michigan Law School, 'The Michigan Guidelines on the Right to Work' (2010). <https://www.refworld.org/docid/4bbaf1242.html> accessed 30 June 2020 (Michigan Guidelines).

[45] Alice Edwards, 'Human Rights, Refugees, and The Right 'To Enjoy' Asylum (2005) 17 IJRL 293.

[46] The drafting history reveals that a stronger version was contemplated and rejected. Mathew (n 6) 86.

[47] See further Hathaway, *Rights* (n 45) ch 3.

is recognized (including on a *prima facie* basis) undoubtedly, she should thereby be treated as 'lawfully staying'. Crucially, 'lawfully staying' should also include asylum seekers, if their claims are not dealt with within a reasonable time.[48] 'Lawfully in', the standard for self-employment, is a weaker degree of attachment, which includes those admitted for any period, including asylum seekers, and those remaining under temporary or other informal protections.[49]

The right to work is to be accorded at the 'most favourable foreigner' standard.[50] To illustrate, this should mean that refugees are granted the same work rights as EU citizens (in EU Member States) or nationals of any such States who enjoy special rights under bilateral or regional agreements. Otherwise, if there is no such 'privileged' foreigner, the Michigan Guidelines urge that the appropriate comparator be 'permanent residents'.[51] Significantly, Edwards notes that most of the many reservations to the right to work under the Convention purport to exclude refugees from the standard that ought to be applicable as 'most favourable' (ie that under regional and other preferential agreements) or clarify that article 17 does not preclude requiring refugees to get work permits.[52] For self-employment, the 'aliens generally' standard for the right to self-employment requires the State to treat refugees as it does other foreigners in general, which may offer little economic freedom in practice.

Overall, the Refugee Convention's work provisions are important, but limited. However, as already noted, by virtue of article 5 of the Refugee Convention, refugees are entitled to the benefit of higher human rights standards, which generally will be those under ICESCR, or in particular in Africa, under its regional human rights instrument.

3. The Right to Work in Regional Human Rights Law

a. The African Charter of Human and Peoples' Rights

The African Charter adopts an integrated approach to human rights, both civil and political, and socio-economic.[53] Article 15 recognizes that '[e]very individual shall have the right to work under equitable and satisfactory conditions'. The Commission's initial interpretation of the right to work has emphasized how it guarantees equal access to decent work for all, generating obligations on States to regulate the conduct of private employers as well as State organs. Its approach reflects the 'minimum core' requirements of article 6 ICESCR.[54]

48 See Michigan Guidelines (n 45) para 8.

49 See further Hathaway, *Rights* (n 45) 173–86.

50 Refugee Convention, art 6.

51 Michigan Guidelines (n 45) para 11.

52 Edwards, 'Part 4 Gainful Employment' (n 45) 957.

53 Manisuli Ssenyonjo, 'Analysing the Economic and Cultural Rights Jurisprudence of the African Commission' (2011) 29(3) Netherlands Quarterly of Human Rights 358.

54 Rachel Murray, *The African Charter on Human and Peoples' Rights: A Commentary* (OUP 2019) 389–97.

There is nothing in the Charter to indicate that refugees and asylum seekers are excluded from its protection. Indeed, the African Commission on Human and Peoples' Rights (ACHPR) has repeatedly affirmed the equal application of the Charter to national and non-nationals alike. While its jurisprudence has not focused on refugees and asylum seekers in detail,[55] in the case of *Rencontre Africaine pour la Défense des Droits de l'Homme v Zambia* it confirmed that States must secure the rights under the Charter to everyone within their jurisdiction, including non-nationals.[56] In a number of resolutions and comments on State reports, the Commission has also called for speedier processing of asylum applications,[57] as well as the integration of refugees into the host society.[58]

b. The Inter-American System

The Charter of the Organization of American States (OAS) recognizes the importance of the right to work. Article 45(b) of the 1948 OAS Charter states:

> Work is a right and a social duty, it gives dignity to the one who performs it, and it should be performed under conditions, including a system of fair wages, that ensure life, health, and a decent standard of living for the worker and his family, both during his working years and in his old age, or when any circumstance deprives him of the possibility of working.[59]

The legally binding American Convention on Human Rights (ACHR), later drafted under the auspices of the OAS, mainly covers civil and political rights. However, article 26 of the ACHR commits States parties to progressively realizing the socio-economic rights recognized in the OAS Charter, including the right to work. Furthermore, the San Salvador Protocol to the Convention, which protects various socio-economic rights, provides in article 6(1) that: '[e]veryone has the right to work, which includes the opportunity to seek the means for living a dignified and decent existence by performing a freely elected or accepted lawful activity'. Not every States party to the ACHR has ratified this Protocol.[60]

[55] See further Gina Bekker, 'The Protection of Asylum Seekers and Refugees within the African Regional Human Rights System' (2013) 13 African Human Rights Law Journal 1. Chapter 15 in this volume.

[56] *Rencontre Africaine pour la Défense des Droits de l'Homme v Zambia* (2000) AHRLR 321 (ACHPR 1996). See also *African Institute for Human Rights and Development (on behalf of Sierra Leonean refugees in Guinea) v Guinea* (2004) AHRLR 57 (ACHPR 2004).

[57] See ACHPR, 'Concluding Observations and Recommendations on the 1st Periodic Report of the Union of South Africa' (21 November–5 December 2005) para 26.

[58] ACHPR, 'Concluding Observations and Recommendations on the 3rd Periodic Report of the Republic of Sudan' (13–27 May 2009) para 39.

[59] See also American Declaration of the Rights and Duties of Man, OAS Res XXX adopted by the Ninth International Conference of American States (1948) reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System OEA/Ser L V/II.82 Doc 6 Rev 1, 17(1992) art XIV.

[60] The Protocol has been ratified by 16 OAS States.

Crucially, the Inter-American Commission and Court of Human Rights recognize the interconnectedness of civil and political, and socio-economic rights. When they interpret and apply the Inter-American rights, they take into account the dual value of the right to work.[61] In particular, the Commission and court have affirmed aspects of the right to work of undocumented migrants under the right to equality and the right to juridical personality. For example, in its *Advisory Opinion on the Juridical Condition and Rights of Undocumented Migrants*,[62] the court concluded that denying undocumented migrants protection against workplace exploitation would be discriminatory. In *Undocumented Workers v United States of America*,[63] the Commission deemed legal protection against workplace exploitation to be a 'civil right' enjoyed under the right to juridical personality, and held that a failure to provide proper remedies for such exploitation constituted unjustified discrimination contrary to the requirements of the OAS Charter. The reasoning would seem to apply to asylum seekers and refugees *a fortiori*.

c. The Council of Europe System

The Council of Europe system reflects the bifurcation between civil and political and socio-economic rights. The explicit right to work is enshrined within the weaker socio-economic instrument, the European Social Charter. However, it also enjoys a degree of indirect protection via the ECHR.

i. *European Social Charter*

Adopted in 1961, the European Social Charter (ESC) predated ICESCR by five years, was the first international human rights treaty on socio-economic rights, and was intended to complement the ECHR. The right to work is central to the ESC,[64] appearing in article 1, which requires States (i) to take positive steps to maintain high levels of employment through the implementation of adequately resourced national employment and job creation policies, and (ii) to protect individuals against discrimination, forced labour, and other forms of exploitation. The decency of work is protected under a number of other interconnected ESC rights, including in particular the detailed provisions of article 2 (the right to just conditions of work), article 3 (the right to healthy and safe working conditions), and article 4 (the right to fair remuneration).

[61] See in general Verónica Gómez, 'Economic, Social, and Cultural Rights in the Inter-American System' in Mashood Baderin and Robert McCorquodale, *Economic, Social, and Cultural Rights in Action* (OUP 2007).

[62] *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18, Inter-American Court of Human Rights Series A No 18 (17 September 2003).

[63] *Undocumented Workers v United States of America*, Inter-American Commission on Human Right Report No 50/16, Case No 12.834 (30 June 2016).

[64] Simon Deakin, 'The Right to Work' in Niklas Bruun, Klaus Lorcher, Isabelle Schomann, and Stefan Clauwaert (eds), *The European Social Charter and the Employment Relation* (Hart 2017).

The European Committee on Social Rights (ECSR) interprets article 1 and these other provisions systematically.[65] They are read as imposing a range of detailed positive obligations on States to ensure workers enjoy access to decent work, with the Committee monitoring compliance with these requirements through a State-reporting process and also a 'collective complaints' mechanism.

Unlike most other human rights treaties, the ESC does not generally apply to nationals and non-nationals alike. The Appendix to the ESC governing the scope of the Charter limits it to non-nationals of States parties.[66] However, the exclusion is qualified by a provision covering 'refugees as defined in the [Refugee Convention]'. For those who are 'lawfully staying in its territory', States are required to extend 'treatment as favourable as possible, and in any case not less favourable than under the obligations accepted by the Party under the said convention and under any other existing international instruments applicable to those refugees'. The ECSR interprets this provision as requiring equal treatment between refugees and asylum seekers and nationals, except where a States party can show a compelling justification for differential treatment, and crucially that refugees should in all circumstances enjoy the protection of the essential features of the relevant ESC rights.[67] This focus on the 'core' of ESC rights, which would appear to cover the central elements of the right to decent work as protected by articles 1–4 ESC, has again echoes of the core requirements of article 6 ICESCR.

ii. *Systemic Integration of the Right to Work into the ECHR*

When interpreting civil and political rights, the ECtHR takes into account that their effectiveness depends on access to work and other core socio-economic entitlements. This has resulted in a partial integration of right to work concerns into the ECHR jurisprudence.[68] In *Niemietz v Germany*, the court stated that article 8 (the right to privacy) includes 'the right to establish and develop relationships with other human beings', including in working life, as it is in that context that 'the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world'.[69] By extension, the ECtHR has interpreted article 8 and other Convention rights, taken together with the right to non-discrimination set out in article 14, as requiring States to protect individuals against discriminatory barriers to employment. Thus, in *Sidabras v Lithuania*,[70] the ECtHR held that 'a far-reaching ban' on taking up employment violated article 8 ECHR. Notably the court's reasoning reflected the dual value of the right to work.[71]

[65] ÓCinnéide, 'The Right to Work in International Human Rights Law' (n 22) 99–122.

[66] The Appendix states that persons covered by the ESC's provisions 'include foreigners only in so far as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned'.

[67] See European Committee on Social Rights, *Conclusions 2015*, 'Statement of Interpretation: the right of refugees under the Charter', 2015_163_10/EN, 8 October 2015.

[68] See in particular Virginia Mantouvalou, 'The Protection of the Right to Work through the European Convention on Human Rights' (2014) 16 Cambridge Yearbook of European Legal Studies 313.

[69] *Niemietz v Germany*, App No 13710/88 (ECtHR, 16 December 1992) para 29.

[70] *Sidabras v Lithuania* (2004) 42 EHRR 104.

[71] Mantouvalou, 'The Protection of the Right to Work' (n 69) 329.

Article 4 ECHR (protection against slavery, servitude, and forced labour) is of growing importance. While the wrongs outlined in article 4 are extreme, forced labour, often emerges when migration status limits free choice of employment.[72] There are also well-established links between trafficking and refugeehood.[73] Article 4 ECHR imposes a range of positive duties on States to take action to prevent exposure to these wrongs, including an obligation to work transnationally.[74] By extension, article 4 ECHR also arguably requires States to take positive steps to avoid extreme labour exploitation—an obligation that may extend to reform migration status, including work bans, to reduce risks of such exploitation.[75] Restrictions on the work rights of asylum seekers may also contribute to inhuman and degrading living conditions, as the ECtHR recognized in *MSS v Belgium and Greece*.[76] Notably, asylum seekers at the time in Greece could apply for a work permit, but this was acknowledged as being ineffective. Depending on their impacts, then, restrictions on work rights may contribute to a finding of a violation of articles 8, 3, or 4 ECHR. Refugees may also rely on article 14 ECHR to protect against discrimination between them and other migrants.[77] The partial integration of right to work into the ECHR opens up legal avenues for contesting labour market restrictions on asylum seekers and refugees.

4. Contesting Work Rights Restrictions

Many restrictions on the right to work of asylum seekers and refugees are incompatible not only with the right to work, but also with other human rights standards. This section explores two modes of realizing these rights. The first mode is domestic litigation and the second relates to transnational political processes, including under the Global Compact. The latter could be conceived as an effort to secure the right to work 'through international assistance and cooperation' as required under ICESCR,[78] although this linkage is often not made explicit.

a. Litigating the Right to Work

The explicit protection of the right to work in constitutional systems varies considerably,[79] as does these systems' openness to international law.[80] This section examines litigation in South Africa, Hong Kong, the UK, and Ireland.

[72] Costello (n 10).

[73] See Chapter 30 in this volume.

[74] *Rantsev v Cyprus and Russia* (2010) 51 EHRR 1.

[75] Costello (n 10).

[76] *MSS v Belgium and Greece* (2011) 53 EHRR 2.

[77] See generally *Bah v the United Kingdom*, App No 56328/07 (ECtHR, 27 September 2011); *Niedzwiecki v Germany*, App No 58453/00 (ECtHR, 25 October 2005) paras 27–33.

[78] ICESCR, art 2(1).

[79] Courtney Jung, Ran Hirschl, and Evan Rosevear. 'Economic and Social Rights in National Constitutions' (2014) 62 American Journal of Comparative Law 1043; Luke Mason, 'Labour Rights', *Max Planck Encyclopedia of Comparative Constitutional Law* (December 2017).

[80] Pierre-Hugues Verdier and Mila Versteeg, 'International Law in National Legal Systems: An Empirical Perspective' (2015) 109 AJIL 514; see Chapter 14 in this volume.

Under South Africa's original refugee legislation, refugees had the right to work but the legislation was silent on asylum seekers.[81] In practice, asylum seekers were left in rightless limbo during long asylum proceedings that generally led to rejection of their claims. But asylum seekers successfully challenged their economic exclusion. On work and self-employment, the South African Constitutional Court found that the restrictions in question violated human dignity.[82] However, this case law did not engage deeply with international human rights or refugee law, in spite of the South African Constitution's openness thereto.[83] Instead, the court emphasized the combined effect of the denial of the right to work and lack of State social support,[84] emphasizing avoiding destitution, rather than the right to work *per se*.[85] In spite of the constitutional protections, in 2020, new legislation entered into force[86] that is in clear tension with this constitutional jurisprudence. The new policy aims to require asylum seekers to live in processing centres near land borders. Further constitutional litigation is inevitable. The existing case law's weakness is that its focus on non-destitution may leave open the possibility to justify work rights restrictions provided welfare provision is ensured, which would be incompatible with international human rights law.

In Hong Kong the courts have developed some protections against *refoulement*.[87] In addition, a work ban was successfully challenged, albeit on limited grounds, in *GA v Director of Immigration*.[88] Given the constitutional limitations in that jurisdiction, the court reviewed the ban on 'reasonableness' grounds, an approach that incorporated some human rights considerations. On the facts, the refusal of the permission to work was deemed unreasonable, but only in those extreme cases where a work ban may lead to inhuman and degrading conditions, rather than the right to work *per se*.[89]

A somewhat similar approach has been taken in the UK, where the ECHR serves as the effective domestic bill of rights, since its incorporation by the Human Rights Act.[90] The UK's highest court, in *Adam and Limbuela*, held that welfare restrictions violated article 3 ECHR, where the work ban combined with withdrawal of welfare support exposed asylum seekers to a risk of destitution.[91] Later, the English High Court in *Tekle*

[81] Refugees Act No 130 of 1998.

[82] s 10 of the Bill of Rights: 'Everyone has inherent dignity and the right to have their dignity respected and protected'. *Minister of Home Affairs v Watchenuka* 2004 (4) SA 326 (SCA) (right to work); *Somali Association of South Africa v Limpopo Department of Economic Development, Environment and Tourism* [2014] ZASCA 143, 2015 (1) SA 151 (SCA) (self-employment); cf *Union of Refugee Women and Others v Director, Private Sector Industry Regulatory Authority and Others* [2006] ZACC 23, 2007 (4) SA 395 (CC). Note powerful dissents by Mokgoro and O'Regan JJ.

[83] The Constitution provides that 'courts *must* consider international law in interpretation of the Bill of Rights'. See Ruvi Ziegler, 'Access to Effective Refugee Protection in South Africa: Legislative Commitment, Policy Realities, Judicial Rectifications' (2020) 10 Constitutional Court Review 65.

[84] *Minister of Home Affairs v Watchenuka* (n 83) para 32.

[85] *Somali Association of South Africa v Limpopo Department* (n 83) para 44.

[86] Refugees Amendment Act 11 of 2017 (RAA 2017) (1 January 2020).

[87] *GA v Director of Immigration*, No 7 of 2013 (CIVIL), Hong Kong: Court of Final Appeal, 18 February 2014. See Chapter 21 in this volume.

[88] *GA v Director of Immigration* (n 88).

[89] Michael Ramsden and Luke Marsh, 'The "Right to Work" of Refugees in Hong Kong: *MA v Director of Immigration*' (2013) 25 IJRL 574.

[90] Human Rights Act 1998.

[91] *R (Limbuela) v Secretary of State for the Home Department* [2005] UKHL 66, [2006] 1 AC 396.

accepted that the right to work fell within article 8 ECHR, but higher court rulings decided that issue on other grounds.[92] The UK still has one of the strictest approaches in Europe to the right to work for asylum seekers, only permitting them to work after 12 months, and then only in very limited fields. These restrictions are now the focus of a broad-based campaign for legal change.[93]

The outlier in our selection is Ireland in terms of giving effect to the right to work *per se*. In 2017, after many years of unsuccessful political campaigns against the asylum system's restrictive features, the Supreme Court held that the ban on asylum seekers working was a violation of the constitutional right to work.[94] Notably, Ireland had not opted into the pertinent EU rules, so the ban persisted for the entire duration of the asylum process.[95] The court held that the right to work also applied to non-citizens, given its roots in human dignity, although some limitations to their work rights were permissible. Although Ireland's is a strictly dualist system, the court cited the ICESCR.[96] The implementation of the ruling has led to some labour market access for asylum seekers after nine months, although many other restrictive features of its asylum system remain.[97]

These examples illustrate that in diverse constitutional orders, courts have tended to focus on a minimum protection against destitution, rather than protecting the right to work *per se*. The rulings also reflect the ambiguous position of asylum seekers and refugees in these diverse constitutional orders. Further research is needed on this topic of the comparative constitutional protection of refugee rights, and its links with the realization of international rights, as this brief comparison exemplifies. As Lester has explored in this volume, in some regions, notably Latin America, constitutional protection of the right to work for at least some refugees has been effective.[98]

b. Leveraging the Right to Work

One of the strongest elements of the Refugee Compact is to support refugee 'self-reliance'.[99] Against this backdrop, and in parallel to the emergence of the Compact, a

[92] *R (on the application of Tekle) v Secretary of State for the Home Department* [2008] EWHC 3064; cf *R(Rostami) v Secretary of State for the Home Department* [2013] EWHC 1494 (Admin) citing *Negassi & Lutalo* (CA). On appeal, both the Court of Appeal and the Supreme Court decided the case on EU law grounds exclusively. *R (on the application of ZO (Somalia) and others) (Respondents) v Secretary of State for the Home Department* [2010] UKSC 36.

[93] 'Lift the Ban: Why People Seeking Asylum Should Have the Right to Work' (October 2018) <https://www.refugee-action.org.uk/wp-content/uploads/2018/10/Lift-the-Ban-report.pdf> accessed 30 June 2020; Melanie Gower, 'Should Asylum Seekers Have Unrestricted Rights to Work in the UK?' (23 October 2019) <https://commonslibrary.parliament.uk/research-briefings/sn01908/> accessed 30 June 2020.

[94] *NVH v Minister for Justice & Equality and ors*, 30 May 2017 [2017] IESC 35.

[95] Council Directive 2013/33/EU of 26 June 2013 Laying Down Standards for the Reception of Applicants for International Protection [2013] OJ L180/96.

[96] *NVH v Minister for Justice & Equality and ors* (n 95) para 17.

[97] Liam Thornton, 'Clashing Interpretations of EU Rights in Domestic Courts' (2020) 26(2) European Public Law (forthcoming).

[98] See Chapter 14 in this volume.

[99] See generally Claudena Skran and Evan Easton-Calabria, 'Old Concepts Making New History: Refugee Self-reliance, Livelihoods and the "Refugee Entrepreneur" ' (2020) 33 JRS 1.

number of initiatives have been taken that aim to increase refugees' access to work. This section briefly examines three of the most prominent 'deals', namely those with Turkey and Jordan, noting that the Ethiopian Compact is in its incipient stage.[100] While the GCR has led to some action on refugees' access to work in the Global North,[101] most of the focus has been on host States in the Global South.

i. *Turkey*

One example of a 'deal' that aims to improve refugees' rights, while also containing them away from donors' own territories and labour markets, is the March 2016 'EU–Turkey Statement'.[102] Syrian refugees' with 'temporary protection' status in Turkey did not initially enjoy the right to work. The Statement notes the 'progress already achieved' 'including Turkey's opening of its labour market to Syrians under temporary protection'[103] referring to Turkey's decision in January 2016 to grant the right to work. In spite of this 'progress', the right to work remains heavily restricted in practice, with work permits being costly and held by the employer. It appears that less than 1 per cent of Syrians in Turkey are employed under these permits,[104] with the gender breakdown 10:1 men to women.[105] The situation of refugees of other nationalities is even more precarious in Turkey, with requirements to reside in 'satellite cities'. Those in need of work generally evade these restrictions and work informally in major cities.[106]

ii. *Jordan*

Under the 2016 Jordan Compact, Jordan agreed with 'donor states' to grant up to 200,000 Syrians work permits in exchange for World Bank loans and improved market access to the EU for goods manufactured in designated Special Economic Zones (SEZs), provided that at least 15 per cent of the workers were Syrian.[107] As Lenner and Turner have explained, the SEZ element in particular failed to deliver, as refugees were neither willing nor able to work under the poor conditions in the relevant sector, where most workers are migrant women from Southeast Asia.[108] These women's tied migrant status

[100] Gordon (n 5) 2.

[101] Organisation for Economic Co-operation and Development (OECD) and UNHCR, 'Engaging with Employers in the Hiring of Refugees: A 10-Point Multi-Stakeholder Action Plan for Employers, Refugees, Governments and Civil Society' (2018) <https://www.oecd.org/els/mig/UNHCR-OECD-Engaging-with-employers-in-the-hiring-of-refugees.pdf> accessed 30 June 2020.

[102] European Council, 'EU–Turkey Statement' (Press Release 144/16, 18 March 2016) para 1 <https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/> accessed 30 June 2020. See Chapter 19 in this volume.

[103] ibid.

[104] Statistics from 2018 indicate that 27,830 permits were issued, while the Syrian refugee population is estimated to be 3.5 million. AIDA Asylum Information Database, 'Turkey: Access to the Labour Market' <https://www.asylumineurope.org/reports/country/turkey/access-labour-market-0> accessed 30 June 2020.

[105] ibid. With 25,457 permits to men, and 2,473 to women.

[106] Clemens, Huang, and Graham (n 32) 42.

[107] By means of loosening EU 'rules of origin'. See Decision No 1/2016 of the EU–Jordan Association Committee of 19 July 2016 [2016] OJ L233/6.

[108] Katharina Lenner and Lewis Turner, 'Making Refugees Work? The Politics of Integrating Syrian Refugees into the Labor Market in Jordan' (2018) 28 Middle East Critique 65.

means they often live in dormitories, work long hours, and invariably leave their children, if they have any, in their home countries. Aside from the failed SEZ plan, the Compact has been impactful. Official data indicates over 150,000 permits have been issued.[109] In terms of its deeper impact, it remains unclear whether the work permit improves pay or working conditions.[110] One striking further finding in relation to the Jordan Compact is that 'access to self-employment... has become even more restrictive for refugees since the Compact, which, given the preference of women for home-based work, has a detrimental gender impact'.[111] Overall, the Jordan Compact has met with criticism, in particular from the perspective of ensuring decent work.[112]

iii. *Ethiopia*

The Ethiopian Compact has led to a shift in the right to work of refugees, albeit as yet only on paper. Initially, the Compact also focused on export-oriented industrial parks, but lessons were learned from the Jordan Compact's failures. At the end of 2019, its sectors and geographic areas remain to be determined. However, even aside from questions of implementation, the Compact rests on weak normative commitments. In particular, the 'Refugees Proclamation' ties refugee work rights to those granted to other non-citizens in Ethiopia, which are restrictive.[113]

iv. *Assessment*

Securing the right to decent work for refugees, in particular in developing countries, is challenging. These processes are assumed to be political 'deals' rather than binding treaties (although that is a matter for assessment). The 'parties' are host States and donors, with refugees absent from the table. Aside from the failure to engage with those most affected, without some clear benchmarking and monitoring, these deals can easily become empty promises, or even lead to a deterioration in refugee rights. It has been suggested that getting national governments on board is only part of the process, and that local engagement is crucial.[114]

Secondly, at present, these 'deals' often promise permits for refugees' *employers*, rather than for refugees themselves. Issuing permits to employers may limit free choice of employment, a vital element of the right to work. While many labour migration systems issue work permits to the employer rather than the worker, this practice is invariably a risk factor for exploitation. A recent study confirmed that refugees perceived a number of risks' to their proposed mode of labour market inclusion, including greater exploit-

[109] 179,445 permits from 1 January 2016 to 31 January 2020. Ministry of Labour Syrian Refugee Unit, 'Syrian Refugee Unit Work Permit Progress Report' (January 2020) <https://data2.unhcr.org/en/documents/download/73881> accessed 30 June 2020.

[110] Gordon (n 5) 3.

[111] Amanda Gray Meral, 'Assessing the Jordan Compact One Year On: An Opportunity or a Barrier to Better Achieving Refugees' Right to World' (2020) 33 JRS 42, 56.

[112] Ala Al-Mahaidi, 'Securing Economic Livelihoods for Syrian Refugees: The Case for a Human Rights-Based Approach to the Jordan Compact' (2020) The International Journal of Human Rights.

[113] Gordon (n 5) 26.

[114] Alexander Betts, *The Wealth of Refugees* (forthcoming).

ation risks as 'the power remained with employers' and 'a work permit (which was time-bound and conditional) was not the same as having the right to work'.[115]

A third set of concerns arises around the links between these processes and mobility restrictions. The Jordan Compact was initially framed around a 'zonal development model', which envisaged refugees working in SEZs and living in adjacent camps. The Ethiopian Compact initially also focused on SEZs. Other new models of 'self-reliance' piloted as part of the GCR implementation also focus on particular settlements.[116] Given that mobility restrictions generally hamper the realization of the right to work,[117] that these processes seem to normalize mobility restrictions, which are in themselves often a human rights violation, is itself of concern.

Concerning non-discrimination, serious issues around nationality, race, and gender discrimination arise. Many of the deals only leverage better rights for one particular group of refugees, ignoring the others, as both the EU–Turkey deal and the Jordan Compact exemplify. Underlying this explicit nationality discrimination may be race or ethnicity discrimination by proxy.[118] The processes outlined above also illustrate a stunning failure to consider women's rights, in particular the deeply gendered nature of work and care.

The processes discussed above reflect many of the structural global inequalities that underpin refugee containment. A further challenge emerges from the range of actors involved in these processes. Beyond these specific agreements discussed above, the World Bank now offers financing to support refugee inclusion.[119] The ILO has recently remerged into the refugee rights field.[120] The contrasting roles of the ILO and international economic institutions in the refugee regime are in need of greater scholarly attention.[121] Refugees have not been included in the decision-making process, and as Gordon concludes, '[d]ecent work for refugees will not be achieved as an add-on; it must be part of the plan from the beginning'.[122]

[115] Caitlin Wake and Veronique Barbelet, 'Towards a Refugee Livelihoods Approach: Findings from Cameroon, Jordan, Malaysia and Turkey' (2020) 33 JRS 125, 137 (on refugees in Turkey and Jordan).

[116] Alexander Betts, Naohiko Omata, Cory Rodgers, Olivier Sterck, and Maria Stierna *The Kalobeyei Model: Towards Self-Reliance for Refugees?* (RSC 2019).

[117] Clemens, Huang, and Graham (n 32).

[118] See Chapter 2 in this volume on race discrimination by proxy.

[119] Global Concessional Financing Facility, 'Supported Projects' <https://globalcff.org/supported-projects/> accessed 30 June 2020; International Development Association World Bank Group, 'IDA18 Regional Sub-Window for Refugees and Host Communities' <http://ida.worldbank.org/replenishments/ida-18replenishments/ida18-regional-sub-window-for-refugees-host-communities> accessed 30 June 2020.

[120] ILO, 'Guiding Principles on the Access of Refugees and Other Forcibly Displaced Persons to the Labour Market' (28 November 2016) <https://www.ilo.org/global/topics/labour-migration/publications/WCMS_536440/lang—en/index.htm> accessed 30 June 2020; ILO, 'Recommendation R205: Employment and Decent Work for Peace and Resilience' (16 June 2017).

[121] Sarah Deardoff Miller, 'The GCR and the Role of Development Actors with Refugees: A Game-Changer, or More of the Same?' (2019) 57 International Migration 173; Leah Zamore, 'Refugees, Development, Debt, Austerity: A Selected History' (2018) 6(1) Journal on Migration and Human Security 26.

[122] Gordon (n 5) 4.

5. Conclusion

This chapter has demonstrated that the right to decent work in international human rights law, in particular its 'minimum core', applies to asylum seekers and refugees. Many contemporary restrictions on asylum seekers and refugees' access to work are arguably in breach of ICESCR and regional human rights treaties. Making the right to decent work effective is thus the key challenge, and as demonstrated, both domestic litigation and transnational leveraging often lose sight of the basic elements of decent work, instead focusing on minimal elements of anti-destitution, or forgetting the basic insight that decent work is not about empowering employers, but should empower refugees *qua* workers and employers. The chapter has identified many issues in need of greater scholarly attention throughout, in particular in relation to the 'informal' economy, gendered and racialized divisions of labour, and the role of law in both limiting work rights, as well as enabling decent work. The GCR and the Compacts suggest an unmooring of refugee protection from law and normative commitments. However, for these processes to be meaningful and effective, establishing participatory forms of monitoring and benchmarking is vital, as are clear commitments rooted in human rights.

CHAPTER 54

THE RIGHT TO EDUCATION

SARAH DRYDEN-PETERSON AND HANIA MARIËN

1. Refugee Education: Background and Context

At the end of 2018, 25.9 million people lived as refugees globally, and more than half were children under the age of 18.[1] Of these refugees, 80 per cent lived in a country that neighbours their conflict-affected country of origin, most of which are low- and middle-income countries.[2] One-third of refugees live in States categorized as Least Developed Countries.[3] This geography of exile matters for refugee children and their access to education. Most refugee children globally seek access to education in situations where national education systems are overstretched and where citizen children also struggle to realize their right to education.[4] In 2017, only 61 per cent of refugee children enrolled in primary school compared to 92 per cent globally; and at secondary levels, only 23 per cent of refugees had access compared to 84 per cent globally.[5] Yet these global access rates mask a large variation: most refugees live in parts of States where school access rates are far lower. For example, in the Turkana region of Kenya, where most South Sudanese refugees live, only 11 per cent of young people have access to secondary school compared to 48 per cent in Kenya as a whole, a national rate that is still only half that of global levels.[6]

[1] UNHCR, 'Global Trends: Forced Displacement in 2018' (20 June 2019) <https://www.unhcr.org/dach/wp-content/uploads/sites/27/2019/06/2019-06-07-Global-Trends-2018.pdf> accessed 20 April 2020.

[2] ibid. [3] ibid.

[4] Sarah Dryden-Peterson, Elizabeth Adelman, Michelle J Bellino, and Vidur Chopra, 'The Purposes of Refugee Education: Policy and Practice of Including Refugees in National Education Systems' (2019) 92 Sociology of Education 346.

[5] UNHCR, 'Turn the Tide: Refugee Education in Crisis' (2018) <https://www.unhcr.org/5b852f8e4.pdf> accessed 20 April 2020.

[6] UNICEF, 'Turkana Social Sector Budget Brief (2013–2014 to 2015–2016)' (2017) <https://www.unicef.org/esaro/UNICEF_Kenya_—_2017_—_Turkana_Budget_Brief.pdf> accessed 20 April 2020.

Over the last 10 years, both the nature of conflicts from which refugee children flee, and the policies designed to fulfil their right to education have changed. The conflicts from which they have fled are increasingly protracted. In 2011, the average conflict in low-income countries lasted 12 years and in middle-income countries 22 years.[7] By 2016, the average length of exile for a refugee was estimated at between 10 and 25 years, up to three times as long as it was in the early 1990s.[8] This long-term nature of exile, for many young refugees lasting the entire duration of their possible education, has altered the focus of global refugee education policy. Prior to 2012, in most settings, refugees were educated in parallel schools, separate from national students and often following the curriculum and in the language of instruction of the country of origin.[9] The UNHCR Global Education Strategy (GES) 2012–16 articulated a new approach to the education of refugees based on their inclusion in national education systems.[10] The adoption of this new approach was swift. In 2010, only five of 14 of the largest refugee-hosting States[11] used the national curriculum and national languages of instruction to teach refugee learners but, by 2014, 11 of these 14 States did.[12] Subsequently, the New York Declaration for Refugees and Migrants and the Global Compact on Refugees echoed this inclusion effort.[13]

International human rights instruments, including the UDHR, the CRC, the ICESCR, and the Refugee Convention, provide a framework for the right to education for refugees. As a social right, and as reflected in the ICESCR, the right to education is to be progressively realized and requires positive action and allocation of funding. Like all human rights, it is dependent on action by government, the availability of public resources, and enforcement mechanisms.[14] The devolution of responsibility for the education of refugees to States through recent policy further entrenches the role of the State in respecting, protecting, and fulfilling refugees' right to education.[15]

[7] UNESCO, 'Education for All Global Monitoring Report 2011: The Hidden Crisis: Armed Conflict and Education' (2011) <https://unesdoc.unesco.org/ark:/48223/pf0000190743> accessed 20 April 2020.

[8] Nicholas Crawford, Simone Haysom, and Nadine Walicki, 'Protracted Displacement: Uncertain Paths to Self-Reliance in Exile' (2015) <http://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/9851.pdf> 20 April 2020; Xavier Devictor and Quy-Toan Do, 'How Many Years Have Refugees Been in Exile?' (2016) 43(2) Population and Development Review 355; James Milner and Gil Loescher, 'Responding to Protracted Refugee Situations: Lessons from a Decade of Discussion' (2011) Forced Migration Policy Briefing 6 <https://www.rsc.ox.ac.uk/files/files-1/pb6-responding-protracted-refugee-situations-2011.pdf> accessed 20 April 2020.

[9] Sarah Dryden-Peterson, 'Refugee Education: The Crossroads of Globalization' (2016) 45 Educational Researcher 473.

[10] UNHCR, 'Education Strategy 2012–2016' (2012) <https://www.unhcr.org/uk/protection/operations/5149ba349/unhcr-education-strategy-2012-2016.html> accessed 20 April 2020.

[11] These 14 countries comprised Bangladesh, Chad, Egypt, Ethiopia, Iran, Kenya, Lebanon, Malaysia, Pakistan, Rwanda, South Sudan, Sudan, Uganda, and Yemen.

[12] Dryden-Peterson (n 9).

[13] Volker Türk and Madeline Garlick, 'From Burdens and Responsibilities to Opportunities: The Comprehensive Refugee Response Framework and a Global Compact on Refugees' (2016) 28 IJRL 656.

[14] Kurt Willems and Jonas Vernimmen, 'The Fundamental Human Right to Education for Refugees: Some Legal Remarks' (2018) 17 European Educational Research Journal 219.

[15] Dryden-Peterson, Adelman, Bellino, and Chopra (n 4).

This chapter explores the intersection of global and national frameworks for the right to education for refugees and its realization in the form of access to schools. Though some scholarship has discussed the right to education for refugees, much of the literature surrounding children's rights as related to migration and refugee status omits, or only briefly addresses, the right to education. As Bhabha explained related to child migrants, 'state intervention has been pulled in different directions because of a clash between two opposing normative frameworks—immigration control preoccupations on the one hand, and welfare protection (including child's rights) concerns on the other'.[16] A prevailing focus at the State level on a child's migration status, rather than status as a child, precludes attention to the right to education. As Pobjoy explains, States tend to focus on 'a child's status as a migrant (inevitably enlivening discourses of suspicion and immigration control) rather than their status as a child (more likely to evoke discourses of welfare and protection)'.[17] Furthermore, the limited literature addressing the intersection of refugee law and the right to education for young refugees has focused on European countries as opposed to those States in which most refugees live.[18]

In looking across States, with a focus on the low- and middle-income ones in which most refugee children live, we find that despite the widely embraced global articulation of the right to education for all children, the realization of the right to education is highly variable, being largely dependent upon children's State of asylum. As argued elsewhere, we find that refugees' access to education is 'caught between the global promise of universal human rights, the definition of citizenship rights…, and the realization of these sets of rights in everyday practices'.[19] This tension between universal rights and local implementation is also both the genesis and ongoing preoccupation of global institutions and legal frameworks, including in education.

In the remainder of this chapter, we use two analytical frames to explore the right to education for refugees. The first draws on Somers and Roberts[20] who argue that rights are multifaceted and exist at 'multiple registers'. They define these 'registers' as normative aspirations, codification, and doctrines, and the mechanisms and institutions of enforcement. The second analytic draws on what Bartlett and Vavrus[21] call 'multi-scalar' research, which includes comparisons on three axes. One axis of analysis is vertical, comparing laws and policies related to refugee education at global and national levels.

[16] Jason M Pobjoy, 'Art. 22 Refugee Children' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (OUP 2019).

[17] Jason M Pobjoy, 'A Child Rights Framework for Assessing the Status of Refugee Children' in Satvinder S Juss and Colin Harvey (eds), *Contemporary Issues in Refugee Law* (Edward Elgar 2013).

[18] Helene Marie-Lou de Clerck, Julie Ryngaert, Estelle Carton de Wiart, Marie Verhoeven, Woter Vandenhole, Paul Mahieu, and Christiane Timmerman, 'Undocumented Children and the Right to Education: Illusory Right or Empowering Lever?' (2011) 19 The International Journal of Children's Rights 613; Willems and Vernimmen (n 14).

[19] Dryden-Peterson (n 9) 473.

[20] Margaret Somers and Christopher Roberts, 'Toward a New Sociology of Rights: A Genealogy of "Buried Bodies" of Citizenship and Human Rights' (2008) 4 Annual Review of Law and Social Science 385.

[21] Lesley Bartlett and Frances K Vavrus, *Rethinking Case Study Research: A Comparative Approach* (Routledge 2017).

The second axis of comparison is horizontal across regions and States. The third axis is transversal, over time, situating laws and policies of refugee education in historical and contemporary contexts. Our approach overall is sociocultural, focused on understanding how legal frameworks at multiple levels interact with refugees' lived experiences of access to education. We also situate refugees' realization of the right to education in the context of the marginalized nationals amid whom they typically live and seek access to education. We thus build on Bhabha's conclusion that children's lack of access to rights is often as a result of the 'structures of inequality embedded in society [that] are not adequately corrected by the available resources'.[22]

2. Obligations for Refugee Education: A Multi-scalar View

a. Refugees' Right to Education

i. *Legal Obligations under International Human Rights Law*

Enshrined in the UDHR is the right to education for all (article 26), 'without distinction of any kind' including on 'national . . . origin'.[23] The CRC, with 196 States parties, includes article 28 on the right to education, specifying that States must 'make primary education compulsory and available free to all', 'with a view to achieving this right progressively and on the basis of equal opportunity'.[24] While immigration status is not explicitly noted as grounds for non-discrimination,[25] article 2 of the CRC provides that the Convention rights accrue to 'each child within their jurisdiction without discrimination of any kind', including on the basis of national origin or other status.[26] A child's right to education is echoed in regional treaties as well. The African Charter on Human and Peoples' Rights (Banjul Charter), for example, articulates that every person, regardless of status, is entitled to an education. Non-citizen children, including refugees, are clearly included within these global and regional articulations of the right to education.[27]

The right to education in ICESCR requires States parties to provide free and compulsory primary education to all children, with no limits on this right as related to national origin or other status.[28] ICESCR recognizes States' obligations to the rights outlined

[22] Jacqueline Bhabha, 'Arendt's Children: Do Today's Migrant Children Have a Right to Have Rights?' (2009) 31 Human Rights Quarterly 450.

[23] UDHR, art 26. [24] CRC, art 28.

[25] UNESCO, 'Right to Education Handbook' (2019) 93 <https://unesdoc.unesco.org/ark:/48223/pf0000366556> accessed 20 April 2020.

[26] CRC, art 2.

[27] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 21 ILM 58 (the African Charter).

[28] ICESCR, art 2(2).

therein, including to education, 'to the maximum of its available resources'.[29] This availability of resources is critical to the realization of the right to education for refugees. It is one reason for which, in many nation-States, and 'for millions of people throughout the world, the enjoyment of the right to education remains a distant goal'[30] now, as it was in 1966 when the ICESCR was adopted, and in 1999 when the Committee on Economic, Social and Cultural Rights (CESCR) issued its General Comment No 13 on the right to education.

This General Comment of the CESCR recalls States' 'minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels' of each of the rights enunciated in the Covenant, including 'the most basic forms of education', as outlined in General Comment No 3.[31] General Comment No 13 moreover added the obligation to not only 'ensure the right of access to public educational institutions and programmes on a non-discriminatory basis' for primary education, but 'to adopt and implement a national educational strategy which includes provision for secondary, higher and fundamental education'.[32] Additionally, General Comment No 20 on non-discrimination in economic, social, and cultural rights explicitly notes that Covenant rights 'apply to everyone including non-nationals, such as refugees'.[33] While General Comments are not legally binding in themselves, they often have greater legal influence than the UNGA resolutions discussed below, as they provide an authoritative interpretation of a binding treaty.[34]

ii. *Legal Obligations under the Refugee Convention*

Article 22 of the Refugee Convention on refugees' education provides that Contracting States 'shall accord to refugees the same treatment as is accorded to nationals with respect to elementary education . . . [and] treatment as favourable as possible . . . with respect to education other than elementary education'.[35] Though article 22 has been critiqued as being somewhat vague in its definition of 'elementary education',[36] the right to education as outlined in this article is notably stronger than some other Convention rights because it applies as soon as a refugee is within the jurisdiction of a State, unlike some other rights that require lawful presence.[37] Moreover, while some Convention

[29] ICESCR, art 2(1).

[30] Committee on Economic, Social and Cultural Rights (CESCR), 'General Comment No 13: The Right to Education', UN doc E/C.12/1999/10 (8 December 1999) para 2.

[31] CESCR, 'General Comment No 3 The Nature of States Parties' Obligations (art 2, para 1, of the Covenant)', UN doc E/1991/23 (14 December 1990) para 10.

[32] CESCR, General Comment No 13 (n 30) para 57.

[33] CESCR, 'General Comment No 20: Non-Discrimination in Economic, Social and Cultural Rights (art 2, para 2, of the International Covenant on Economic, Social and Cultural Rights)', UN doc E/C.12/GC/20 (2 July 2009) para 30.

[34] UNESCO, 'Right to Education Handbook' (n 25) 49.

[35] Refugee Convention, art 22.

[36] Samuel KN Blay and Martin B Tsamenyi, 'Reservations and Declarations under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees' (1990) 2 IJRL 527, 547; James C Hathaway, *The Rights of Refugees under International Law* (CUP 2005) 596.

[37] Hathaway (n 36) 597.

rights are to be granted to refugees at the same level of provision as other non-nationals, the right to education is to be guaranteed at the level provided to nationals.[38]

While 146 States are party to the Refugee Convention and 147 to the 1967 Protocol, there are notable exceptions, including States where large numbers of people seek protection: India, Lebanon, Malaysia, and Pakistan, for example. In addition, some States have made expansive reservations to these treaties. Egypt, for example, has a sweeping reservation to article 22 on education, objecting to the provision as it 'consider[s] the refugee as equal to the national'.[39] Ethiopia, Malawi, Monaco, Mozambique, Papua New Guinea, Timor-Leste, Zambia, and Zimbabwe have also registered their reservations about article 22, noting that they consider access to education for refugees a recommendation but not a legally binding obligation.[40]

iii. *Soft Law and Policy Commitments*

Various UN bodies have consistently reaffirmed the right to education. Recent pronouncements have contained a specific focus on refugees and other children affected by armed conflict, pointing out that the progressive realization of the right to education for these groups is particularly challenging. The Human Rights Council (HRC) 2008 Resolution on the right to education registers 'deep concern' about the almost half of out-of-school children globally who live in conflict-affected fragile States and calls upon States to guarantee the right to education for marginalized groups, including refugees.[41] The Special Rapporteur on the Right to Education's 2010 report focuses on the need for adequate educational legislation to guarantee the right to education for migrants, refugees, and asylum seekers and, in particular, notes that human rights law 'does not sufficiently address the question of binding obligations of States to take positive measures and it is largely unclear which distinctions between migrants and citizens are admissible and which are not'.[42] In response to this report, in July 2010, the UNGA passed a resolution on the right to education in emergencies.[43] This resolution recognizes 'that a large proportion of the world's children out of school live in conflict-affected areas and in natural-disaster-stricken regions, and that this is a serious challenge to the fulfilment of the international education goals, including millennium development goal 2'.[44] It calls upon States to make resources available for education in emergency settings, but does not address the particularities of the status of refugees.[45]

[38] ibid 595.

[39] 'Convention relating to the Status of Refugees: Declarations and Reservations' <https://treaties.un.org/Pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-2&chapter=5&Temp=mtdsg2&clang=_en> accessed 20 April 2020.

[40] ibid.

[41] Human Rights Council, 'The Right to Education', UN doc A/HRC/RES/8/4 (18 June 2008) para 7b.

[42] Special Rapporteur on the Right to Education, 'The Right to Education of Migrants, Refugees and Asylum-Seekers', UN doc A/HRC/14/25 (16 April 2010).

[43] UNGA, 'The Right to Education in Emergency Situations', UN doc A/RES/64/290 (27 July 2010).

[44] ibid preamble. [45] ibid paras 7–8.

Again in July 2019, the UNGA affirmed the right to education, as a follow up to the 2008 HRC Resolution.[46] This new resolution continues to recognize the 'negative impact of climate change, natural disasters, conflict and crisis on the full realization of the right to education, the fact that a large proportion of the world's out-of-school population lives in conflict-affected areas'[47] and '*[c]alls upon* States to take all necessary measures, including sufficient budgetary allocations, to ensure accessible, inclusive, equitable and non-discriminatory quality education, and to promote learning opportunities for all, paying particular attention to girls, marginalized children, older persons, persons with disabilities and all vulnerable and marginalized groups, including those affected by humanitarian emergencies and conflict situations'.[48] The resolution does not specifically address refugee children.

The UNHCR Executive Committee (ExCom), composed of Contracting States to the Refugee Convention as well as non-party States hosting a significant number of refugees, has discussed the right to education for refugee children in several recent Conclusions. UNHCR ExCom Conclusion No 107 (2007) reaffirmed refugee children's right to education calling upon States 'individually and collectively, to intensify their efforts, in co-operation with the High Commissioner, to ensure that all refugee children benefit from primary education of a satisfactory quality, that respects their cultural identity and is oriented towards an understanding of the country of asylum'.[49] ExCom Conclusion No 47 (1987) moved beyond a recommendation for primary education to suggest that 'the High Commissioner consider the provision of post-primary education within the general programme of assistance'.[50] However, similar to the mentioned above pronouncements of different UN bodies, these UNHCR ExCom Conclusions are non-binding.

The right to education for refugees has recently been explicit in global education policy frameworks. Unlike the precursor Education for All and the Millennium Development Goals, the key policy document associated with Sustainable Development Goal 4, the Incheon Declaration, and Education 2030: Framework for Action, specifically references the educational rights and needs of refugee children.[51] Paragraph 11 of the Incheon Declaration states:

> Furthermore, we note with serious concern that, today, a large proportion of the world's out-of-school population lives in conflict-affected areas, and that crises, violence and attacks on education institutions, natural disasters and pandemics continue to disrupt education and development globally. We commit to developing more inclusive, responsive and resilient education systems to meet the needs of children, youth and adults in these contexts, including internally displaced persons and refugees.

[46] Human Rights Council, 'The Right to Education: Follow-up to Human Rights Council Resolution 8/4', UN doc A/HRC/41/L.26 (9 July 2019).

[47] ibid preamble. [48] ibid para 10.

[49] UNHCR ExCom Conclusion No 107 (LVIII), 'Children at Risk' (2007).

[50] UNHCR ExCom Conclusion No 47 (XXXVIII), 'Refugee Children' (1987).

[51] UNESCO, 'Education 2030: Incheon Declaration and Framework for Action for the Implementation of Sustainable Development Goal 4', UN doc ED-2016/WS/28 (2016).

The right to education has become more prominent in global refugee policies. The 2016 New York Declaration reasserts the right to education, for both primary and secondary schooling,[52] while the Global Compact on Refugees commits 'to expand and enhance the quality and inclusiveness of national education systems'.[53] The shift to focus on host States as responsible for refugee education has also been articulated at regional levels. In 2017, the Intergovernmental Authority on Development (IGAD) Member States issued the Djibouti Declaration on Refugee Education with the goal to 'integrate education for refugees and returnees into National Education Sector Plans by 2020'.[54] In 2018, UNESCO and the African Union issued the Nairobi Declaration and Call for Action on Education committed to 'making our educational systems more responsive, flexible and resilient to include refugees and internally displaced people, and increasing investment for Education in Emergencies and Crises'.[55] Latin American and Caribbean States issued the 2016 Buenos Aires Declaration which committed to 'making our education systems more responsive, adaptable and resilient in order to meet the rights and satisfy the needs of migrants and refugees'.[56] And in 2018, States in the Arab region adopted the Dubai Roadmap for Education 2030, stating that they 'remain dedicated to the inclusion of refugee children and youth systematically in national educational planning processes in order to monitor their participation and educational attainment'.[57]

b. National Implementation

National commitments to the right to education in international human rights law instruments vary. To show these patterns, we examine six of the top 10 countries hosting the largest number of refugees globally: Bangladesh, Ethiopia, Jordan, Lebanon, Turkey, and Uganda, as well as Tanzania and Kenya, two States on the forefront of provision of education to refugees over the past several decades.[58] All of these States are States parties

[52] New York Declaration for Refugees and Migrants, paras 39, 57, 59, and 81.

[53] Global Compact on Refugees, para 68.

[54] IGAD Member States (Djibouti, Ethiopia, Kenya, Somalia, South Sudan, Sudan, and Uganda), 'Djibouti Declaration on Regional Conference on Refugee Education in IGAD Member States: Regional Quality Education Standards and Inclusion into National Systems for Refugee Children in line with CRRF, SDG 4 and Agenda 2063 on Education' (14 December 2017).

[55] UNESCO and African Union, 'Nairobi Declaration and Call for Action on Education: Bridging Continental and Global Education Frameworks for the Africa We Want' (2018) <https://unesdoc.unesco.org/ark:/48223/pf0000263829> accessed in 21 April 2020.

[56] UNESCO, 'Buenos Aires Declaration: Regional Meeting of Education Ministers of Latin America and the Caribbean' (2017) para 15 <http://www.unesco.org/new/fileadmin/MULTIMEDIA/FIELD/Santiago/pdf/Buenos-Aires-Declaration-ENG-2017.pdf> accessed in 21 April 2020.

[57] UNESCO, 'The Dubai Roadmap for Education 2030 in the Arab Region (2017–2018)' (2018) para 3 <https://unesdoc.unesco.org/ark:/48223/pf0000266103> accessed in 21 April 2020.

[58] Jeff Crisp, Christopher Talbot, and Daiana Cipollone (eds), *Learning for a Future: Refugee Education in Developing Countries* (UNESCO 2003); Marion Fresia and Andreas Von Känel, 'Beyond Space of Exception? Reflections on the Camp through the Prism of Refugee Schools' (2015) 29 JRS 250; Christine Monaghan, 'Educating for Durable Solutions? Histories of Schooling in Kenya's Dadaab and Kakuma Refugee Camps' (DPhil thesis, University of Virginia 2015).

to the CRC, and none of them has made reservations pertaining to the right to education.[59] Similarly, all of these States are States parties to the ICESCR, with Turkey submitting a reservation to article 13(3)–(4) and Bangladesh to articles 10 and 13.[60] Out of these eight States, five are Contracting States to the Refugee Convention,[61] Bangladesh, Jordan, and Lebanon are not, and only Ethiopia has submitted a reservation to article 22(1).[62]

In a recent study of Education Sector Plans across 41 refugee-hosting nation-States, Zeus found that only one-third make reference to refugees.[63] Whether or not refugees are mentioned specifically in national legislation or policy, their right to education generally requires that they be treated equally with nationals. Yet national treatment as regards the right to education is rarely granted, across the range of commitments to international instruments. For example, while net primary and secondary enrolment for citizens in Uganda is 91 per cent and 22 per cent, it is 71 per cent and 12 per cent for refugees[64]; for citizens in Ethiopia, 85 per cent at primary and 31 per cent at secondary, compared to 67 per cent and 9 per cent respectively for refugees[65]; and for citizens in Jordan 92 per cent at primary and 64 per cent at secondary, compared to 57 per cent for refugees at primary and secondary combined.[66]

Furthermore, recent research points to ways in which non-discrimination in education is in fact not about education that is the same for refugees and nationals.[67] Instead, 'equal opportunity' as stipulated in article 28 of the CRC requires differentiation. Achieving the four As, as outlined in General Comment 13 on the Right to Education—availability, accessibility, acceptability, and adaptability[68]—may justify differential treat-

[59] 'Convention on the Rights of the Child, Status as at 1 June 2020': <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=_en> accessed 1 June 2020.

[60] 'International Covenant on Economic, Social and Cultural Rights, Status as at 1 June 2020': <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4> accessed 1 June 2020.

[61] 'Convention relating to the Status of Refugees, Status as at 1 June 2020': <https://treaties.un.org/Pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-2&chapter=5&Temp=mtdsg2&clang=_en> accessed 1 June 2020.

[62] ibid; 'The provisions of articles 8, 9, 17 (2) and 22 (1) of the Convention are recognized only as recommendations and not as legally binding obligation'.

[63] Barbara Zeus, 'Refugee Education between Humanitarian and Development Assistance: A Configurational Comparative Analysis across Low- and Middle-Income Host Countries' (DPhil thesis, Oxford University 2019) 120.

[64] National data from the World Bank Data Bank, 2013 for primary and 2010 for secondary; refugee data from 2019 from UNHCR, UNHCR Monthly Protection Update Education July 2019 <https://data2.unhcr.org/en/documents/download/71441>.

[65] National data from the World Bank Data Bank, 2015 for primary and secondary; refugee data from 2018 from Federal Democratic Republic of Ethiopia Ministry of Education, Education Statistics Annual Abstract 2010 E.C. (2017/18) 2018.

[66] National data from the World Bank Data Bank, 2004 for primary and 2017 for secondary; refugee data from 2018 from Brussels Conference, 'We Made a Promise: Ensuring Learning Pathways and Protection for Syrian Children and Youth 2018'.

[67] Dryden-Peterson, Adelman, Bellino, and Chopra (n 4).

[68] CESCR, 'General Comment No 13' (n 30) para 8.

ment of children, such as mother-tongue instruction,[69] separate classes to catch up on missed schooling, provision for psycho-social needs,[70] and culturally relevant curriculum.[71]

c. Local Implementation

Across global, national, and sub-national data, we see variation. While refugees are typically unable to access education at the same rates as nationals,[72] local rates do not always follow the patterns that might be expected by global and national frameworks and laws. Practices at the very local level are a critical element to complement global, regional, and national-level analysis. Indeed, normative commitments at the local and individual level are a powerful force for realizing the right to education. Refugee youth, teachers, and school leaders in areas where refugees live often describe the 'felt responsibility' of ensuring refugees' right to education.[73] There is no systematic data on how and with what frequency decisions to permit—or deny—refugees admission to schools occur. However, a few examples from our own field-based data are illustrative.[74]

i. *Uganda, 2003*

The Kyaka area of Uganda first hosted refugees in the late 1950s and early 1960s when thousands of Tutsi fled to Uganda in the aftermath of the Hutu Revolution and the installation of an all-Hutu government in post-colonial Rwanda.[75] The Kyaka II refugee

[69] Celia Reddick and Sarah Dryden-Peterson, 'Refugee Education and Medium of Instruction: Tensions in Theory, Policy and Practice' in Carol Benson and Kimmo Kosonen (eds), *Language Issues in Comparative Education* (Brill/ Sense 2021); Martha Bigelow, *Mogadishu on the Mississippi: Language, Racialized Identity, and Education in a New Land* (Wiley-Blackwell 2010).

[70] Selcuk R Sirin and Lauren Rogers-Sirin, *The Educational and Mental Health Needs of Syrian Refugee Children* (Migration Policy Institute 2015).

[71] Michelle J Bellino and Sarah Dryden-Peterson, 'Inclusion and Exclusion within a Policy of National Integration: Refugee Education in Kenya's Kakuma Refugee Camp' (2019) 40 British Journal of Sociology of Education 222; Mary Mendenhall and others, 'Quality Education for Refugees in Kenya: Pedagogy in Urban Nairobi and Kakuma Refugee Camp Settings' (2015) 1 Journal on Education in Emergencies 92; Maha Shuayb, 'The Art of Inclusive Exclusions: Educating the Palestinian Refugee Students in Lebanon' (2014) 33 RSQ 20.

[72] See eg Bellino and Dryden-Peterson (n 71); Sarah Dryden-Peterson, 'Refugee Education in Countries of First Asylum: Breaking Open the Black Box of Pre-resettlement Experiences' (2015) 14 Theory and Research in Education 131; David Smawfield, 'A Comparative Study of the Provision of Primary Education for Mozambican Refugees in Malawi and Zambia' (1993) 6 JRS 286; Zeus (n 63).

[73] See eg Elizabeth Adelman and Sarah Dryden-Peterson, 'The Role of the Nation-State in Education Provision: A Vertical Policy Analysis of the Integration of Syrian Refugee Students into Lebanese Public Schools' (under review).

[74] All data collected for these studies was approved under the Harvard University Institutional Review Board. All names used are pseudonyms.

[75] Yolamo Barongo, 'Problems of Integrating Banyarwanda Refugees Among Local Communities in Uganda' in Gingyera Pinycwa (ed), *Uganda and the Problem of Refugees* (Makerere University Press 1998); Katy Long, 'Rwanda's First Refugees: Tutsi Exile and International Response 1959–64' (2012) 6 Journal of Eastern African Studies 211.

settlement was created in 1959, and many of the refugees who came at that time stayed in protracted exile until 1994, when some, but not all, returned to Rwanda. After 1994, the Kyaka II settlement hosted primarily Congolese refugees and ethnically Hutu Rwandans. In force at this time in Uganda was the 1960 Control of Alien Refugees Act (CARA), which predated Uganda's ratification of the Refugee Convention and made no provision for refugees' access to education. Nonetheless, as the District Inspector of Schools for Kyaka County explained, the schools in the settlement 'are like any other schools'.[76] The District Education Officer for Kyenjojo District, in which Kyaka is located, further explained: 'I grew up and found that these people are studying together .... [T]here is no way you can say that refugees go there', he pointed to one side, 'and those who are not refugees go there', he pointed in the other direction. '[T]he goal is to have the child educated. So we don't separate them.'[77]

ii. *Kenya, 2013*

At a primary school, in the Eastleigh neighbourhood of Nairobi, Kenya, is a Kenyan government school that also serves refugees. In 2013, there were 30 teachers at the school, all of whom were Kenyan nationals. Of the 782 students, 73 per cent were refugees, mostly with origins in Somalia and some in Ethiopia. At the school, refugees were admitted 'on site', with no questions asked. Teachers and students explained that many come 'disguised' as Kenyans, given challenges they have faced trying to register at some schools; some borrow identification cards from neighbours; and many produce a 'mandate', the UNHCR-issued card identifying them as registered refugees. As the Deputy Head Teacher explained, however, this school admits all children even without these papers. Not even a birth certificate is a condition of enrolment, he said. The rationale for this process is clear to the Deputy Head Teacher: 'They have a right to education'.[78]

This right to education in Nairobi, while clearly perceived by the Deputy Head Teacher at this school, was not as obvious in national legal frameworks and in the experiences of students at this school who had also sought access to other schools. Although Kenya is a Contracting State to the Refugee Convention, government directives issued between 2012 and 2014 promulgated an encampment policy, whereby residence in urban areas was no longer permitted, all refugees needed to reside only in designated camps, and that '[e]very refugee and asylum seeker shall ... not leave the designated refugee camp without the permission of the Refugee Camp Officer'.[79] Despite a 2013 High Court ruling that this government directive was in violation of the national

[76] Interview by Sarah Dryden-Peterson with District Inspector of Schools (Kyaka, Uganda, 4 April 2003).

[77] Interview by Sarah Dryden-Peterson with District Education Officer (Kyenjojo, Uganda, 25 April 2003).

[78] Interview by Sarah Dryden-Peterson with Deputy Head Teacher (Eastleigh, Kenya, 28 May 2013). See also Sarah Dryden-Peterson and Lucy Hovil, 'A Remaining Hope for Durable Solutions: Local Integration of Refugees and their Hosts in the Case of Uganda' (2004) 22 Refuge 26.

[79] Republic of Kenya, Security Laws (Amendment) Act No. 19 of 2014 (Republic of Kenya 2014).

Constitutional right to freedom of movement,[80] a later 2014 ruling upheld the directive of encampment.[81] A 2014 press statement by the Cabinet Secretary for Interior and Coordination of National Government on Refugee and National Security Issues further directed that 'All Kenyans are requested to report to the Police any refugees and/or illegal immigrants found outside the designated refugee camps'. Despite being in contradiction of these directives, the Deputy Head Teacher at this school acted on a 'felt responsibility' to uphold the right to education for the children who sought admission to his school.[82] The 2013 High Court ruling, however, was later upheld on appeal in 2017.[83]

iii. *Lebanon, 2016*

In 2016, over 1.4 million Syrians registered with UNHCR lived in Lebanon, equivalent to one-third of the Lebanese population.[84] Lebanon is not a Contracting State to the Refugee Convention and has not recognized that these Syrians are refugees. The government of Lebanon generally refers to Syrians as 'persons displaced from Syria' (a term which includes Palestine refugees from Syria, Lebanese returnees from Syria, and registered/unregistered Syrian nationals); 'displaced Syrians' (referring only to Syrian nationals); or 'persons registered as refugees by UNHCR'.[85] The government has required that all education of Syrians take place within public schools in Lebanon, implementing a second shift programme in 2013 whereby Lebanese children attended school in the morning and Syrian children used the same school buildings for an afternoon shift.[86] Enrolment was highest in primary education, particularly grades one and two. At the secondary level, less than 2 per cent of Syrians of this age group enrolled in school.[87]

A critical barrier for Syrian young people in accessing their right to education in Lebanon was establishing equivalency for their prior education.[88] By policy, school

[80] *Kituo Cha Sheria v The Attorney General* [2013] eKLR.

[81] *Samow Mumin Mohamed and Others v Cabinet Secretary, Minister of Interior Security and Co-ordination and others*, Petition No 206 of 2011, High Court of Kenya (30 June 2014).

[82] See also Mendenhall and others (n 71) 2015.

[83] *Attorney General v Kituo Cha Sheria & 7 Others* [2017] eKLR.

[84] Eric Le Borgne, Thomas Jacobs, and Paul Barbour, 'Lebanon: Promoting Poverty Reduction and Shared Prosperity' (World Bank 2016) <http://documents.worldbank.org/curated/en/951911467995104328/pdf/103201-REPLACEMNT-PUBLIC-Lebanon-SCD-Le-Borgne-and-Jacobs-2016.pdf> accessed in 21 April 2020.

[85] Government of Lebanon and United Nations, Lebanon Crisis Response Plan 2017–2020 (Government of Lebanon 2017).

[86] Adelman and Dryden-Peterson (n 73); Maha Shuayb, Nisrine Makkouk, and Suha Tutunji, 'Widening Access to Quality Education for Syrian Refugees: The Role of Private and NGO Sectors in Lebanon (Center for Lebanese Studies 2014) <https://www.alnap.org/help-library/widening-access-to-quality-education-for-syrian-refugees-the-role-of-private-and-ngo> accessed in 21 April 2020.

[87] Lebanon Ministry of Education and Higher Education, RACE Lebanon: Presentation to Education Partners Meeting (MEHE 2017).

[88] Elizabeth Buckner, Dominique Spencer, and Jihae Cha, 'Between Policy and Practice: The Education of Syrian Refugees in Lebanon' (2017) 31 JRS 444.

directors were to accept only Lebanese Brevet (Grade 9) certificates or documentation certified by the Ministry of Education and Higher Education (MEHE), a process that was slow and unpredictable. Amal, a young Syrian who arrived in Lebanon in 2012, did not have this official approval. Yet, as Chopra and Dryden-Peterson documented, 'Amal found a generous Lebanese school Director who made an exception by swiftly enrolling her in his public senior secondary school without waiting for her equivalency certificates'.[89]

Access to higher education was even more elusive for Syrians in Lebanon at this time, as it often is in refugee-hosting States.[90] MEHE required Syrians to submit Lebanese Baccalaureate (Grade 12) certificates or an equivalent document from Syria, certified by MEHE.[91] This certification by MEHE also depended on proof of legal residence in Lebanon, a process that had been suspended by the GoL in 2015.[92] Even with proof of legal residence, establishing equivalence was not a straightforward process. When Azaa arrived in Lebanon in 2013,

> she learnt she would need to restart her university education. Embodying her name's meaning—courage—Azaa refused to cave. She petitioned her case directly with the Ministry of Education. She describes walking into a bureaucrat's office, setting her bag on his table and waiting quietly in front of him for 50 minutes. When he finally took notice, she proclaimed, 'I'm in the third year and you will put me in the third year and if you don't want to put me in the third year, I will stay in your office forever…I want to continue my education and whether you like it or not, I'm going to do it.' The bureaucrat eventually agreed, only after letting her know that she had a 'mind of a rock.' Azaa finally enrolled in her third and final year at university, continuing from where she had left off in Syria.[93]

Across diverse regions, States, and time periods, these examples illustrate that individual and local action rooted in a deep sense of normative obligation to children and appreciation of education as a universal human right often determines whether the right to education is realized, even in situations where that right has no legal basis. Studying local implementation is accordingly crucial to understanding law-in-practice. Local experiences warrant further scholarly attention in particular in order to understand the role of host communities and refugees themselves in realizing rights. Moreover, widening the range of local

[89] Vidur Chopra and Sarah Dryden-Peterson, 'Borders and Belonging: Syrian Youth's Experiences of Displacement in Lebanon' (2020) Globalisation, Societies and Education.

[90] See eg Sarah Dryden-Peterson, 'The Politics of Higher Education for Refugees in a Global Movement for Primary Education' (2011) 27 Refuge 10; Barbara Zeus, 'Exploring Barriers to Higher Education in Protracted Refugee Situations: The Case of Burmese Refugees in Thailand' (2011) 24 JRS 256.

[91] Hana El-Ghali, Roula Berjaoui, and Jennifer DeKnight, 'Higher Education and Syrian Refugee Students: The Case of Lebanon' (UNESCO 2017) <https://www.aub.edu.lb/ifi/Documents/publications/research_reports/2016–2017/20170702_refugee_education.pdf> accessed in 21 April 2020.

[92] UNESCO, UNHCR, UNICEF, United Nations and Lebanon Go, 'Q & A for the "Back to School" Programme 2016/2017' (2016) <http://www.unesco.org/new/fileadmin/MULTIMEDIA/FIELD/Beirut/pdf/QA-BTS.pdf> accessed in 21 April 2020.

[93] Chopra and Dryden-Peterson (n 89).

cases studied would allow for rigorous comparative study to understand the determinants of the effectiveness of rights, a matter in need of greater scholarly attention.

d. Monitoring and Enforcement

The preceding sections have outlined the commitment to the right to education in binding international law and States' programmatic commitments, as well as its implementation at national and local level. This section examines the monitoring and enforcement of the right at the international level. While the CRC, ICESCR, and the Refugee Convention are legally binding on States parties, the justiciability and enforceabilty of the right to education varies. As the Special Rapporteur noted in his 2010 report, '[t]he mechanisms for the enforcement of the right to education are still at an embryonic and fragile stage of development'.[94] In addition, as Willems and Vernimmen describe it, '[t]he right to (access to) education is applicable to refugee children. However, due to the careful phrasing of international treaties of how this right is to be achieved, the question of how those rights can effectively be invoked against States remains delicate.'[95] Horsch Carsley and Russell's analysis of the right to education shows that the Refugee Convention, the CRC, and the ICESCR are amongst the least enforceable treaties in international law.[96]

At the global level, there are two important monitoring mechanisms attached to the ICESCR and the CRC respectively, while the UN Special Rapporteur on the Right to Education also has an important, if less formal, role. The CESCR, created in 1985, monitors the ICESCR. Its specification of the 'essential features' of the right to education in General Comment No 13 sets important benchmarks for monitoring, stipulating that education must be *available* in sufficient quantity for all; be *accessible* to everyone, without discrimination; be *acceptable*, meaning relevant, of good quality, and culturally appropriate; and *adaptable* to meet the changing needs of society.[97] This General Comment also explicitly affirms the right to education that meets these four criteria for refugees, noting that 'the principle of non-discrimination extends to all persons of school age residing in the territory of a State party, including non-nationals, and irrespective of their legal status'.[98] In addition, while still recognizing obligations of progressive realization, it clearly states that 'the obligation to provide primary education for all is an immediate duty of all States parties'.[99] In 2013, the Optional Protocol to the ICESCR created the possibility for individuals also to submit

[94] Report of the Special Rapporteur on the Right to Education (n 42) para 77.

[95] Willems and Vernimmen (n 14) 230.

[96] Sarah Horsch Carsley and S Garnett Russell, 'Exploring the Enforceability of Refugees' Right to Education: A Comparative Analysis of Human Rights Treaties' (2020) 5(2) Journal on Education in Emergencies 10–39.

[97] CESCR, 'General Comment No 13' (n 30) para 6.

[98] ibid para 34.

[99] ibid para 51 (emphasis added).

complaints against signatory States.[100] Moeckli argues that this new enforcement mechanism increased the juridical powers of the ICESCR.[101] To date, no complaints pertaining to the right to education have been ruled on.

The CRC also includes monitoring and complaints mechanisms, with States parties obliged to submit period reports.[102] Individual complaints may be brought to the Committee against States that have ratified the Optional Protocol.[103] One case on the right to education has been adjudicated by this body, related to the eviction of a Roma family in France and its consequences for education. However, the case was declared inadmissible.[104] Pending cases as of June 2019 are all in Europe, with the exception of three in Georgia, three in Argentina, one each in Panama, Paraguay, and Chile, and one joint complaint filed by 16 children in five States related to climate change; only one is connected to the right to education, for an unaccompanied migrant child in possession of documentation who had not been assigned a tutor.[105]

The UN Special Rapporteur on the Right to Education is appointed by the HRC to examine and report back on the status of realization of the right to education in various country contexts or as connected to a particular theme, as in education of migrants, refugees, and asylum seekers in 2010, as described above.[106] The Special Rapporteur can also receive and investigate individual complaints. There are no specific sets of recourse to these reports or investigations, instead findings can be used by the HRC and the UNGA in promoting dialogue on actions that States could take to ensure the right to education, or otherwise exposing States to political pressure.[107]

Local communities and State institutions, such as schools, often act on normative commitments, absent legal and institutional frameworks, to ensure that refugees can enrol in schools and realize their right to education. New orientations to ensuring realization of refugees' rights, as codified in the Global Compact on Refugees, describe the shift of inclusion of refugees in national education systems, for example, as a formalization of this 'responsibility-sharing', when accompanied by mechanisms to financially

[100] *Optional Protocol* to the International Covenant on Economic, Social and Cultural Rights (adopted 10 December 2008, entered into force 5 May 2013) UN doc A/63/435.

[101] Daniel Moeckli, 'Interpretation of the ICESCR: Between Morality and State Consent' in Daniel Moeckli, Helen Keller, and Corina Heri (eds), *The Human Rights Covenant at 50: Their Past, Present, and Future* (OUP 2018).

[102] The CRC, as outlined in Articles 43 through 45, requires that each signatory State provides a report on its compliance with the Convention. The Committee on the Rights of the Child, composed of 18 independent experts, then evaluates these reports, along with any statements submitted by outside organizations such as NGOs or individuals, and reports back both to the States party and to the UNGA on appropriate action.

[103] Optional Protocol to Convention on the Rights of the Child on a Communications Procedure (adopted 19 December 2011, entered into force 14 April 2014) UN doc A/RES/66/138.

[104] Committee on the Rights of the Child, 'Decision Adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, Concerning Communication No. 10/2017', UN doc CRC/C/77/D/10/2017 (26 March 2018).

[105] Committee on the Rights of the Child, 'Table of Pending Cases before the Committee on the Rights of the Child' (3 June 2020).

[106] Cross refer. [107] UNESCO, 'Right to Education Handbook' (n 25).

support the primarily low-income countries that host and seek to educate refugees.[108] Such ideas of 'responsibility-sharing' are bolstered by ICESCR article 2(1) stating that States parties should undertake steps 'individually and through international assistance' to achieve 'progressively the full realization of the rights recognized in the present Covenant'.[109] Yet early evidence, as pertaining to implementation of the right to education, shows instead outsourcing of responsibility by Western States, shifting the 'big responsibility' of social services like education to refugee-hosting nation-States.[110]

3. Future Directions

Our analysis has purposefully taken a multi-scalar approach to the right to education for refugees, moving across global, regional, and national frameworks. In many cases, the challenges to refugees realizing their right to education are not legal ones, but instead derive from policies and practices of exclusion in resource-constrained environments. These policy and practice gaps are further exacerbated by the number of actors ranging from governments, international agencies, NGOs, and the private sector, who are working on refugee education, and resulting uncertainty about the responsibility each holds in the provision of services.[111]

Understanding of the right to education in legal scholarship has been broadly defined in terms of access to school enrolment. Access to education for refugees is limited, as seen in refugees' school enrolment rates which are low and, in most cases, lower than nationals. More research is needed to better understand the extent of the limited realization of the right to education as measured by access. This research must take into account that data about refugee enrolment can be unreliable because identifying refugees within schools can be difficult, both when data collection schemes do not include refugee status, and when refugees seek to blend in to avoid discrimination and other risks.[112] Moreover, while national enrolment data provide overarching trends in enrolment, rates of access to education typically vary widely between regions of countries hosting the largest numbers of refugees, as well as amongst groups within those regions. For example, children in rural areas, girls, and ethnic and linguistic minorities may have lower levels of access to education.[113] For these reasons we suggest that future research focus not only on between-State variation as our analysis has, but on within-State vari-

[108] Global Compact on Refugees, paras 68–9. [109] ICESCR, art 2(1).

[110] See also E Tendayi Achiume, 'The Postcolonial Case for Rethinking Borders' (2019) 71 Stanford Law Review 1509; Dryden-Peterson, Adelman, Bellino, and Chopra (n 4).

[111] See eg Adelman and Dryden-Peterson (n 73); Buckner, Spencer, and Cha (n 88); Francine Menashy, *International Aid to Education Power Dynamics in an Era of Partnership* (Teachers College Press 2019).

[112] UNHCR, 'Turn the Tide: Refugee Education in Crisis' (2018); UNHCR, 'Refugee Education 2030: A Strategy for Inclusion' (2019).

[113] UNESCO, '2019 Global Education Monitoring Report, Migration, Displacement and Education: Building Bridges Not Walls' (2018).

ation at the local level in the realization of the right to education for refugees, with particular attention to the most vulnerable groups within refugee populations.

Echoing the shift from a focus on access to education in the Millennium Development Goals to the quality of education in the Sustainable Development Goals, a growing body of school-based research forces consideration of whether access to education reflects the purposes of the right to education. The right to education, as an enabling right, means that it enables the realization of other rights; it is not an end in itself. The *4 As framework*, outlined in the CESCR General Comment No 13, provides a starting point for thinking about how to imbed the purposes of education in considering what is needed to realize the right to education: education must be available, accessible, acceptable, and adaptable. Article 29 of the CRC also anticipates the need to address quality within the rights framework, establishing the right to a 'specific quality of education'.[114] The Committee on the Rights of the Child further defines elements of the right to a specific quality of education, including curriculum which is of 'direct relevance to the child's social, cultural, environmental and economic context and to his or her present and future needs and take full account of the child's evolving capacities'.[115] There are both resource and political constraints, however, to realizing the right to this type of education for refugees, particularly within refugee governance systems that favour inclusion of refugees within institutions of the nation-State.[116] Inclusion of refugees in national education systems, in theory, could enable access to quality education through, for example, already trained teachers and recognized certification.[117] And yet the content and nature of what children learn in school, which is central to the realization of the right to a 'specific quality of education', is typically highly contentious within nation-States, even in settings where schools do not serve non-citizens for whom the duration of schooling in that place is uncertain.

As approaches to global governance of refugees continue to favour the authority and responsibility of the host State, including in the provision of education, an important area of focus for research, practice, and policy is how a national curriculum can be both directly relevant to a refugee child's social, cultural, environmental, and economic contexts as well as to States' interests, capacities, and resources. The benefits of adapting curricula to be responsive to needs of specific learners accrue not only to refugees but to the learning of whole school populations and to the collective development of States.

[114] Committee on the Rights of the Child, 'General Comment No 1: Article 29(1)—The Aims of Education', UN doc CRC/GC/2001/1 (17 April 2001); Pobjoy (n 16) 845.

[115] Committee on the Rights of the Child, General Comment No 1 (n 114) para 9.

[116] See eg Bellino and Dryden-Peterson (n 71); Buckner, Spencer, and Cha (n 88); Dryden-Peterson, Adelman, Bellino, and Chopra (n 4); Monaghan (n 58).

[117] Dryden-Peterson, Adelman, Bellino, and Chopra (n 4).

CHAPTER 55

THE RIGHT TO FAMILY REUNIFICATION

FRANCES NICHOLSON

1. Introduction

Refugees fleeing persecution and armed conflict often become separated from their families or have to leave family members behind. Border guards, armed groups, smugglers, or simply force of circumstance may separate refugee families in the chaos of flight. For refugees and other beneficiaries of international protection,[1] family reunification in the country of asylum is generally the only way to ensure respect for their right to family life and family unity. Their situation is thus different from that of other migrants, who can generally enjoy this right in their country of origin.

This chapter examines the extent of the rights to family life and family unity under human rights law both globally and regionally (Section 2), with the right to family reunification itself also receiving widespread recognition (Section 3). In practice, however, in order to realize these rights, refugee families must surmount numerous legal and practical obstacles that can render reunification a tortuous or even impossible undertaking (Section 4). Section 5 takes a children's rights perspective, focusing notably on the situation of adopted, fostered, and unaccompanied children. Section 6 concludes with suggestions for future research.

[1] This chapter uses the term 'refugee' to include all beneficiaries of international protection, except where refugees' treatment differs from that of beneficiaries of complementary/subsidiary international protection, in which case corresponding distinctions are made. The focus is on persons whose need for international protection has been recognized, though the rights to family life and family unity are relevant in other forced displacement contexts.

2. The Rights to Family Life and Family Unity

The rights to family life and family unity are enshrined in international and regional human rights instruments. They apply to everyone, including asylum seekers, refugees and others in need of international protection. The principle of non-discrimination and the protections accorded to children are particularly important. The content of these rights has been further defined by international and regional tribunals and courts, initially in the expulsion context.

a. International Human Rights Law

International human rights law recognizes the family as the 'fundamental group unit of society' and as 'entitled to protection and assistance'.[2] It affirms the right to marry and found a family[3] and that '[n]o one shall be subjected to arbitrary or unlawful interference with [their] privacy, family, home or correspondence'.[4]

The Human Rights Committee (HRC) interprets the right to family life as precluding States from expelling non-citizens if their right to family life would be breached. When one member of a family faces expulsion and other(s) in the family are entitled to remain, the HRC assesses 'whether or not the specific interference with family life can be objectively justified' by balancing 'the significance of the State party's reasons for the removal of the person concerned' against 'the degree of hardship the family and its members would encounter as a consequence of such removal'.[5] Factors it has taken into account in this assessment include whether deportation would result in family ties being 'irreparably severed'.[6]

The CRC sets out some of the strongest protections of the child's right to family life and family unity. Underpinning them is the principle of the best interests of the child.[7] The Convention affirms the child's right 'to preserve his or her . . . family relations' and 'not [to] be separated from his or her parents against their will', unless this is in her/his best interests.[8] States parties must deal with family reunification applications by a child or her/his parents 'in a positive, humane and expeditious manner' and ensure that no child is 'subjected to arbitrary or unlawful interference' with her/his family life.[9] States

[2] UDHR, art 16(3); ICCPR, art 23(1); ICESCR, art 10(1); Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 93 (CMW), art 44(1); CRC, preamble; Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 (CRPD), preamble.

[3] UDHR, art 16(1); ICCPR, art 23(2); ICESCR, art 10(1); CRPD, art 23(1)(1).

[4] ICCPR, art 17(1); CMW, art 14; CRC, art 16(1); CRPD, art 22(1).

[5] *Madafferi v Australia*, UN doc CCPR/C/81/D/1011/2001 (26 August 2004) para 9.8.

[6] *Warsame v Canada*, UN doc CCPR/C/102/D/1959/2010 (1 September 2011) para 8.10.

[7] CRC, art 3. [8] ibid arts 8(1) and 9(1). [9] ibid arts 10(1) and 16(1).

parties must ensure asylum-seeking and refugee children, whether unaccompanied or accompanied, receive 'appropriate protection and humanitarian assistance' and must cooperate in family tracing 'for the purpose of family reunification'.[10] Thus, for refugees, the CRC 'is not merely an explication of children's rights, but also an expression of the rights belonging to the family'.[11]

The Refugee Convention does not specifically refer to the family, but the Final Act of the Conference of Plenipotentiaries, which adopted the Convention, considered that 'the unity of the family . . . is an essential right of the refugee' and recommended governments 'take the necessary measures for the protection of the refugee's family, especially with a view to ensuring that the unity of the family is maintained'.[12] As Jastram and Newland emphasize, these rights reflect a 'universal consensus' that family unity is part of respecting 'the family as a "group" unit'. Family unity is implicit in 'the right to marry and found a family'. It is also 'drawn from the prohibition against arbitrary interference with the family and from the special family rights accorded to children under international law'.[13]

b. Regional Human Rights Protections

Regional human rights instruments reflect these standards. The family is recognized as the fundamental group unit of society and as entitled to protection and assistance, for instance, in the American Convention on Human Rights (ACHR), the African Charter on Human and Peoples' Rights, and the African Charter on the Rights and Welfare of the Child.[14] The right to marry and found a family is confirmed, for example, in the ACHR, the ECHR, and the EU Charter of Fundamental Rights.[15]

Family life is protected from arbitrary or unlawful interference, *inter alia*, by the ACHR, EU Charter, and ECHR. Article 8 ECHR affirms, for instance, that there shall be no interference with the right to family life, and that exceptions must be 'in accordance with the law' and 'necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or . . . of the rights and freedoms of others'.[16]

[10] ibid art 22.

[11] Mark Rohan, 'Refugee Family Reunification Rights: A Basis in the European Court of Human Rights' Family Reunification Jurisprudence' (2014) 15(1) Chicago Journal of International Law 354. See also Section 5 on children and family reunification below.

[12] Final Act, Refugee Convention.

[13] Kate Jastram and Kathleen Newland, 'Family Unity and Refugee Protection' in Erica Feller et al (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (CUP 2003) 555–603.

[14] American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (ACHR) art 17(1); African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 21 ILM 58, art 18(1); African Charter on the Rights and Welfare of the Child (adopted 11 July 1990, entered into force 29 November 1999) OAU Doc CAB/LEG/24.9/49, art 18(1).

[15] See ACHR, art 17(2); ECHR, art 12; EU Charter of Fundamental Rights, art 9.

[16] See also ACHR, art 11(2); EU Charter of Fundamental Rights, art 7.

With regard to the rights of the child, article 19 of the African Charter on the Rights and Welfare of the Child echoes the child's rights under article 9 CRC regarding separation from her/his parents, while article 10 protects the child's privacy and 'family home' from arbitrary or unlawful interference. Article 19 ACHR affirms the child's right to protection by the family, society, and the State.

In expulsion cases involving families, the European Court of Human Rights (ECtHR) starts from the premise that migration control amounts to a 'pressing social need'.[17] It then identifies a range of factors that must be evaluated if States are to strike a 'fair balance . . . between the competing interests of the individual and of the community as a whole' and accords the State 'a certain margin of appreciation' in this respect.[18] Relevant factors it has identified when determining whether removal of a family member on account of criminal offences committed is in line with article 8 ECHR include 'the applicant's family situation, such as the length of the marriage; . . . whether the couple lead a real and genuine family life, . . . and whether there are children in the marriage and, if so, their age'.[19]

Where children are involved, the Grand Chamber highlights the requirement to evaluate their 'best interests and well-being' and 'the solidity of social, cultural and family ties with the host country and with the country of destination'.[20] Factors requiring evaluation that the ECtHR has identified include: the length and closeness of the bond with the parent or other family members; any custody proceedings; any disruption and stress already experienced; any special needs and care requirements; and any delays on the part of the authorities in seeking to expel the parent. The court also takes into account whether the child/children are 'of adaptable age' and could adapt to the deportation of a parent.[21] Exceptionally, it has accepted that the separation of older children from their parents may breach article 8 ECHR.[22] The child's best interests may shift the balance against a parent's removal[23] and are now seen as of 'paramount importance', which although not decisive alone must certainly be afforded 'significant weight'.[24]

[17] Cathryn Costello, *The Human Rights of Migrants and Refugees in European Law* (OUP 2016) 112–17; Cathryn Costello, Kees Groenendijk, and Louise H Storgaard, 'Realising the Right to Family Reunification of Refugees in Europe' (Council of Europe 2017) ch 3; Frances Nicholson, 'The "Essential Right" to Family Unity of Refugees and Others in Need of International Protection in the Context of Family Reunification' (UNHCR January 2018) (Nicholson, 'Essential Right') section 3.2.1; Council of Europe, *Guide on Article 8 of the European Convention on Human Rights*, (31 August 2020).

[18] *Nunez v Norway* (2011) 58 EHRR 7, para 68. See also Mark Klaassen, 'Between Facts and Norms: Testing Compliance with Article 8 ECHR in Immigration Cases' (2019) 37(2) Netherlands Quarterly of Human Rights 157.

[19] *Boultif v Switzerland* (2001) 33 EHRR 50, para 48.

[20] *Üner v The Netherlands* (2007) 45 EHRR 14, para 58.

[21] ibid para 64.

[22] *Tuquabo-Tekle and Others v The Netherlands*, App No 60665/00 (ECtHR, 1 December 2005).

[23] *Rodrigues da Silva and Hoogkamer v The Netherlands* (2006) 44 EHRR 729; *Nunez* (n 18) para 84; *Butt v Norway*, App No 47017/09 (ECtHR, 4 December 2012); *Kaplan and Others v Norway*, App No 32504/11 (ECtHR, 24 July 2014); *Jeunesse v The Netherlands* (2015) 60 EHRR 17; Ciara Smyth, 'The Best Interests of the Child in the Expulsion and First-Entry Jurisprudence of the European Court of Human Rights: How Principled is the Court's Use of the Principle?' (2015) 17 EJML 70.

[24] *Jeunesse v The Netherlands* (n 23) para 109; *El Ghatet v Switzerland*, App No 56971/10 (ECtHR, 2016) para 46.

Some authors have critiqued the 'casuistry' of the ECtHR's approach, which tends to 'assess the facts of each case separately [thus] minimis[ing] the precedent value of its judgments' and leading to 'structural instability'.[25] Some view the court as siding 'with the sovereign states' migration control prerogatives' and refer to 'aberrations in [its] reasoning'.[26] Others point to 'unexplained gendered assumptions concerning caring obligations', presumptions about the adaptability and risks faced by children of different ages, and the difficulties faced by single mothers of 'non-Western' origin and by parents seeking to reunify with adult children.[27]

In the Americas, the Inter-American Court of Human Rights (IACtHR) has stressed the 'intrinsic relationship' between the right to family unity and the best interests of the child. It determined in the expulsion context that the separation of children from their family is, 'under certain circumstances', a violation of the right to family unity, notably 'because even legal separations' must be 'duly justified in the best interests of the child, exceptional and, insofar as possible, temporary'.[28] With regard to the necessary balancing of national and individual interests in a decision 'on the eventual expulsion of one or both parents', in order to avoid 'any hint of arbitrariness', the IACtHR affirms that States are obliged to assess 'whether the measure: is established by law, and complies with the requirements of (a) suitability; (b) necessity, and (c) proportionality; in other words, it must be necessary in a democratic society'.[29] This requires an evaluation of 'the specific circumstances of the persons concerned'; 'the nationality, custody and residence of the children' involved; the 'scope of the harm caused by the rupture of the family owing to the expulsion'; and 'the disruption of the daily life of the child' owing to the 'expulsion of a person in charge of the child'. The IACtHR advises that 'all these circumstances' must be weighed 'rigorously in light of the best interest of the child in relation to the essential public interest that should be protected'.[30]

Comparing the interpretations of the IACtHR with those of the ECtHR suggests that the former has made clearer statements of principle than the latter, especially in the

[25] Costello (n 17) 128–30, 163, 168–9; Thomas Spijkerboer, 'Structural Instability: Strasbourg Case Law on Children's Family Reunion' (2009) 11 EJML 271, 291.

[26] Vladislava Stoyanova, 'Populism, Exceptionality, and the Right to Family Life of Migrants under the European Convention on Human Rights' (2018) 10(2) European Journal of Legal Studies 83–125, 89, 106.

[27] Costello (n 17) 117–26; Betty de Hart, 'Love They Neighbour: Family Reunification and the Rights of Insiders' (2009) 29(3) EJML 235–52; Sarah van Walsum, 'Against All Odds: How Single and Divorced Migrant Mothers Were Eventually Able to Claim Their Right to Respect for Family Life' (2009) 11 EJML 295, 311.

[28] *Pacheco Tineo Family v Bolivia*, Inter-American Court of Human Rights Series C No 272 (25 November 2013) para 226, following *Pacheco Tineo Family v Bolivia*, Inter-American Commission of Human Rights Report No 136/11, Case No 12.474 (31 October 2011) para 173, and *Gelman v Uruguay*, Inter-American Court of Human Rights Series C No 221 (24 February 2011) para 125.

[29] *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, Advisory Opinion OC-21/14, Inter-American Court of Human Rights Series C No 21 (19 August 2014) paras 263–82, 275.

[30] ibid para 279.

context of its advisory opinions.[31] Thus far, however, the IACtHR case law directly relevant to refugees is less developed, as discussed below.

3. The Right to Family Reunification

But do the rights to family life/family unity result in a right to family reunification, in particular for refugees and other beneficiaries of international protection? Are States not only obliged not to imperil the right to family life in the context of expulsion, but also positively required to reunite family members, especially if they cannot enjoy family life elsewhere?

a. International Human Rights

At the international level, the HRC acknowledges that 'the possibility to live together implies' that States must adopt 'appropriate measures, both at the internal level and as the case may be, in cooperation with other States, to ensure the unity or reunification of families, particularly when their members are separated for political, economic or similar reasons'.[32] The ICCPR may protect a right to entry or residence 'when considerations of … respect for family life arise'.[33] The 2017 Joint General Comment by the Committees on the Protection of Migrant Workers and Members of their Families (CMW Committee) and on the Rights of the Child (CRC Committee) goes further, stating that States must also 'take positive measures to maintain the family unit, including the reunion of separated family members'.[34]

The case of *El Dernawi v Libya* specifically concerned a Libyan refugee in Switzerland, whose reunification there with his wife and children had been prevented, as they were unable to leave Libya to join him. The HRC affirmed that a refugee 'cannot reasonably be expected to return to [her or] his country of origin' to enjoy her/his right to family unity. It found violations of articles 17, 23, and 24 ICCPR, the latter 'in view of the advantage to a child's development in living with both parents'.[35]

[31] ibid; Marie-Benedicte Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (OUP 2015) ch 14.

[32] Human Rights Committee (HRC), 'General Comment No 19: Article 23 Protection of the Family, the Right to Marriage and Equality of the Spouses', UN doc HRI/GEN/1/Rev/1, 28 (27 July 1990) para 5.

[33] HRC, 'General Comment No 15: The Position of Aliens Under the Covenant', UN doc HRI/GEN/1/Rev.1, 18 (11 April 1986) para 5. See also *Ngambi and Nébol v France*, UN doc CCPR/C/81/D/1179/2003 (16 July 2004); *Bakhtiyari v Australia*, UN doc CCPR/C/79/D/1069/2002 (6 November 2003).

[34] Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW Committee) and Committee on the Rights of the Child (CRC Committee), 'Joint General Comment No 4 and No 23 … on State Obligations regarding the Human Rights of Children in the Context of International Migration in Countries of Origin, Transit, Destination and Return', UN doc CMW/C/GC/3-CRC/C/GC/22 (16 November 2017) (CMW and CRC Committees, Joint General Comment No 4/23) para 27.

[35] *El Dernawi v Libya*, UN doc CCPR/C/90/D/1143/2002 (20 July 2007) para 6.3.

b. Regional Human Rights Protections

With regard to the right to family reunification at the regional level, the African Charter on the Rights and Welfare of the Child contains specific provisions on tracing and reunifying asylum-seeking and refugee children with their 'parents or other close family'.[36] In Central and Latin America, the Cartagena Declaration affirms that the 'reunification of families constitutes a fundamental principle in regard to refugees'.[37]

In Europe, while the ECtHR's case law provides some protection against expulsion for settled migrants,[38] the rights of family members to enter are less protected. In immigration cases, the court accords States a wide 'margin of appreciation'. It has nonetheless regularly affirmed that 'there may . . . be positive obligations inherent in an effective "respect" for family life'.[39]

Amongst the factors circumscribing States' powers is whether the family separation was voluntary or not. The ECtHR recognizes this is not the case for persons who have fled persecution or indiscriminate violence, meaning that they could not 'be said to have voluntarily left family members behind'.[40] In such situations, the court recognizes that there are insurmountable obstacles to family life being enjoyed elsewhere, unlike in other migration situations. States' discretion to refuse family reunification in such cases is thus significantly limited, leading the court to rule that admission to the territory is the 'most adequate way of developing family life'.[41]

In the EU, the right to family reunification of lawfully resident, third-country nationals is explicitly affirmed in the Family Reunification Directive (FRD).[42] This defines family reunification as 'a necessary way of making family life possible' and as helping to create 'sociocultural stability', facilitate integration, and 'promote economic and social cohesion'.[43] The directive sets out more favourable conditions for refugees 'on account of the reasons which obliged them to flee their country and prevent them from leading a normal family life there', the situation for beneficiaries of subsidiary protection

[36] Articles 23(2) and 25.

[37] Cartagena Declaration. See also *Juridical Condition and Human Rights of the Child*, Advisory Opinion OC-17/02, Inter-American Court of Human Rights Series C No 17 (28 August 2002) 36; Advisory Opinion OC-21/14 (n 29) para 105.

[38] See Section 2.b.

[39] *Abdulaziz, Cabales and Balkandali v UK* (1985) 7 EHRR 471, para 67, and many subsequent judgments.

[40] *Mayeka and Mitunga v Belgium* (2006) 46 EHRR 23, para 75; *Tuquabo-Tekle v The Netherlands* (n 22) para 47.

[41] *Şen v The Netherlands* (2001) 36 EHRR 81, para 40; *Tuquabo-Tekle v The Netherlands* (n 22) paras 48–50.

[42] Council Directive 2003/86/EC on the Right to Family Reunification (FRD) [2003] OJ L251/12–251/18.

[43] FRD, Recital 4. See also Case C-540/03 *European Parliament v Council of the EU* (CJEU, 27 June 2006) para 69; Case C-558/14, *Khachab v Subdelegación del Gobierno en Álava* (CJEU, 21 April 2016) para 26; Council of Europe: Parliamentary Assembly (PACE), 'Recommendation 1686 (2004) on Human Mobility and the Right to Family Reunion' (23 November 2004) para 6.

being, however, less favourable, as discussed below.[44] Key judgments of the Court of Justice of the EU (CJEU) on these issues are referred to as relevant below.[45]

In the Americas, the Inter-American Commission and Court of Human Rights have thus far seldom ruled on the issue of refugee family reunification. This may change, given the mass flight of Venezuelan migrants and refugees to other Latin American countries in recent years, which could lead to an increase in family reunification requests and more litigation. National legislation in many Latin American States nonetheless clearly affirms the rights to family life/family unity, including specifically of refugees. The Constitutional Court of Colombia has considered family reunification a 'fundamental right'.[46]

Thus, instruments, guidance, and jurisprudence at international and regional level show that refugees and other beneficiaries of international protection, who are unable to enjoy their rights to family life/family unity elsewhere, do indeed have a right to family reunification.

4. Refugee Family Reunification in Practice

Refugees and other beneficiaries of international protection nevertheless face numerous, cumulative obstacles realizing their rights to family life and family unity. This section examines some of these obstacles and related, applicable legal standards.

a. Family Definition Applied

While there is no standard definition of the family in international or regional law, there is guidance on the meaning of 'family' beyond the nuclear or close family of spouse and minor children.

At the international level, the HRC has affirmed that 'the term "family" … [should] be given a broad interpretation to include all those comprising the family as understood in the society of the State party concerned'.[47] It has determined that a long-standing relationship between two persons, resulting in the birth of a son, constitutes a '*de facto*

[44] FRD, Recital 8 and Chapter V. See also Section 4.d.

[45] See Sections 4.b, 4.c, 4.d, 5.a, and 5.b below.

[46] Nicholson, 'Essential Right' (n 17) 34–5; Case T-573/2015 (4 September 2015) (Constitutional Court of Colombia) para 7.6.

[47] HRC, 'General Comment No 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation', UN doc HRI/GEN/1/Rev.1, 21 (8 April 1988) para 5; HRC, 'General Comment No 19' (n 32) para 2; *Aden and Hassan v Denmark*, UN doc CCPR/C/126/D/2531/2015 25 July 2019; Fareda Banda and John Eekelaar, 'International Conceptions of the Family' (2017) 66 ICLQ 833–62.

relationship akin to marriage'[48] and that protection of the family is not dependent on formal recognition nor 'necessarily displaced by geographical separation, infidelity, or the absence of conjugal relations'.[49]

The CMW and CRC Committees state that the term family 'must be interpreted in a broad sense to include biological, adoptive or foster parents or, where applicable, the members of the extended family or community as provided for by local custom' in accordance with article 5 CRC.[50] UNHCR's Executive Committee calls for the application of 'liberal criteria in identifying those family members who can be admitted with a view to promoting a comprehensive reunification of the family'.[51]

At the regional level, the Council of Europe's Parliamentary Assembly urges States to interpret the concept of 'family' as encompassing 'de facto family members . . . [including] a partner or natural children as well as elderly, infirm or otherwise dependent relations'.[52] It recommends that States adopt 'an enabling approach to family reunification beyond the traditional definition of family which does not necessarily correspond to the multitude of ways in which people live together as a family today'.[53] As for the ECtHR, some have critiqued it for accepting broader definitions of 'family' in other contexts, but insisting 'on the nuclear family approach in migration cases'.[54]

In the EU, the right to family reunification under the FRD extends only to nuclear family members. Member States *may* nevertheless extend this right to other family members, such as dependent parents of an adult applicant and dependent adult unmarried children.[55] The FRD also permits refugees to reunify with other dependent family members.[56]

In the Americas, the IACtHR goes beyond 'the traditional notion of a couple and their children' as constituting a family to include other blood relatives and others with no

[48] *Winata and Li v Australia*, UN doc CCPR/C/72/D/930/2000 (16 August 2001) para 2.1.

[49] *Ngambi and Nébol v France* (n 33) para 6.4.

[50] CMW and CRC Committees, Joint General Comment No 4/23 (n 34) paras 27, 60. See also *Aden and Hassan v Denmark*, UN doc CCPR/C/126/D/2531/2015 (25 July 2019), para 10.7 stressing the requirement to take adequate account of the 'personal situation' of the couple seeking reunification and the 'cultural context in their country of origin' (Somalia).

[51] UNHCR Executive Committee (ExCom) Conclusions No 24 (1981) para 5 and No 88 (1999) para b(ii).

[52] PACE, 'Recommendation 1327 on Protection and Reinforcement of the Human Rights of Refugees and Asylum-Seekers in Europe' (1997) para 8.7(o); PACE, Recommendation 1686 (2004) (n 43) para 8; PACE, Committee on Migration, Refugees and Displaced Persons, 'Position Paper on Family Reunification', AS/Mig (2012) 01 (2 February 2012) para 11.

[53] PACE, 'Family Reunification of Refugees and Migrants in the Council of Europe Member States', Resolution 2243 (11 October 2018) para 3.

[54] Alan Desmond, 'The Private Life of Family Matters: Curtailing Human Rights Protection for Migrants under Article 8 of the ECHR?' (2018) 29(1) European Journal of International Law 261, 265–71; Heli Askola, '(No) Migrating for Family Care in Later Life: *Senchishak v Finland*, Older Parents and Family Reunification: Case Report' (2016) 18 EJML, 351, 371–2.

[55] FRD, art 4. Application of the more favourable rules for refugees may be limited to relationships predating the refugee's entry to the EU (art 9(2)).

[56] FRD, art 10(2). See nonetheless Jinan Bastaki, '"Not Without My Daughter": EU Asylum Law, Gender, and the Separation of Refugee Families' (2019) 38(3) RSQ 266.

biological relation amongst whom there are ‘close personal ties’ and notes that ‘in the migratory context, “family ties” may have been established between individuals who are not necessarily family members in a legal sense’.[57] The court has further ruled that ‘the term “family members or next of kin” should be understood in its broadest sense, including all those persons connected by a close relationship’.[58]

In Africa, the South African Constitutional Court has acknowledged in a migration case that ‘families come in many shapes and sizes’ and that the definition of the family ‘also changes as social practices and traditions change’.[59]

In practice, couples in common law, traditional, or religious marriages (including proxy marriages) encounter problems securing recognition of their relationship, since formal documentation may not be available. For persons in polygamous marriages, these may have been legally concluded in their country of origin, but are illegal in most countries of asylum, meaning only one spouse will be permitted to reunify.

Reunification cases involving child marriage raise complex questions. The age at which marriage is permitted under law (and in practice) varies widely between countries of origin and asylum.[60] International law prohibits child marriage and forced marriage, while the marriage of a child shall have no legal effect.[61] Arguably, this does not necessarily preclude the existence of *de facto* family life between the couple, meaning that denial of family reunification in such cases could potentially violate the right to family life.[62] In light of the arrival of numbers of married child refugees, Germany, the Netherlands, and Norway are amongst States that have recently raised the minimum age of marriage to 18 and/or ceased to recognize marriages concluded legally abroad where one or both spouses is/are under 18 years.

As for lesbian, gay, bisexual, transgender, or inter-sex (LGBTI) refugees, many courts recognize that same-sex relationships may constitute family life.[63] Generally, however, LGBTI refugees will struggle to provide evidence of a long-standing stable relationship, let alone marriage, as required if seeking family reunification, depending on their country of origin, individual situation, and circumstances of flight.

[57] Advisory Opinion OC-21/14 (n 29) para 272.

[58] *Fornerón and Daughter v Argentina*, Inter-American Court of Human Rights Series C No 242 (27 April 2012) para 98; Inter-American Commission on Human Rights, ‘Human Rights of Migrants, Refugees, Stateless Persons, Victims of Human Trafficking and Internally Displaced Persons: Norms and Standards of the Inter-American Human Rights System’, OEA/Ser.L/V/II (31 December 2015) para 350.

[59] *Dawood and Others v Minister of Home Affairs and Others* [2000] ZACC 8, 2000 (3) SA 936, para 31.

[60] Sanna Mustasaari, ‘The Married Child Belongs to No One? Legal Recognition of Forced Marriages and Child Marriages in the Reuniting of Families’ (2014) 26 Child and Family Law Quarterly 261; PACE, ‘Resolution 1468 (2005) on Forced Marriages and Child Marriages’ (5 October 2005); *ZH and RH v Switzerland*, App No 60119/12 (ECtHR, 2015).

[61] CEDAW, art 16(2); CRC, art 24(3).

[62] Anne Wijffelman, ‘Child Marriage and Family Reunification: An Analysis Under the European Convention on Human Rights of the Dutch Forced Marriage Prevention Act’ (2017) 35(2) Netherlands Quarterly of Human Rights 104.

[63] See eg *Pajić v Croatia*, App No 68453/13 (ECtHR, 23 February 2016); *Taddeucci and McCall v Italy*, App No 51362/09 (ECtHR, 30 June 2016); *Atala Riffo y Niñas v Chile*, Inter-American Court of Human Rights Series C No 254 (24 February 2012) para 177.

The concept of dependency is key to the assessment of whether members of the wider family beyond the close family should be considered family members. This assessment is 'essentially a question of fact, which must be determined on a case-by-case basis, requiring a flexible approach which takes account of cultural variations, and economic and emotional dependency factors'.[64] The CJEU has determined that assessing this 'factual situation' requires a case-by-case evaluation of the 'material support' required, including financial or health-related support, that has regard for the 'special situation of refugees', the material support actually provided, and whether the refugee is 'the family member most able to provide the material support required'.[65]

Thus, dependence can be *presumed* between close family members, but needs to be *established* for others. This assessment needs to take into account social, cultural, emotional and economic factors, not solely financial dependence, and to involve a detailed examination of all available evidence. It requires awareness of the socio-cultural contexts of family life in different countries and of the impact of flight and displacement on family formation and reformation.

b. Documenting and Proving Family Membership

People who have fled persecution and armed conflict often find it very difficult to provide documentation proving the identity of family members, a marriage or common law partnership, and/or the filiation/adoption of children. Documents may not exist, may have been lost, destroyed, or left behind due to flight. Obtaining replacements may be difficult or impossible and/or may expose family members to danger.

States nevertheless require refugees and their family members to obtain attestations from different authorities at various levels in the country where the document was issued or from an embassy of that State abroad. Minor discrepancies in documents provided may mean an application is rejected.

Acknowledging these issues, UNHCR's Executive Committee states: 'When deciding on family reunification, the absence of documentary proof of the formal validity of a marriage or of the filiation of children should not per se be considered as an impediment'.[66] Instead, documentary evidence requirements 'should be realistic and appropriate to the situation of the refugee and the conditions in the country of refuge as well as the country of origin' and a 'flexible approach should be adopted'.[67]

[64] UNHCR, 'Summary Conclusions: Family Unity, Expert Roundtable, Geneva, Switzerland, 8–9 November 2001' (UNHCR, Summary Conclusions, Family Unity) para 8. See also *L v The Netherlands*, App No 45582/99 (ECtHR, 2004) para 36.

[65] Case C-519/18, *TB v Bevándorlási és Menekültügyi Hivatal*, (CJEU, 12 December 2019) paras 47 and 77.

[66] ExCom Conclusion No 24 (n 51) para 6.

[67] UNHCR, Summary Conclusions, Family Unity (n 64) para 12.

In Europe, the Council of Europe recommends States 'should primarily rely on available documents provided by the applicant, by competent humanitarian agencies or in any other way' and that the 'absence of such documents should not per se be considered as an impediment to the application'.[68] In addition, the ECtHR has ruled that family reunification procedures must take 'into account the events that had disrupted and disturbed [the applicant's] family life and had led to his being granted refugee status'.[69]

The CJEU ruled on these issues in a case concerning a beneficiary of international protection seeking to reunite with her minor nephew who had been placed under her authority and guardianship after his parents died. The court determined that an application cannot be rejected for lack of official documentary evidence, even if the sponsor's explanation for its absence is deemed implausible; rather, it is necessary to take 'into consideration the specific circumstances of the sponsor and the minor and the particular difficulties they have encountered, according to their testimony, before and after fleeing their country of origin'.[70]

Where documentation proving a parent–child relationship cannot be provided, States increasingly require DNA testing. This is not, however, always affordable or even available in locations family members can reach. UNHCR recommends reliance on '[d]ocumentary proof, registration records, interviews with the individuals concerned and other forms of verification', with DNA testing 'only [being used] where serious doubts remain after all other types of proof have been examined, or, where there are strong indications of fraudulent intent and DNA testing is considered as the only reliable recourse to prove or disprove fraud'.[71]

Even where documentation can be provided, it may not be recognized as valid. Marriages or adoptions may be deemed valid under one legal regime but not under another.[72] The resulting interactions between international refugee law and international private law and family law are complex and have very real consequences for refugees seeking to reunite with family members. They are one area where further research could be fruitful.

[68] Council of Europe, Committee of Ministers, 'Recommendation N° R (99) 23 of the Committee of Ministers to Member States on Family Reunion for Refugees and Other Persons in Need of International Protection' (15 December 1999) para 4.

[69] *Tanda-Muzinga v France*, App No 2260/10 (ECtHR, 10 July 2014) para 73; *Mugenzi v France*, App No 52701/09 (ECtHR, 10 July 2014) para 52.

[70] Case C-635/17, *E v Staatssecretaris van Veiligheid en Justitie* (CJEU, 13 March 2019) para 81.

[71] UNHCR, 'UNHCR Note on DNA Testing to Establish Family Relationships in the Refugee Context' (June 2008) paras 28, 13. See also Catherine Lee and Torsten H. Voigt, 'DNA Testing for Family Reunification and the Limits of Biological Truth' (2020) 45(3) Science, Technology, and Human Values 430–54.

[72] Jinske Verhellen, 'The Cross-Border Portability of Refugees' Personal Status' (2017) 31(4) JRS 427; European Parliament, Policy Department for Citizens' Rights and Constitutional Affairs, 'Private International Law in a Context of Increasing International Mobility: Challenges and Potential' (June 2017).

c. Income, Accommodation, and Other Requirements

Many States recognize that refugees may be unable to meet requirements regarding income, accommodation, health insurance, and/or command of the national language that may otherwise be imposed on immigrants. They therefore offer preferential terms to refugees.

In the EU, however, Member States are permitted to restrict application of these preferential terms to refugees and their families who are able to apply within three months of the grant of international protection.[73] Yet refugees may not have clear information about the deadlines applying or may take time to trace family members, who may be in a conflict zone and/or displaced. Family members may face difficulties obtaining the required documentation. If a deadline for applications applies but cannot be met, resulting requirements regarding income etc may mean refugees cannot enjoy their right to family reunification.

d. Restrictions Based on Status and Other Legal Obstacles

In some States, beneficiaries of complementary/subsidiary international protection may not apply for family reunification under the preferential terms available to refugees or they may, unlike refugees, only be permitted to do so after a period of residence after recognition.[74] This has particularly been the case in Europe following the large numbers of asylum seekers arriving in 2015–16. Anticipating a resulting increase in applications for family reunification, some States introduced restrictions, notably for beneficiaries of subsidiary protection.[75] This has, in turn, led to more litigation seeking clarification of the law.

Where such restrictions apply, they effectively bar beneficiaries of subsidiary protection from enjoyment of their right to family life, at least for some years. Yet, like refugees, they cannot enjoy that right in their country of origin, meaning States have positive obligations towards them, including on non-discrimination grounds.[76] Indeed, the CJEU has ruled that a waiting period before family reunification may be sought 'cannot be imposed without taking into account, in specific cases, all the relevant factors' and that due regard must be had for 'the particular circumstances of specific cases [and] the best interests of minor children'.[77] Yet the CJEU has also ruled that the FRD 'must be interpreted as not applying to third-country national family members of a beneficiary of subsidiary protection'.[78]

[73] FRD, ch V and art 12(1). See also Case C-380/17, *K and B v Staatssecretaris van Veiligheid en Justitie* (CJEU, 7 November 2018) para 66.

[74] Article 12(2) FRD exempts refugees from such a requirement.

[75] Costello, Groenendijk, and Storgaard (n 17) 33–5; Nicholson, 'Essential Right' (n 17), 141–5.

[76] Costello, Groenendijk, and Storgaard (n 17) 23–6; Nicholson, 'Essential Right' (n 17) 149–63.

[77] *European Parliament v Council*, CJEU (n 43) paras 99–101.

[78] *K and B* (n 73) para 33.

Some States restrict refugees' right to family reunification depending on their manner of arrival. In Australia, for instance, reunification is 'effectively impossible' for refugees who arrive by sea without a valid visa, as they are given the lowest priority and places are limited.[79] Such restrictions raise similar concerns to those regarding beneficiaries of subsidiary protection.

Other obstacles include high fees, which may violate the principle of proportionality;[80] a lack of legal aid or representation, especially since reunification procedures have become increasingly complex in many States; and the absence of an appeal possibility. These further hurdles may undermine the right to an effective remedy, to good administration, and principles of equivalence and effectiveness.[81] Ultimately, they may preclude family reunification.

e. Practical Obstacles

Refugees and their families face numerous practical difficulties realizing their rights to family life/family unity.

Family members of refugees may remain in unstable or dangerous situations in the country of origin or be living in precarious exile, often facing great danger and hardship. This can lead to protection and survival strategies, such as illegal and/or exploitative work or child marriage, which create further problems.[82] Refugees and their families may also not receive timely information adapted to their circumstances about the reunification procedure. They may not know whether other family members are alive or where they are and may face difficulties tracing them.[83]

Family members, the majority of whom are women and children, who are required to travel to distant embassies/consulates, including in other countries, may face considerable risk and expense. They may have to cross borders illegally or survive precariously in a third country without legal stay as they seek to meet successive requirements of the authorities of the refugee family member's country of asylum.

Costs associated with reunification include procuring documentation; obtaining notarized copies and official translations of documentation, medical, or DNA tests; visa application and embassy fees; journeys to embassies/consulates; associated living costs;

[79] Refugee Council of Australia, 'Denying Family Reunion for Refugees: Impact of Direction 80' (15 April 2019).

[80] Case C-153/14, *Minister van Buitenlandse Zaken v K and A* (CJEU, 9 July 2015) para 64. This case concerned the fees for integration tests, but the principle applies more generally. See also *GR v The Netherlands*, App No 22251/07 (ECtHR, 2012).

[81] See, regarding the lack of an appeal possibility in Poland against decisions under the EU Visa Code, Case C-403/16, *El Hassani v Minister Spraw Zagranicznych* (CJEU, 13 December 2017) paras 27–30.

[82] See eg The Freedom Fund, 'Struggling to Survive: Slavery and Exploitation of Syrian Refugees in Lebanon' (2016) <https://freedomfund.org/wp-content/uploads/Lebanon-Report-FINAL-8April16.pdf> 8 June 2020.

[83] James C Hathaway, *The Rights of Refugees under International Law* (CUP 2005) 533–4.

appeals against negative decisions; legal representation; and finally the costs of travelling to join the family member. While loans are occasionally available, accumulated expenses may place reunification out of reach for some refugee families.

Administrative delays and obstacles present further problems. Sometimes they mean families spend years apart, as asylum and family reunification procedures succeed one another, exposing family members to hardship and danger and prolonging separation and uncertainty. In this context, the ECtHR has ruled that, in view of the appellant's refugee status, it is of overriding importance that the family's visa applications be examined 'promptly, attentively and with particular diligence'. It ruled that the authorities are obliged to institute a procedure that takes into account the events that disrupted and disturbed their family lives and led to their being granted refugee status. Ultimately, the court determined that the accumulation and prolongation of multiple difficulties and the authorities' failure to take account of the appellant's specific situation meant the process had not shown the guarantees of 'flexibility, promptness and effectiveness' needed to respect his right to family life.[84]

Continuing family separation is a key preoccupation of refugees. It can slow the process of integration in the country of asylum. The costs associated with the procedure may leave families with fewer resources to invest in housing, education, and integration more generally. The extent to which restrictive rules and/or practice on family reunification impede refugee integration may be difficult to measure. One study has nonetheless found that restrictive measures on the admission and residence of family members have not furthered integration but may have impeded it.[85] Ultimately, lengthy bureaucratic processes may push family members to try and find other, irregular routes to reunite.[86]

5. Children and Family Reunification

Children separated from their family because of displacement are particularly vulnerable. The CRC nevertheless accords some of the strongest protections of their right to family life and family unity.[87] In practice, children face significant difficulties reuniting with family members.

The African Committee of Experts on the Rights and Welfare of the Child has identified numerous challenges in Africa that also apply to a greater or lesser extent in

[84] *Tanda-Muzinga v France* (n 69) paras 73, 81, 82.

[85] Tineke Strik, Betty de Hart, and Ellen Nissen, *Family Reunification: A Barrier or Facilitator of Integration? A Comparative Study* (European Commission 2016) 103–11.

[86] Nick Thorpe, *The Road Before Me Weeps: On the Refugee Route Through Europe* (Yale University Press 2019) 212, 217 (concerning an Afghan and a Yezidi family in Istanbul and Serbia respectively, each seeking to join family members in Germany).

[87] See Section 2.a above, Chapter 41 in this volume, and Council of Europe, *Family Reunification for Refugee and Migrant Children: Standards and Promising Practices* (April 2020).

other regions. These include the lack of 'systematic assessment of the best interests of the child'; procedures to determine 'children's identity, age and nature of the relationship between separated child and accompanying adult [that] are not based on the best interests of the child'; and the absence of 'documentation, family tracing and guardian systems'.[88]

This section examines the situation of children, whether they are seeking to reunite with a refugee family member or are themselves unaccompanied child refugees. The emerging case law of the CRC Committee provides clear statements of principle on issues such as the child's best interests and her/his rights to development and to be heard, in contrast to some regional courts' more circumstantial approaches.

a. Child Members of a Refugee's Family

Adopted or foster children face particular hurdles reunifying with their refugee parents, guardians, or carers. Their situation raises important questions regarding the best interests principle and the difficulties faced meeting requirements for proof of sole custody, legal guardianship, and/or the death of a parent, including in situations where one parent cannot be traced.

With regard to the assessment of the child's best interests, the CRC Committee notes that, inter alia in family reunification cases, issues to be taken into account include the child's views; the preservation of the family unit; the care, protection, and safety of the child; their situation of vulnerability; and their right to health and education.[89] The committee further states that the child's right 'to maintain personal relations and direct contact with both parents on a regular basis' (CRC article 9(3)) 'also extends to any person holding custody rights, legal or customary primary caregivers, foster parents and persons with whom the child has a strong personal relationship'.[90]

Children in the *kafalah* system, a process of legal guardianship akin to adoption, face particular difficulties. Two recent rulings provide guidance. In a case concerning a young Moroccan girl taken in by a Belgian couple under the *kafalah* system, the CRC Committee ruled that, while States were not obliged 'in general to recognize the right to family reunification for children in *kafalah* arrangements', they were obliged to take into account 'the de facto ties' that existed and had developed on the basis of *kafalah* and the girl's right to be heard, even at the age of five years.[91] For its part, the CJEU determined

[88] African Committee of Experts on the Rights and Welfare of the Child, 'Mapping Children on the Move within Africa' (November 2018) 82.

[89] CRC Committee, 'General Comment No 14 (2013) on the Right of the Child to have His or Her Best Interests Taken as a Primary Consideration', UN doc CRC/C/GC/14 (29 May 2013) (CRC General Comment No 14) paras 52–79.

[90] CRC General Comment No 14 (n 89) para 60.

[91] *YB and NS v Belgium*, UN doc CRC/C/79/D/12/2017 (27 September 2018) paras 8.8–8.12.

that a *kafala* relationship can constitute family life depending on the individual circumstances, including the duration and quality of the relationship, and that a 'balanced and reasonable assessment of all the . . . circumstances of the case [must take] account of the various interests in play and, in particular, of the best interests of the child concerned'.[92]

Other children in a refugee family may end up being left behind, if parent(s) are obliged to choose between reunifying with one child and leaving another behind, for instance if an older child has recently reached the age of majority[93] and may no longer qualify for reunification, or if a child was born shortly after the departure of the father. The effect is to split rather than reunite families and may result in vulnerable children or young, still dependent adults being left to fend for themselves in a potentially hostile environment. Yet, as the ECtHR has ruled: 'When assessing the compliance of State authorities with their obligations under Article 8 [ECHR], it is necessary to take due account of the situation of all members of the family, as this provision guarantees protection to the whole family'.[94]

b. Unaccompanied Child Refugees

Unaccompanied and separated child refugees face particular challenges reunifying with their parents and other family members, even though they generally enjoy greater rights than adult refugees in this context.

To start with, an informed age assessment is fundamental, since its outcome determines their enjoyment of the rights under CRC.[95] The best interests principle provides further crucial protection.[96] The CRC Committee further states: '[T]he granting of refugee status constitutes a legally binding obstacle to return to the country of origin and, consequently, to family reunification therein.'[97]

[92] Case C-129/18, *SM v Entry Clearance Officer, UK Visa Section* (CJEU, 26 March 2019) paras 66–8.

[93] The CJEU has nevertheless clarified that the relevant date for 'determining whether an unmarried third country national or refugee [seeking to reunify with a parent] is a minor . . . is that of the submission of the application'. Thus, a child reaching majority during subsequent court proceedings is to be considered a minor. See Joined Cases C-133/19, C-136/19, and C-137/19, *BMM and Others v Belgium* (CJEU, 16 July 2020), para 47.

[94] *Jeunesse v The Netherlands* (n 23) para 117.

[95] CMW and CRC Committees, Joint General Comment No 4/23 (n 34) para 4; CRC Committee, 'General Comment No 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin', UN doc CRC/GC/2005/6 (1 September 2005) (CRC General Comment No 6) para 31(i); *NBF v Spain*, UN doc CRC/C/79/D/11/2017 (27 September 2018); *AL v Spain*, UN doc CRC/C/81/D/16/2017 (31 May 2019); *JAB v Spain*, UN doc CRC/C/81/D/22/2017 (31 May 2019).

[96] CRC General Comment No 14 (n 89); Jorg Werner and Martine Goeman, *Families Constrained: An Analysis of the Best Interests of the Child in Family Migration Policies* (Defence for Children The Netherlands and Adessium Foundation 2015).

[97] CRC General Comment No 6 (n 94) para 82.

In a few States, unaccompanied child refugees are denied family reunification.[98] States may seek to justify this on the grounds that it deters parents from sending 'anchor children' on dangerous journeys so that they can later join them, but more research into the veracity of such assertions and the legality and impact of these policies could be useful.

In other States, unaccompanied child refugees may only reunify with their parent(s) and not (minor) siblings. This can present parent(s) with difficult choices between remaining separated from their child in the country of asylum or leaving other offspring behind, including in precarious and/or dangerous circumstances. Where an unaccompanied refugee child has lost her/his parent(s) or they cannot be traced, the child may have to prove that more than normal emotional ties exist with another family member and/or that this person has since been taking care of them to secure reunification. Where formal guardianship or adoption processes do not exist or function in practice this is particularly difficult.

Even unaccompanied refugee children who are permitted to reunite with parent(s) and/or minor siblings may face problems if they reach the age of majority during the asylum procedure. In some countries, this means their entitlement to family reunification with such family members is deemed no longer to apply. In the EU, the CJEU has nevertheless clarified that such persons are to be considered minors for the purposes of the FRD and that they retain their right to family reunification with their parents (and minor siblings if permitted in the national context).[99]

6. Conclusion

International and regional law recognizes the rights to family life/family unity and, for persons granted international protection, their right to family reunification in the country of asylum. In practice, refugees and their families face many obstacles reuniting. They may spend years apart before they can reunite or may not be able to do so at all. Where the process takes too long, family members may try to reunite using irregular routes, thereby exposing themselves to great danger, undermining the proper regulation of migration, and fuelling the smuggling trade.

The law concerning the family reunification of refugees before international, regional, and national courts is evolving quite rapidly. Its evolution merits further analysis, including regarding the similarities and divergences between the case law of the HRC and CRC Committee and of regional courts. Research into family reunification has

[98] Canada, Switzerland, the United Kingdom, and the United States do not permit unaccompanied child refugees/beneficiaries of complementary protection to reunite with their parents. Reunification in such cases is sometimes possible, but exceptions are generally heavily circumscribed and rarely applied.

[99] Case C-550/16, *A and S v Staatssecretaris van Veiligheid en Justitie* (CJEU, 12 April 2018).

tended to focus on the migration context more generally, but the particular situation of refugees and other beneficiaries of international protection warrants further investigation, including from an interdisciplinary angle. Canvassing refugee perspectives and narratives could strengthen understanding of gaps in protection, practical challenges faced, and the impact of separation on the lives and integration of refugees and their families. Such initiatives could enhance appreciation, amongst others, of the situation of family members left behind, single-parent families, unaccompanied children, vulnerable young adult family members, and elderly parents.

CHAPTER 56

THE DIGITAL TRANSFORMATION OF REFUGEE GOVERNANCE

KRISTIN BERGTORA SANDVIK

1. Introduction

Over the last 20 years, in tandem with the adoption of results-based management (RBM) systems[1] and the introduction of increasingly sophisticated registration software, there have been significant expansive shifts in the refugee digital ecosystem. This includes the growth of UNHCR platforms, the introduction of biometrics, and the proliferation of digital devices, meaning that refugees also produce and possess data of relevance to protection procedures, including registration, refugee status determination (RSD), and resettlement processes. At present, there is significant expectation that the introduction of new digital platforms, tools, and digitization processes will enable the international refugee regime to enhance accountability, effectiveness, and efficiency by improving verification procedures, shorten processing times, and better prioritize applications.[2] A great deal of technological optimism characterizes this development. The assumption is that technology will work as promised, have the capacity to fulfil strategic objectives, such as producing a given number of individual caseloads, and even to resolve difficult political struggles by automating integration, credibility, or vulnerability assessments. Problems related to technology

[1] A new public management approach.

[2] The chapter conceptualizes digitization as the conversion, articulation, and management of historically analogue information, processes, and actions through digital technology, meaning devices that transmit digital data, encompassing mobile phones, computers, and a range of digitally connected devices. Kristin Bergtora Sandvik, Katja Lindskov Jacobsen, and Sean Martin McDonald, 'Do No Harm: A Taxonomy of the Challenges of Humanitarian Experimentation' (2017) 99(904) International Review of the Red Cross 319.

adoption are often described as technical, infrastructural, or pertaining to capacity. In contrast, a growing critical literature argues that the digitization of all aspects of refugee protection engenders a wide range of risks, including cybersecurity, threats to data protection and privacy rights, and threats to due process arising from automated decision-making.[3]

Taking a socio-legal approach to problem framing, this chapter discusses four selected issues arising from the digital transformation of refugee protection, in order to explore how this transformation shapes and challenges refugee law.[4] The chapter explores the following domains, namely UNHCR's 2015 Data Protection Policy (the DPP),[5] a concept (legal identity), a platform (databases), and legal-bureaucratic processes (RSD and resettlement procedures). While the focus is on humanitarian actors in the Global South, the transformation is intrinsically connected to the priorities and practices of States in the Global East and the Global North.

Digital transformation generates new risks—in part because it is premised on a duty of refugee visibility. The chapter argues that international refugee law conceptually and in practice appears to be moving towards an idea of 'algorithmic protection'.[6] First, digitization and the integration of new technology create risks—and harms—that can compromise existing legal rights and procedural guarantees *but also* threaten the integrity of refugee protection in new ways. The digital transformation of the refugee regime engenders an expansion of refugee law to include new legal areas and formats with less stringent focus on due process and rule of law, such as data protection policies and algorithmic code. Furthermore, this shift places new topics within the bounds of what can reasonably be considered refugee law. A general set of risks concerning technological innovation and digitization affect the refugee management system along with

[3] Gus Hosein and Carly Nyst, 'Aiding Surveillance: An Exploration of How Development and Humanitarian Aid Initiatives are Enabling Surveillance in Developing Countries' (2014) I&N Working Paper 20114/1; Kristin Bergtora Sandvik, Maria Gabrielsen Jumbert, John Karlsrud, and Mareile Kaufmann, 'Humanitarian Technology: A Critical Research Agenda' (2014) 96(893) International Review of the Red Cross 219; Mark Latonero, Keith Hiatt, Antonella Napolitano, Giulia Clericetti, and Melanie Penagos, 'Digital Identity in the Migration & Refugee context: Italy Case Study' (Data & Society 2019) <https://datasociety.net/wp-content/uploads/2019/04/DataSociety_DigitalIdentity.pdf> accessed 6 May 2020.

[4] Following Sheila Jasanoff's work, digital transformation can be construed as a form of 'technoscience': ordering practices that are materially productive, giving meaning to the 'how', 'whom', and 'what' of refugee protection. Importantly, these 'technical' measures and technology adaption thus have an explicitly political dimension that should not go unnoticed as they may otherwise risk when framed simply as 'technical'—rather than political— matters. Sheila Jasanoff (ed), *States of Knowledge: The Co-Production of Science and the Social Order* (Routledge 2004). See also Sally Engle Merry, *The Seductions of Quantification: Measuring Human Rights, Gender Violence, and Sex Trafficking* (University of Chicago Press 2016). For a critical unpacking of how digital transformation shapes UNHCR's accountability efforts, see Katja Lindskov Jacobsen and Kristin Bergtora Sandvik, 'UNHCR and the Pursuit of International Protection: Accountability through Technology?' (2018) 39(8) Third World Quarterly 150.

[5] UNHCR, 'Policy on the Protection of Personal Data of Persons of Concern to UNHCR' (May 2015) <https://www.refworld.org/docid/55643c1d4.html> accessed 3 May 2020 (DPP).

[6] On algorithmic protection, see Kristin Bergtora Sandvik, 'Technology, Dead Male Bodies, and Feminist Recognition: Gendering ICT Harm Theory' (2018) 44 Australian Feminist Law Journal 49.

literally everyone else in the international community; this includes problems of criminality, such as the potential of data misuse and cyber/information data security breaches leading to identity theft, or theft, destruction, or manipulation of data. The humanitarian sector is at risk from technological experimentation, referring to the use of untested approaches in insecure and unstable mass displacement contexts, but also in stable contexts experiencing mass influx.[7] There are also risks connected to the persistence of digital divides, which is about the unequal access of people to Information and Communication Technology (ICT) and unequal possession of skills and experiences needed to optimize this technology.[8] When protection procedures are wrapped around digital structures, refugee populations in locations with unstable or inadequate electricity supply, Internet connectivity, or mobile networks, or without adequate digital literacy and access, will be disadvantaged. Additionally, there are specific risks that compromise the protection of individuals, protection infrastructure, and protection processes in themselves. This requires careful consideration of the legal, technical, and ethical obligations in relation to upholding the rights, autonomy, and dignity of individuals seeking protection as well as the security and integrity of protection data and the digital infrastructure.

Secondly, 'algorithmic protection' is a useful concept because the digital transformation of refugee protection means that the duty of visibility and acquiescence to become a data subject has become a requirement for being registered as a refugee, receiving aid (eg biometric banking) and having one's claim for a durable solution processed. To explore what algorithmic protection entails for individuals, the chapter uses the notion of 'digital bodies'. Digital technologies create corresponding 'digital bodies'—images, information, biometrics, and other data stored in digital space—that represent the physical bodies of populations affected by conflict and natural hazards, but over which these populations have little say or control. To understand the impact of the digital transformation we must understand the risks to refugees' physical bodies, their digital bodies, and the interplay between the two.[9] According to Privacy International, '[p]utting it bluntly, getting privacy wrong will get people arrested, imprisoned, tortured, and may sometimes lead to death'.[10] While refugee digital and physical bodies are not 'the same', compromising or neglecting the security of digital bodies may be *just as consequential* and lead to compromising the security and well-being of physical bodies. This must be the point of departure in exploring the digital transformation of international refugee law.

[7] Sandvik, Jacobsen, and McDonald (n 2).

[8] Emad Abu-Shanab and Nebal Al-Jamal, 'Exploring the Gender Digital Divide in Jordan' (2015) 19 Gender, Technology and Development 91.

[9] See Kristin Bergtora Sandvik, 'Digital Dead Body Management (DDBM): Time to Think it Through' (2020) 12 *Journal of Human Rights Practice*, huaa002, https://doi.org/10.1093/jhuman/huaa002

[10] Privacy International, 'Why We Work on Refugee Privacy' (8 July 2011) <https://privacyinternational.org/news-analysis/1322/why-we-work-refugee-privacy> accessed 6 May 2020.

The chapter aims to explore familiar topics in international refugee law in light of the challenges posed by digital transformation. To that end, the chapter opens a new multidisciplinary research agenda. The chapter proceeds in four sections, exploring UNHCR's data protection policy and providing a thematic mapping of legal identity, databases, and protection procedures. A brief conclusion follows.

2. UNHCR Data Governance: A Legalized Accountability Deficit for Digital Bodies?

International refugee law, including its soft law components, regulates the allocation of protection to individuals, sets out procedural rules, and includes specific regulations governing international organizations, and protecting them from interference. While there is a large literature documenting humanitarian failures,[11] until recently, little focus has been given to the need to protect refugees *against* humanitarian organizations and their private sector partners. With the linkages between the emergent global data economy and the regulation of mass displacement, privacy and data protection have become important issues for international refugee law, and squarely situated in the decades-old struggle for humanitarian accountability.[12] To ensure the protection of digital bodies, the challenges relating to UNHCR's data governance framework need urgent scrutiny.

With respect to the protection of civilians in emergencies, scholarly attention has been given to the different protection issues engendered by personal identifiable information (PII) and demographically identifiable information (DII),[13] which concerns the identification, tracking, and profiling of groups emerging from 'metadata'. Digital identities—both in terms of design, storage, and implementation—can produce data on location and services accessed on individual and group levels. While 'visibility' is presented as a beneficial aspect of legal identity, being visible may also produce harm, through surveillance itself, and also by exposing individuals to violence and harassment. The problem partly lies with the kind of information collected and the power differences inherent in the refugee context. While governments and the private sector may be restricted from collecting certain kinds of sensitive information, UNHCR is assumed to have a mandate to collect sensitive data. To obtain international protection, refugees must give away personal data. In a telling example from Myanmar, refugees

[11] Barbara E Harrell-Bond, *Imposing Aid: Emergency Assistance to Refugees* (OUP 1986).

[12] Kristin Bergtora Sandvik and Katja Lindskov Jacobsen (eds), *UNHCR and the Struggle for Accountability: Technology, Law and Results-Based Management* (Routledge 2016).

[13] Kristin Bergtora Sandvik and Nathaniel A Raymond, 'Beyond the Protective Effect: Towards a Theory of Harm for Information Communication Technologies in Mass Atrocity Response' (2017) 11 Genocide Studies and Prevention: An International Journal 9.

> worried about how information could end up in their countries of origin, or could be used to their disadvantage. They felt like the information belonged to them, and in some scenarios they took great care in protecting information about themselves and others. Yet they knew they must submit this information to UNHCR in exchange for protection.[14]

Furthermore, UNHCR does not have complete control over the information it collects, which must usually be shared with host governments, implementing partners, or resettlement countries.[15]

These issues have primarily been articulated and discussed as problems of data protection and privacy. While the Refugee Convention has no provision on privacy, the UDHR (article 12), the ICCPR (article 17) and the CRC (article 16) set out a right to privacy. These treaties do not specifically mention data protection, and are formulated in broad terms.[16] However, the UN Human Rights Committee has interpreted them to include core principles of data protection such as legality, lawfulness, rights of correction and elimination, and others.[17] To collect personal information, there must be a legal basis. The primary duty holder for refugee rights—on the basis of the Refugee Convention or human rights law—is the host State. NGOs, the UN, and domestic refugee bureaucracies are guided by different sets of principles and legislative frameworks. International rules land in a patchwork of domestic and regional standards on privacy and data protection or lack thereof, which are enforced or under-enforced to different degrees. This intersects with the fact that many refugee-hosting countries combine a lack of functioning refugee bureaucracies with sophisticated and intrusive surveillance systems in their treatment of displaced populations.

Regional frameworks are increasingly important in refugee protection. In Europe, the General Data Protection Regulation (GDPR) enshrines the key aspects of data protection law: the collection and processing of displaced individual's data must have a legal basis.[18] Legal requirements include informed consent and the right to understand the logic behind the process and the consequences of automated decisions. Article 5(1) of the GDPR includes the general requirements of the lawfulness, fairness, and

[14] Privacy International (n 10).

[15] The US Department of Homeland Security (DHS) has gathered the biometric information of tens of thousands of refugees, through a sharing arrangement with UNHCR: Eric Weiss, 'DHS and UNHCR are Sharing Biometric Data of Refugees', *Find Biometrics* (23 August 2019) <https://findbiometrics.com/dhs-unhcr-sharing-biometric-data-refugees-082304> accessed 6 May 2020; US Committee for Refugees and Immigrants, 'Security Screening of Refugees Admitted to the US' (2019) <https://refugees.org/explore-the-issues/our-work-with-refugees/security-screening/> accessed 6 May 2020.

[16] The Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3, art 31 includes a (rare) provision on statistics and data.

[17] Christopher Kuner, 'International Organizations and the EU General Data Protection Regulation: Exploring the Interaction between EU Law and International Law' (2019) 16 International Organizations Law Review 158.

[18] Regulation (EU) 2016/679 of 27 April 2016 on the Protection of Natural Persons with regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/64/ED (General Data Protection Regulation) [2016] OJ L119/1 (GDPR).

transparency of processing; as well as very specific constraints on data including purpose limitation, data minimization, and data accuracy.[19]

The rules on storage limitation stipulate that personal data should be deleted or anonymized when no longer needed for the original purpose. The GDPR allocates accountability to the data controller. While the GDPR applies to any entity collecting and processing personal data of any person residing in the EU (thus having effect *beyond* the EU as well), the GDPR procedures do not explicitly contemplate what data collection rights look like in a migration context, although it is argued that the humanitarian basis for data collection extends its scope somewhat.[20]

However, whereas the GDPR applies to UNHCR's European implementing partners, importantly, intergovernmental organizations, such as the UN, claim immunity from the GDPR and similar data regulations. While UNHCR processes the personal data of millions of refugees and other people of concern, as an international body, UNHCR—and UNHCR's records, archives, and host country agreements—is governed by privileges and immunities,[21] intended to assist the organization in fulfilling its mandate. This means that the organization is neither subject to domestic laws nor to regional frameworks, such as the GDPR. How far into the domain of refugee law—*de jure* and *de facto*—this reaches is unclear. In recent times, UNHCR has also claimed privileges and immunities when subjected to critical questions about cybersecurity glitches and personal data loss.[22]

The alternative legal basis is UNHCR's mandate function to protect people of concern and facilitate durable solutions and the 2015 UNHCR DPP.[23] The basic principles of the DPP are: (1) legitimate and fair processing, (2) purpose specification, (3) necessity and proportionality, (4) accuracy, (5) respect for individual rights, (6) confidentiality, (7) security, and (8) accountability and supervision (through data controllers, data protection focal points and data processers, and a Data Protection Officer (DPO) at UNHCR Headquarters). The policy applies a rights-based approach and emphasizes that UNHCR data and information activities will adhere to high international information and cybersecurity standards, including the concept of privacy, by design and by default.[24]

Scrutiny must be undertaken not only of the substantive content of this policy but also its legal effects. While it is mere policy, not law, refugees are effectively bound to

[19] Ben Hayes, 'Migration and Data Protection: Doing No Harm in an Age of Mass Displacement, Mass Surveillance and "Big Data" ' (2017) 99(904) International Review of the Red Cross 179.

[20] ibid.

[21] Economic and Social Council, 'Convention on the Privileges and Immunities of the Specialized Agencies,' UN doc E/RES/212 (VIII) (9 March 1949) annex relating to the International Refugee Organization.

[22] Ben Parker, 'Exclusive: The Cyber Attack the UN Tried to Keep Under Wraps', *The New Humanitarian* (29 January 2020 <https://www.thenewhumanitarian.org/investigation/2020/01/29/united-nations-cyber-attack> accessed 6 May 2020.

[23] DPP (n 5).

[24] UNHCR, 'Data Transformation Strategy 2020–2025' (September 2019) <https://www.unhcr.org/5dc2e4734.pdf> accessed 6 May 2020.

become digital subjects of UNHCR: the requirement of becoming a data subject entails providing extremely detailed data, collected and held in a manner suspended from the normal due process obligations applying to State bureaucracies. Refugees are enrolled in extremely lengthy processes—from initial screening to RSD interviews to resettlement perhaps years down the line—to build their own digital bodies. The harms that might befall refugees if data is mishandled are real.

A 2019 evaluation notes that UNHCR has 'rich and meaningful data collected on persons of concern, their protection risks, services and assistance provided to them, and their access to solutions, socioeconomic improvements in their lives, and the contexts in which they live'.[25] In UNHCR, there are broadly three different types of data: financial, human resources, and operational data, namely data from population management activities, protection risks and needs assessments, programme implementation, case management and monitoring, and evaluation. 'Personal data' means any data related to an individual who can be identified from that data, alone or combined with other information, or by means related to that data. Personal data includes biographical data (biodata) such as name, sex, marital status, date and place of birth, country of origin, country of asylum, individual registration number, occupation, religion and ethnicity, biometric data such as a photograph, fingerprint, facial, or iris image, as well as any expression of opinion about the individual, such as assessments of status and/or specific needs.[26]

In short, UNHCR has an enormous amount of data on individuals. As explained by the DPP, the individual case file is the central repository for data related to a specific person of concern, whether in hardcopy or electronic format, including all relevant correspondence created and received by UNHCR.[27] According to the guidance document on the DPP from 2018, this includes asylum application forms, protection needs assessments, registration forms, RSD application forms, signed consent and/or disclosure forms, interview transcripts and counselling notes, documents produced by the Persons of Concern (POC) and dependent family members, home visit requests and reports, medical documents (such as medical assessment forms), subsistence allowance documents, copies of Best Interest Assessments and Best Interest Determinations and related procedural steps, Resettlement Registration Forms (RRF), correspondence with partners, including government authorities and resettlement countries, and any printed email or other correspondence pertaining to the case.[28] Together, 'personal operational data' making up the individual case file conjures up a detailed imagery of a vulnerable digital body.

[25] Stephen Ladek, Nur Abdelkhaliq Zamora, Scott Cameron, Siobhan Green, and Caitlin Procter, 'Evaluation of UNHCR's Data Use and Information Management Approaches', UN doc ES/2019/07 (UNHCR 2019) <https://www.unhcr.org/5dd4f7d24.pdf> accessed 6 May 2020.

[26] ibid.

[27] UNHCR, 'Guidance on the Protection of Personal Data of Persons of Concern to UNHCR' (23 August 2018) <https://www.refworld.org/docid/5b360f4d4.html> accessed 8 May 2020.

[28] ibid 6.

To date the ramifications of this situation, and specifically what is at stake in this digital transformation, have apparently been mischaracterized or partially misunderstood. UNHCR data protection standards are significantly lower than those that apply to many States and regions. Furthermore, there appears to be a lack of enforcement of those standards that do apply to UNHCR, including when negligence and/or incompetence put refugees at risk or cause actual harm. Overall, refugees have little capacity to exercise self-determination over their digital bodies. According to the DPP, 'personal data breach' means a breach of data security leading to the accidental or unlawful/illegitimate destruction, loss, alteration, unauthorized disclosure of, or access to, personal data transferred, stored, or otherwise processed. The DPP requires that in the event of such a breach that is likely to 'result in personal injury or harm to a data subject, the data controller should use his or her best efforts to communicate the personal data breach to the data subject and take mitigating measures as appropriate without undue delay'.[29] The 2019 UNHCR evaluation observes that 'typical data collection, sharing and storage processes are highly vulnerable to attacks and/or breaches'.[30] It is not only the collection process which poses problems: the report argues that 'in the field, certain actions and practices are commonplace (e.g. sharing documents containing sensitive information via email without password or encryption protections) and undermine this core organizational value, thereby potentially exposing operational data to privacy breaches and risks for persons of concern'.[31]

Furthermore, the report explains that 'from a risk management perspective, there is an understanding that failing to improve data and information systems would have consequences for the organization and the people UNHCR serves'.[32]

Nevertheless, the policy does not contain any provisions on accountability for staff breaches, whether committed accidentally, deliberately, or even fraudulently. Sanctions follow from other instruments, such as employment contracts, Standards of Procedure (SOPs), codes of conduct, or criteria for promotion. As an illustration, the 2019 evaluation never considers UNHCR's data governance in terms of regulation or legality—there is no mention of law, legal norms, or sanctions. Rather, it recommends that UNHCR improve on its data governance through the establishment of a data management 'rule book' that specifies the norms and conventions to govern and align the organization's data, stipulating the parameters for data collection, processing, protection, storage, analysis, and use. The approach is soft: information and data management is a responsibility of all staff, yet it is noted that staff members' confidence and capacities to identify, manage, and analyse operational data varies widely.[33] Similarly, according to UNHCR's senior Data Protection Officer, there is a need to 'establish an all-encompassing culture of data protection. There is a need to withstand internal and external pressure to compromise on data protection principles.'[34]

[29] DPP (n 5) para 4.4.2. [30] Ladek, Zamora, Cameron, Green, and Procter (n 25) 29.
[31] ibid 32. [32] ibid 15. [33] ibid 31.
[34] Alexander Beck, 'Data Protection is Part and Parcel of Refugee Protection' (*UNHCR Blog*, 23 May 2018) <https://www.unhcr.org/blogs/data-protection-part-parcel-refugee-protection/> accessed 6 May 2020.

In addition to the lack of meaningful accountability, refugees and asylum seekers are increasingly disempowered in relation to their own digital bodies. With respect to content, it should also be noted that the GDPR has introduced new rights such as the 'right to be forgotten' (article 17) and 'right to data portability' (article 20) which are currently not mirrored in UNHCR's DPP.[35] As articulated in the DPP, the right to request the correction and/or deletion of data,[36] and the right to object to the processing of data[37] are very limited rights. The nature of UNHCR's work means that there is no free giving of consent in the first place: one cannot obtain refugee status or access a durable solution without providing data. And there is no right to be forgotten, even if an application is withdrawn, or rejected, for example. Individual case files, whether open or closed, are considered permanent records and remain in UNHCR's archives—or the databases of host countries or resettling countries—and are subject to whatever policies the agency adopts for sharing with third parties.[38]

3. Legal Identity

There is an established consensus across States, humanitarian organizations, and the private sector that lack of legal and verifiable identity works as a barrier to access basic services, financial inclusion, social integration, regularization, and to vetting for security purposes.[39] The aim of Sustainable Development Goal (SDG) 16 is to '[p]romote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels'.[40] For UNHCR, SDG 16.9, which calls for universal access to legal identity, has given new impetus and direction to the organization's long-standing work on refugee IDs. This section begins to critically unpack the digital transformation of UNHCR's legal identity work and its implications for protection.

35 GDPR (n 18) arts 17, 20.

36 According to DPP (n 5) para 3.3.1 'The data subject may request the correction or deletion of personal data that is inaccurate, incomplete, unnecessary or excessive', but according to para 3.3.2, the refugee has the burden of proof. According to para 4.3.1, 'UNHCR may correct or delete personal data held on its systems that is inaccurate, incomplete, unnecessary or excessive', and should according to para 4.3.2 periodically verify personal data records.

37 The right to object under ibid para 3.4 is caveated by extensive restrictions articulated under para 3.7.

38 According to ibid para 4.6.1, 'Personal data that is not recorded in individual case files is not to be retained longer than necessary for the purpose(s) for which it was collected'. However, as stated in para 4.6.2, all individual case files, whether open or closed, are considered permanent records, and must therefore be permanently retained in line with the Access Policy of UNHCR Archives.

39 UNHCR, 'Global Virtual Summit on Digital Identity for Refugees, Concluding Workshop: Summary Conclusions and Recommendation' (August 2019) <https://www.unhcr.org/idecosystem/wp-content/uploads/sites/69/2019/12/Conclusions_and_Recommendations.pdf> accessed 6 May 2020.

40 'Transforming our World: The 2030 Agenda for Sustainable Development,' UNGA res 70/1 (21 October 2015) goal 16.

Over the last century, it has been a priority of the international community to provide refugees with certificates that served both as an identity and a travel document, eg the Nansen passport. Host States are primarily responsible for providing refugees with a legal or foundational identity, supported by UNHCR where necessary. Article 27 of the Refugee Convention states that '[t]he Contracting States shall issue identity papers to any refugee in their territory who does not possess a valid travel document'. Identification documents include general documents, such as passports and national or local government ID, or sector-specific IDs, such as taxpayer ID numbers, criminal justice record numbers, or military service member IDs. In the context of forced displacement, refugees can be issued with 'local' IDs from service providers or government agencies. IDs also serve as a distribution tool: in refugee camps, UNHCR has historically used stamps, wristbands, photographs, or fingerprints to avoid multiple registrations.[41]

Attention must be given to how the duty of physical and digital visibility are put to work in UNHCR's legal identity efforts. There appears to be a nascent merger between legal and digital identities. This is particularly evident in the push for making legal identity systems the key to unlocking access to legal protection, vulnerability assessments, durable solutions (in particular resettlement-vetting), and material assistance. UNHCR's Strategy on Digital Identity and Inclusion states that '[r]efugees, asylum seekers, stateless persons, and other forcibly displaced persons should have a legally recognized as well as a digital identity. Individuals will be able to request UNHCR to certify their identity.'[42] Today, practically, a digital identity that enables protection, solutions and access to assistance includes a refugee's digitally stored identity records in UNHCR's Population and Refugee Identity Management Ecosystem (PRIMES) (see Section 4).[43] The long-term consequences of such a merger—in particular how and whether legal identity will exist as a meaningful right outside the digital ecosystem, and what kind of co-construction will occur between the two over time—need to be mapped out. In the following, the chapter provides two preliminary reflections.

One significant issue concerns how the underlying faith in technology—that it will work as planned and not have undesirable consequences—shapes the production of digital identity. Biometric systems have emerged globally as the solution to the problem of refugee legibility. Biometrics encompass the physiological and behavioural characteristics of individuals, such as fingerprints, voice, face, retina and iris patterns, hand

[41] UNHCR, 'Handbook for Registration, Part 2: How to Register, Manage Population Data and Issue Documentation' (September 2003) <www.unhcr.org/3f8e97344.pdf> accessed 6 May 2020. See Kristin Bergtora Sandvik, 'Making Wearables in Aid: Digital Bodies, Data and Gifts' (2019) 1(3) Journal of Humanitarian Affairs 33.

[42] UNHCR, 'Strategy on Digital Identity and Inclusion' (2018) <https://www.unhcr.org/blogs/wp-content/uploads/sites/48/2018/03/2018-02-Digital-Identity_02.pdf> accessed 6 May 2020.

[43] According to the World Bank, a digital identity is an electronic representation of a person consisting of a set of electronically captured and stored attributes/credentials that uniquely identifies a person and is exclusively used by that person to carry out transactions and receive assistance. The World Bank, GMSA, and Secure Identity Alliance, 'Digital Identity: Towards Shared Principles for Public and Private Sector Cooperation' (July 2016) <http://documents.worldbank.org/curated/en/600821469220400272/pdf/107201-WP-PUBLIC-WB-GSMA-SIADigitalIdentity-WEB.pdf> accessed 6 May 2020.

geometry, gait, or DNA profiles. ID systems most commonly use facial photographs, fingerprints, and iris scans. These systems raise questions with respect to how to collect, store, and facilitate the responsible sharing of digital identity data, and when and how to enable the disposal and/or withholding of digital identities conferred on refugees. They rest on a promise of unprecedented precision and personalization, but the capacity to deliver on this promise varies significantly from technology to technology, population to population.[44] Biometric identification may fail due to physical attributes of individual refugees, such as fading fingerprints or eye diseases.[45] Human errors, be they technical or bureaucratic, for example, create significant problems if systems are assumed to be infallible. The consequences may include failing to access protection, services, and durable solutions.

A second issue relates to the type of problems digital identity systems are designed to solve. In displacement contexts, various aid providers develop their own digital identity systems, often neither appropriately adapted to the context nor interoperable with those of other providers.[46] Neither the very real marginalization of displaced individuals caused by the absence of ID nor policy objectives like SDG 16.9 can be used to justify any humanitarian identity system: legality, functionality, and purpose limitation is crucial. While the humanitarian sector is plagued by the prevalence of data silos, there are simultaneously none or few technical or legal barriers preventing mission or function creep.[47] New technologies interact with non-humanitarian systems in ways that can produce humanitarian *mission* creep—for example, UNHCR setting out to provide welfare services to non-displaced populations because it has processed the data to do so. Function creep occurs when data is appropriated by other actors who are not allowed to collect it but would like to use it for purposes contrary to UNHCR's protection mandate. This may occur when the use of artefacts, such as ID cards, are extended beyond original purposes and used for discriminatory purposes against the refugee population, or when existing ID systems are linked to new types of technologies, such as facial recognition and/or drone surveillance. As pointed out by Privacy International, as UNHCR is rolling out its global Biometric Information Management System (BIMS), providing enduring digital identity, the risk is that the profiles collected to allocate international protection will be used for distributing material assistance, and eventually shared with third parties to secure 'financial inclusion', joint registration exercises with host governments or joint resettlement-vetting processes with third countries.[48] As pertinently observed, this means that 'links between UNHCR's policies of inclusion and States' pol-

[44] Katja Lindskov Jacobsen, 'Experimentation in Humanitarian Locations: UNHCR and Biometric Registration of Afghan Refugees' (2015) 46 Security Dialogue 144.

[45] Kevin P Donovan, 'Infrastructuring Aid: Materializing Humanitarianism in Northern Kenya' (2015) 33 Environment and Planning D: Society and Space 732.

[46] UNHCR (n 39) 4.

[47] Privacy International, 'Privacy International's Contribution to Global Virtual Summit on Digital Identity' (April 2019) <https://privacyinternational.org/sites/default/files/2019-05/Global%20Virtual%20Summit%20submission-%20Privacy%20International.pdf> accessed 6 May 2020.

[48] ibid.

icies of exclusion are beginning to intersect, creating data protection and fundamental rights challenges that were not foreseen when BIMS was established'.[49]

4. Databases and Knowledge Management

In response to the quest for legibility, and born out of the need to provide financial and political accountability to donors and host States (through quantitative figures and individualized profiles of individual cases), international humanitarian organizations, including UNHCR, are building large databases where they collect enormous amounts of beneficiary data. While the platforms are iterations of previous databases and results-based management frameworks—in UNHCR's case, RBM was introduced in the late 1990s[50]—much remains unclear about how these platforms will work, how data will travel, who will be able to access it, how it will be stored and protected, how individuals will be able to access their own data, and what purposes these systems will ultimately serve.[51] As mentioned above with respect to cyber-attacks against the UNHCR, once databases are created they invariably become targets for criminal, State, and armed actors. If the database is closed down, the risk is that databases are *de facto* abandoned as data is inadequately destroyed and what remains is inadequately protected. New systems also interact with non-humanitarian systems in ways that can produce humanitarian mission creep and function creep. A further risk is 'vendor-lock in', the risk of making UNHCR dependent on a particular provider, including in relation to the control of personal data processed by proprietary systems.[52]

As a technological framework that influences how phenomena are captured and represented as data, the database is a key site for the production and materialization of social meaning. The database reflects values, norms, epistemologies, social relations, and power that in turn influence how people interact with the world and each other.[53] So far, these databases and the type of knowledge management and control they enable have received little scrutiny from refugee law scholars.[54] In the following, the chapter focuses on three interlinked problems.

[49] Hayes (n 19) 206.

[50] Kristin Bergtora Sandvik, 'How Accountability Technologies Shape International Protection: Results-Based Management and Rights-Based Approaches Revisited' in Sandvik and Jacobsen (n 12).

[51] Ben Parker, 'EXCLUSIVE: Audit Exposes UN Food Agency's Poor Data-Handling', *The New Humanitarian* (18 January 2018) <http://www.thenewhumanitarian.org/news/2018/01/18/exclusive-audit-exposes-un-food-agency-s-poor-data-handling> accessed 6 May 2020.

[52] UNHCR (n 39).

[53] Ryan Burns and Grace Wark, 'Where's the Database in Digital Ethnography? Exploring Database Ethnography for Open Data Research' (2019) 20 Qualitative Research 598.

[54] This also includes questions related to contractual agreements and legal frameworks governing development and operation of these platforms and the scope of duty of care.

The first concerns the possible shift occurring from legal to social protection. The Vulnerability Assessment Framework (VAF) was launched in Jordan in 2014 to develop a 'robust model' to map vulnerabilities of the Syrian non-camp population.[55] VAF is owned by UNHCR, the World Food Programme, and the UN Children's Charity, UNICEF, and is a proxy means-testing instrument intended to enable humanitarian organizations to optimize resource use. Its designers hoped that VAF would do this by categorizing and ranking refugees, thus enabling the identification and targeting of the most 'vulnerable' refugees. Data against VAF indicators should be collected by UNHCR at the registration stage, but vulnerability was primarily to be identified through the 'Home Visit Form', a vulnerability assessment questionnaire. This form was to be filled in during household visits by UN agencies and their implementing partners, to be then entered into the Refugee Assistance Information System (RAIS). This information includes the estimated ability of a household to cover its monthly expenses, the number of dependents, the shelter conditions, and access to healthcare. VAF was promoted as central to identifying and ranking demographic vulnerability through a 'vulnerability score' where one represents low vulnerability, two is mild, three is moderate, and four is high/severe. Quantifiable data is created through home visits and qualitative assessments, which is then processed algorithmically, generating a vulnerability score of one–four.[56] This score is a moving target, dependent on the total vulnerability score of the population, and while not officially stated, to receive assistance the highest scores (three–four) are required.[57]

Critics of this turn to proxy means-testing and the 'social protection' agenda of which it is a part have pointed to methodological problems, the prevalence of errors in targeting, its general neo-liberal tenor, and the exclusion of rights-based approaches. Contesting the possibility of 'perfect data' and the notion that such data is actionable across any local refugee protection field, practitioners have also noted inconsistencies in practice: while UNHCR relies heavily on implementing partners, the systems used for identifying vulnerability vary between UNHCR and its partners, and between the partners, for example with different partners using different scorecards. Moreover, there are reports that refugees have purposely been given inadequate information about their scores, and that complaint procedures have been inadequate and unfeasible.[58] All of these criticisms also give rise to due process and access to justice questions.

[55] UNHCR, 'RAIS: Interagency Tool for: Vulnerability Scoring Requesting New Beneficiary Lists VAF Module JORDAN Mission' (16 February 2017) <http://data.unhcr.org/syrianrefugees/download.php?id=12876> accessed 7 May 2020; UNHCR, 'Vulnerability Assessment Framework Jordan' <https://data2.unhcr.org/en/working-group/54> accessed 7 May 2020.

[56] UNHCR, 'The Vulnerability Assessment Framework: The Basics' (December 2014) <https://data2.unhcr.org/ar/documents/download/42854> accessed 7 May 2020.

[57] Cathrine Brun, 'There Is No Future in Humanitarianism: Emergency, Temporality and Protracted Displacement' (2016) 27 History and Anthropology 393.

[58] ibid; Hisham Khogali, Lynette Larsen, Kate Washington, and Yara Romariz Maasri, 'Aid Effectiveness and Vulnerability Assessment Framework: Determining Vulnerability Among Syrian Refugees in Jordan' (2014) 48 Field Exchange 78 <http://www.ennonline.net/fex/48/aideffectiveness> accessed 7 May 2020.

However, on a more general level, this turn also shifts the scope from legal to social protection, which will be important to explore. While the system is designed to produce knowledge about the protection needs of Syrian refugees in Jordan, it has moved the focus of protection from the interaction between protection officers and individuals, to the homes of refugees—a situation produced by UNHCR's 2009 urban refugee policy, 'allowing' refugees to reside outside camps. In practice, given the miniscule number of refugees who successfully manage to get resettled to a third country, the vulnerability assessment assumes a key role with respect to the actual protection received by refugees. In short, the encounter is no longer a face-to-face one between individual refugees and protection officers (and interpreters), but between refugee households 'performing' vulnerability and one or several UNHCR and NGO employees. RSD determination—and resettlement procedures—are premised on legal vocabularies and at least in theory on human rights and due process values. By contrast VAF is built on assigned scores fed into a socio-technical system that calculates final scores according to a larger matrix that takes into account living conditions more generally and the available resources for material support, and is adjusted for political pressures and priorities levied on UNHCR by the State, other humanitarian actors, and donors. While encounters between refugees and UNHCR protection staff are characterized by enormous power differences, leading to endemic problems of fairness, transparency, and timeliness,[59] something is arguably lost when the aspirations of international refugee law are replaced with technical yet deeply subjective criteria—and encounters structured in a no less disempowering manner than traditional RSD procedures.

The gradual development and overlap of domestic, regional, and global platforms also entails a merging and expansion of agendas. There is no need to romanticize the age of paper-based or local database protection systems: typically, a lack of technical expertise in the field has meant that local databases, solutions, and innovations—which have been invaluable in delivering protection and assistance—have not always been developed or managed with information security in mind.[60] Yet, as operational data moves along the dimension from local to global, it can be accessed and used in different combinations and for different purposes. This path of expansion can be illustrated by the emergence of RAIS and PRIMES. RAIS is an inter-agency tool for tracking assistance, referrals, and assessment information. RAIS was initially developed by UNHCR Jordan in 2009 to address the demands for better coordination of partners, effectiveness, and accountability. It enables UNHCR and partners to share assistance records, cross-check beneficiary lists, and hold various types of data. RAIS is used by 59 agencies in four countries.[61] As noted above, RAIS holds data from VAF, but also VAF's Lebanese and Egyptian 'siblings'—The Vulnerability Assessment of Syrian Refugees in Lebanon

[59] Kristin Bergtora Sandvik, 'The Physicality of Legal Consciousness: Suffering and the Production of Credibility in Refugee Resettlement' in Richard Ashby Wilson and Richard D Brown (eds), *Humanitarianism and Suffering: The Mobilization of Empathy* (CUP 2009).

[60] Hayes (n 19).

[61] Inter 2016, -Agency coordinator 2017.

(VASyR)[62] and the Egypt Vulnerability Assessment for Syrian refugees (EVAR).[63] As these localized systems are folding, the data is being archived in RAIS. According to UNHCR, RAIS is a monitoring system that keeps refugee information up to date, prevents duplication of effort and helps provide targeted assistance to vulnerable people and 'persons of concern'.[64] These systems provide 'a comprehensive and collaborative data-driven system that features more in-depth collection of household information, and standardized definitions and benchmarks for determining vulnerability levels within different sectors'.[65] In itself, this entails the aggregation of an enormous amount of the very detailed data of millions of people—with the soft UNHCR data protection policy as the normative framework.

At the same time, RAIS is only one of several systems that, from 2018, have been integrated into PRIMES, which encompasses all interoperable UNHCR registration, identity management and caseload management tools and applications. The scope of PRIMES is enormous: it includes existing UNHCR tools such as proGres (a case-management software application), BIMS, the Global Distribution Tool (GDT), the Rapid Application (RApp), IrisGuard and RAIS, and tools to be developed in the future. It is designed to work in offline, online, and global system for mobile communication (GSM) environments, and will be interoperable with IT systems used by governments and partner organizations such as World Food Program's SCOPE and UNICEF's PRIMERO.[66] PRIMES will also move data from local databases worldwide and consolidate all UNHCR data in a single database that can be accessed via the web. These rapidly unfolding developments require refugee law scholars to rethink how and where we look for problems, the type of stakeholders we put under critical scrutiny—in particular private sector technology companies—and how we assess the linkages between due diligence defaults, deficiency, and malfunctions at the corporate end, and protection failures at the humanitarian end. For individual ICs, this concerns the ability to make corrections or changes to reflect the lifecycle of the digital body, but to make this resistant to fraudulent activity. The next section of this chapter problematizes the rise of automated processes in asylum and resettlement processing, to contemplate how automation and digitization may shift the substantive and procedural content of refugee protection.

[62] UNHCR, UNICEF, and World Food Programme (WFP), 'Vulnerability Assessment of Syrian Refugees in Lebanon 2016' (16 December 2016) <https://reliefweb.int/sites/reliefweb.int/files/resources/VASyR2016.pdf> accessed 13 May 2020; UNHCR, UNICEF, and WFP, 'VASyR 2019: Vulnerability Assessment for Syrian Refugees in Lebanon' (23 December 2019) <https://data2.unhcr.org/en/documents/details/73118> accessed 13 May 2020.

[63] UNHCR, 'Vulnerability Assessment of Syrian Refugees in Egypt 2016' (2016) <https://data2.unhcr.org/en/documents/download/61529> accessed 13 May 2020; UNHCR, 'Vulnerability Assessment: Syrian Refugees in Egypt 2017' (2018) <https://www.unhcr.org/eg/wp-content/uploads/sites/36/2019/09/EVAR2017-2019-Online.pdf> accessed 13 May 2020.

[64] UNHCR, UNICEF, and WFP 2016 (n 62).

[65] UNHCR (n 56).

[66] UNHCR, 'From ProGres to PRIMES' (2018) <https://www.unhcr.org/blogs/wp-content/uploads/sites/48/2018/03/2018-03-16-PRIMES-Flyer.pdf> accessed 13 May 2020.

5. Digitizing Protection Procedures: Credibility Assessments and Due Process

The fourth and final section considers the digital transformation of 'facts' and selection procedures in legal decision-making (RSD, resettlement, asylum). The chapter argues that digitization and automation both destabilize the parameters of these procedures and engender new risks to the integrity of legal and bureaucratic protection procedures. While these risks can at one level be articulated as direct risks to due process and access to justice, it is important that we also carefully consider any distributive consequences to the overarching value of international refugee law.

For grassroots and community-based civil society actors, digital devices are used to document and disseminate information about harms and threats, create digital support networks, give early warnings, and trigger support from powerful constituents. Yet, here, technology has an ambiguous position: on the one hand, for activists, technology produces indisputable 'facts', testimonies, or evidence of events in formats familiar and acceptable to those in power. Even if the physical body cannot speak with credibility—refugee narratives are often met with distrust[67]—digital devices have in recent decades been seen as credible conveyors of information.[68] On the other hand, in recent years countering misinformation, disinformation, and malinformation has become increasingly complicated.[69] In the past, the aim was to harness the power of social media to do good for refugees, but social media is now also seen as a potential source of harm. This type of digital harm can on its own constitute persecution, for example in the case of authentic or forged footage of sexual activity considered culturally unacceptable. At the same time, the rise of Deepfake images and videos/Generative adversarial networks (GANS) poses problems for refugee testimonies about atrocities in RSD and resettlement selection processes. With a specific view to the RSD process, concern has been voiced with respect to the ability of NGOs to provide effective filters for evidence arising from new forms of media in such a way that evidence produced will be viable in RSD processes.[70] For example, rumours about rapes and child killings usually trigger acts of revenge. Graphical illustrations of such crimes can prove fatal, regardless of whether or not they are true.

[67] Sandvik (n 59).

[68] Sam Gregory, 'Cameras Everywhere: Ubiquitous Video Documentation of Human Rights, New Forms of Video Advocacy, and Considerations of Safety, Security, Dignity and Consent' (2010) 2 Journal of Human Rights Practice 191.

[69] Sam Gregory, 'Cameras Everywhere Revisited: How Digital Technologies and Social Media Aid and Inhibit Human Rights Documentation and Advocacy' (2019) 11 Journal of Human Rights Practice 373.

[70] Rosemary Byrne, 'The Protection Paradox: Why Hasn't the Arrival of New Media Transformed Refugee Status Determination?' (2015) 27 IJRL 625.

False attribution of imagery—such as the Deepfake application generating nude images of women—exacerbates vulnerability.[71] Whether the creation and dissemination of such imagery would amount to persecution requires a nuanced and situated social and forensic analysis of the technology and its use in a given social context. The procedural challenge is twofold: to develop guidance for assessing risk in rapidly changing contexts of activism and political repression, but also, in the context of a flood of information, to determine how digital evidence can be accessed, produced, sorted, and assessed. This also includes guidelines for admitting and disclosing evidence to better fortify procedural firewalls and fair process.[72] In a preliminary opinion, UNHCR states that it

> wishes to underline that the evidentiary value of electronic data should be considered with great care. Asylum-seekers will often avoid using their correct names on social media platforms, including to evade surveillance and possible persecution, or potential harm to their families in their country of origin. Further, digital and electronic evidence may in certain instances have limited reliability or accuracy or may be easily altered. Finally, it is relatively common for mobile devices to have been handed over or used by other individuals, including smugglers or traffickers. Due consideration should be given to these factors when verifying information or otherwise assessing the credibility of an asylum-seeker's application, based on information retrieved from electronic devices.[73]

Particular questions arise with respect to digital footprints produced by devices owned by refugees and asylum seekers in the process of establishing a legal identity. A number of domestic regulations now allow for the seizure and search of electronic devices in the context of asylum procedures. UNHCR has cautioned against this development, describing it as a 'highly intrusive measure that should only be conducted when strictly necessary, with the requisite safeguards, for a limited period of time, with respect to data protection laws and the right to an effective remedy'.[74] However, with respect to credibility assessments undertaken in the context of RSD and resettlement selection, we know little about how UNHCR in practice relates to these digital devices and their underlying data pools.

Beyond the RSD process, a different kind of verification issue arises with the production of not only credible but also 'deserving' candidates for third-country resettlement.

[71] Kristin Bergtora Sandvik and Kjersti Lohne, 'The Struggle against Sexual Violence in Conflict: Investigating the Technological Turn' (2021) International Review of the Red Cross (forthcoming).

[72] Byrne (n 70).

[73] UNHCR, 'Preliminary Legal Observations on the Seizure and Search of Electronic Devices of Asylum-Seekers' (4 August 2017) 2 2 <https://www.refworld.org/docid/59a5231b4.html> accessed 22 April 2020.

[74] UNHCR, 'UNHCR Calls on Austrian Government to Keep Refugee Protection at Centre of Asylum Law Amendments' (9 May 2018) <https://www.unhcr.org/news/press/2018/5/5af2bafd4/unhcr-calls-austrian-government-keep-refugee-protection-centre-asylum-law.html> accessed 7 May 2020.

While durable solutions are not anchored in international law, the resettlement process is constructed as a 'quasi-legal' process that entails vetting of candidates and their slotting into the different protection categories demarcated in the Resettlement Handbook, including physical and legal risk, women at risk, survivor of torture and violence, and so forth. While 'vulnerability'—in tandem with integration potential—has been a key criterion for resettlement, in recent years, the individual potential for labour market absorption has emerged as a key factor for most resettlement countries. Various models are now available: a Stanford project designed an algorithm which assigned placements for refugees that it projected 'would increase their chances of finding employment by roughly 40 to 70 percent compared with how the refugees actually fared'. Piloted in Switzerland, the project aimed to substantially increase employment rates with keeping a focus on family preferences.[75] The algorithm, which 'could be implemented at virtually no cost' was presented as a way to 'help resource-constrained governments and resettlement agencies find the best places for refugees to relocate'. [76] The algorithm Annie was developed in close collaboration with the US resettlement agency—the Hebrew Immigrant Aid Society—where the first version was deployed in May 2018. Annie promised to integrate 'machine learning and integer optimization' to suggest 'optimal placements while giving substantial autonomy for the resettlement staff' to place refugees with relatives in the US.[77] How the normalization of this kind of processing technology will reshape the relationship between protection norms and selection procedures remains to be seen.[78]

6. Conclusion

This chapter has linked well-known topics in the field of international refugee law to new challenges and risks arising from the introduction of technological tools and platforms, increased private sector collaboration and the digitization of protection procedures and assistance. In particular, the chapter has considered how this relates to

[75] Avidit Acharya, Kirk Bansak, and Jens Hainmueller, 'Combining Outcome-Based and Preference-Based Matching: The g-Constrained Priority Mechanism' (2019) Immigration Policy Lab Working Paper 19-03 <https://arxiv.org/pdf/1902.07355.pdf> accessed 7 May 2020; Nils Olberg and Sven Seuken, 'Enabling Trade-Offs in Machine Learning-based Matching for Refugee Resettlement' (University of Zurich 10 November 2019) <https://www.ifi.uzh.ch/dam/jcr:b2e7fef9-ac8a-4a00-bbe6-951645a6932b/refugees_ml_matching.pdf> accessed 7 May 2020.

[76] Alex Shashkevich, 'Stanford Scholars Develop New Algorithm to Help Resettle Refugees and Improve their Integration', *Stanford News* (18 January 2018) <https://news.stanford.edu/2018/01/18/algorithm-improves-integration-refugees/> accessed 7 May 2020.

[77] Andrew C Trapp, Alexander Teytelboym, Alessandro Martinello, Tommy Andersson, and Narges Ahani, 'Placement Optimization in Refugee Resettlement' (2018, revised March 2020) Lund University Working Paper 2018:23 <https://project.nek.lu.se/publications/workpap/papers/wp18_23.pdf> accessed 7 May 2020.

[78] See also Will Jones and Alexander Teytelboym, 'Matching Systems for Refugees' (2017) 5 Journal on Migration and Human Security 667.

the allocation of protection to individuals, to procedural rules, as well as the need to protect refugees *against* humanitarian organizations and private sector partners. We are moving towards a complex idea of protection in international refugee law, incorporating the legal, technical, and ethical obligations to uphold the rights of individuals, protect their autonomy and dignity, as well as the security and integrity of protection data and the digital infrastructure. This development has been explored through the concept of algorithmic protection, where refugees' digital bodies both become the object of intervention and protection and where new vulnerabilities arise in conjunction with the emergence of refugees as digital subjects with a 'duty of visibility'. The turn to technology engenders a need to rethink the relationship between international refugee law, the duties and prerogatives of Refugee Convention parties, and those of technology actors. This shift also places new topics on the research agenda of those interested in refugee law. It is hoped that the scoping of the digital transformation of refugee protection presented in this chapter can contribute to charting new directions in international refugee law and scholarship.

PART VII

THE END OF REFUGEEHOOD— CESSATION AND DURABLE SOLUTIONS

CHAPTER 57

CESSATION

GEORGIA COLE

1. Introduction

Questions about when, how, and why refugee status ends remain critical for academics, States, UNHCR, and refugees alike. If States are uncertain about when their responsibilities towards refugees will end, the result may be ever-stricter policies concerning borders, refugee status determination procedures, and individuals—even once they have been granted some form of protection.[1] The changes wrought by this restrictionism would likely be to the long-term detriment of the laws, norms, and institutions of the refugee regime,[2] which is why the first United Nations High Commissioner for Refugees reflected that 'refugee status should "not be granted for a day longer than [i]s absolutely necessary" '.[3] Furthermore, the drafters of the Refugee Convention felt that it would be deleterious for refugees themselves to live outside of their country of origin indefinitely under 'international protection'. Critiques of their paternalism aside, the result is that article 1C of the Refugee Convention provides an exhaustive list of ways in which refugee status can end.

[1] This is exemplified in the proposed Qualification Regulation of the European Union (EU), which enumerates key issues that the European Commission (EC) considers require new regulation. One of these is 'the lack of cessation checks', which the EU assumes creates 'an additional incentive for those in need of international protection to come to the EU rather than to seek refuge in other places': UNHCR, 'UNHCR Comments on the European Commission Proposal for a Qualification Regulation—COM (2016) 466' (February 2018) 6 (emphasis omitted) <https://www.refworld.org/docid/5a7835f24.html> accessed 3 November 2019. To address this, the EC has recommended 'ensuring international protection is granted only as long as needed': 6 (emphasis omitted).

[2] Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (Robertson 1983).

[3] UNHCR Standing Committee, 'Note on the Cessation Clauses', EC/47/SC/CRP.30 (30 May 1997) para 4.

Due to the significant consequences of the cessation of refugee status for individuals and States, however, legal experts and UNHCR promote a strict interpretation of article 1C. In *R (Hoxha) v Special Adjudicator*, Lord Hope of Craighead specified the reasons for such a '"strict" and "restrictive" approach':

> Once an asylum application has been formally determined and refugee status officially granted, with all the benefits both under the Convention and under national law which that carries with it, the refugee has the assurance of a secure future in the host country and a legitimate expectation that he will not henceforth be stripped of this save for demonstrably good and sufficient reason.[4]

This concern, coupled with the administrative and legal challenges discussed in this chapter, has been matched by States' historical reluctance to employ this aspect of the Refugee Convention's armoury. Reasons for this include 'the administrative costs involved' and 'the recognized likelihood that even where cessation results, it may not lead to return because those whose refugee status has ceased will have the possibility to remain under another status; and/or a State preference for naturalization under Article 34 of the Convention'.[5]

In the 1990s, however, interest in the cessation clauses burgeoned.[6] This shift was particularly pronounced in relation to article 1C(5), the 'ceased circumstances' cessation clause,[7] which Fitzpatrick suggested was invoked more frequently because of:

> democratization in some formerly repressive States; concern to prevent asylum from becoming a backdoor to immigration; experiments with temporary protection; stress upon repatriation as the optimal durable solution to displacement; and difficult dilemmas posed by repatriation to situations of conflict, danger and instability.[8]

UNHCR also appeared keen to 'poin[t] to its success in bringing refugee status to an end',[9] and to extricate itself from costly care and maintenance programmes and

[4] [2005] UKHL 19, [2005] 1 WLR 1063, para 65.

[5] 'Summary Conclusions: Cessation of Refugee Status, Expert Roundtable, Lisbon, May 2001' in Erika Feller, Volker Türk, and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (CUP 2003) 546.

[6] UNHCR, 'Report of the 23 January Meeting of the Sub-Committee of the Whole on International Protection', EC/SCP/70 (7 July 1993) para 6.

[7] UNHCR, 'Discussion Note on the Application of the "Ceased Circumstances" Cessation Clauses in the 1951 Convention', EC/SCP/1992/CRP.1 (20 December 1991) para 3.

[8] Joan Fitzpatrick, 'Current Issues in Cessation of Protection under Article 1C of the 1951 Refugee Convention and Article I.4 of the 1969 OAU Convention' (Background Paper for the Global Consultations on International Protection, 2001) para 2. <https://www.refworld.org/docid/3bf925ef4.html> accessed 3 November 19.

[9] James C Hathaway, 'Refugee Solutions, or Solutions to Refugeehood?' (2007) 24 Refuge: Canada's Journal on Refugees 3, 6.

protracted refugee negotiations that, without decisive action, could consume the organization indefinitely.[10]

Putting the politics aside, analyses of article 1C invariably begin by dividing the provision into two discrete forms of cessation. As countless commentators, including UNHCR, put it, '[r]efugee status may cease either through the actions of the refugee (Article 1 C (1) to (4)), such as by re-establishment in his or her country of origin, or through fundamental changes in the objective circumstances in the country of origin (Article 1 C (5) and (6))'.[11] While useful, and reflected in the structure that this chapter assumes, this categorization nonetheless obscures the fact that while articles 1C(1)–(4) categorically involve the actions of refugees, 'fundamental changes in the objective circumstances in the country of origin' may, too. When the roles that refugees play in peace-building and political change from *outside* their countries are acknowledged,[12] such a clear-cut distinction breaks down. Similarly, a more contextualized understanding of 'the actions of the refugee', noting the ways in which their agency is affected by the many actors and systems with which they interact, challenges such a categorical reading of this population's autonomy in articles 1C(1)–(4).

2. Article 1C(1)–(4)

Within the first four cessation clauses, Hathaway and Foster present a rationale for further subdivision, noting the procedural similarities in paragraphs (1), (2), and (4).[13] Grouping these together, they state:

[10] During UNHCR's consultations on 'When Is International Protection No Longer Necessary?' in the early 2000s, Bonoan proposed greater flexibility towards the application of the cessation clauses: Rafael Bonoan, 'When Is International Protection No Longer Necessary? The "Ceased Circumstances" Provisions of the Cessation Clauses: Principles and UNHCR Practice, 1973–1999' (Background Paper for the Global Consultations on International Protection, 2001) para 56. <www.unhcr.org/protection/globalconsult/3bfe1cd84/international-protectionlonger-necessary-ceased-circumstances-provisions.html> accessed 3 November 2019. In suggesting that UNHCR should make decisions that support States' efforts to use cessation 'as a potentially effective method of deterring additional flows of refugees', Bonoan positioned UNHCR as the lapdog of State interests, not a vanguard of refugee law and rights: para 31. His proposals, therefore, sought to position cessation as a punitive tool for rectifying abuses of asylum, rather than a procedural tool designed to assist States and individuals in assessing the appropriate end point of refugeehood. At the UNHCR Global Consultation that followed these discussions, experts nonetheless noted that it 'is not necessarily the view that more flexible interpretation and/or more active use of the "ceased circumstances" cessation clauses' would result in States expanding protection: 'Summary Conclusions' (n 5) 546. The consultations concluded that a more flexible approach could be adopted towards operational procedures, not normative standards.

[11] UNHCR, 'UNHCR Observations on the Proposed Amendments to the Danish Aliens Legislation, L 87' (6 January 2016) para 29. <https://www.refworld.org/docid/5694ed3a4.html> accessed 3 November 2019.

[12] For a great example, see Megan Bradley, James Milner, and Blair Peruniak (eds), *Refugees' Roles in Resolving Displacement and Building Peace: Beyond Beneficiaries* (Georgetown University Press 2019).

[13] While there is extensive jurisprudence on art 1C(1), particularly on the question of whether applying for a passport constitutes the reacquisition of protection, there is little on arts 1C(2)–(4): Susan Kneebone and Maria O'Sullivan, 'Article 1 C' in Andreas Zimmermann (ed), *The 1951 Convention relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (OUP 2011) paras 113–9.

> The refugee may elect to entrust her safety to the State of origin by way of re-availment of its formal protection, by re-acquisition of its nationality, or by re-establishment in its territory. Behavior of any of these three sorts is understood to reflect a determination by the refugee to entrust her well-being to her country of origin, an exercise of individuated self-determination in which international law can but acquiesce.[14]

The application of articles 1C(1), (2), and (4) requires the triad of 'voluntariness, intent, and effective protection'.[15] In a world where the 'voluntary' in voluntary repatriation has been stretched to its semantic breaking point,[16] this emphasis on intent appears critical for ensuring that re-entry is not conflated with re-availment or re-establishment of protection.[17] Even when the re-availment of national protection through mechanisms such as contact with the embassy of a refugee's country of origin, or renewal of a passport,[18] are determined to be *voluntary acts*,[19] of greater significance is whether such acts are undertaken with the *intent* of re-availing oneself of national protection,[20] and whether they result in the *normalization of relations* between the refugee and the State of origin.[21] As Hathaway and Foster note, 'when most persons approach consular or diplomatic authorities to secure the documentation needed for such purposes as travel, enrolment in school, or professional accreditation, they do so simply as a matter of routine, with no thought to the legal ramifications of their act'.[22] Factors including the purpose of trips back to the country of nationality, and whether such a purpose is successfully achieved, determine whether return could justify the cessation of status.[23]

[14] James C Hathaway and Michelle Foster, *The Law of Refugee Status* (2nd edn, CUP 2014) 464.

[15] 'Summary Conclusions' (n 5) 550.

[16] BS Chimni, 'The Meaning of Words and the Role of UNHCR in Voluntary Repatriation' (1993) 5 IJRL 442.

[17] Hathaway and Foster raise the concern that where significant financial inducements are provided to refugees—such as when the Australian government offered Afghan refugees a grant equivalent to five years of salary if they accepted voluntary repatriation—return is not necessarily truly voluntary: Hathaway and Foster (n 14) 473.

[18] The French Office for the Protection of Refugees and Stateless Persons attempted to cease the refugee status of a Bangladeshi national after the individual approached the Bangladeshi embassy to renew their driving licence. This was overturned by the French National Court of Asylum in 2018, which assessed that this document, and the means by which it was procured, did not mean that the applicant was enjoying the protection of the Bangladeshi authorities: CNDA, 14 Sept 2018, No 16029914. See further European Database of Asylum Law, 'France—National Court of Asylum Rules in a Case of Cessation of Refugee Status' (14 September 2018) <www.asylumlawdatabase.eu/en/content/france-%E2%80%93-national-court-asylum-rules-case-cessation-refugee-status> accessed 3 November 2019.

[19] UNHCR nonetheless cautions that, '[i]f the refugee is compelled to act by circumstances beyond his/her control, such as at the instructions of the authorities of the country of asylum or in order to avert illegalities in regard to his/her stay there, such an act should not be considered as voluntary': UNHCR, 'The Cessation Clauses: Guidelines on Their Application' (26 April 1999) para 9.

[20] Kneebone and O'Sullivan (n 13) paras 113–9.

[21] See Hathaway and Foster (n 14) 476.

[22] ibid 465.

[23] Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, OUP 2007) 136–9.

What frequency and duration of return movements should trigger articles 1C(1), (2), and (4) remains unsettled. Fitzpatrick argued that 're-establishment denotes both a subjective re-affiliation as well as an objectively durable presence'.[24] In the case of repeated visits by refugees to their country of origin, she suggested that, 'so long as the visits are of short duration and the refugees primary residence remains in the asylum State, invocation of article 1C(4) is inappropriate'.[25] The duration of stay is, however, a much less relevant proxy for the re-establishment of protection than the nature and 'formality'[26] of the refugee's link and 'commitment'[27] to their country of origin. UNHCR has reasoned that:

> A short stay may warrant cessation of refugee status if the refugee had carried on a normal livelihood without problems and performed obligations which a normal citizen would, such as paying taxes. Such behaviour would be indicative of a normalization of relations with the country. On the other hand, short visits to the country of origin for compelling reasons would not normally suffice for application of this clause.[28]

In this vein, UNHCR's Executive Committee (ExCom) Conclusion No 18 specifies that refugees should be able to make visits 'to their country of origin to inform themselves of the situation there—without such visits automatically involving loss of refugee status'.[29] Hathaway concurs that:

> the refugee who returns only loses his or her refugee status once a durable, ongoing presence in the home country is established. Up to that point, she remains a refugee and is legally entitled to go back to the asylum country and to resume refugee protection there if things do not work out as hoped . . . .[30]

Fitzpatrick extended this reasoning, advocating for an 'escape clause' for refugees whose attempts to re-establish themselves prove unsuccessful.[31]

As evidence suggests that individuals are more likely to repatriate if they know that attempts to re-establish themselves in potentially volatile contexts would not signal a hard end to their rights as a refugee, such an approach may open possibilities for more sustainable and stable models of refugee repatriation. But it also raises difficult normative questions, including how long any 'trial period' should last, over what timeframe individuals would remain entitled to re-acquire or 're-activate' protection in the country of asylum, and about who bears the responsibility for an unsuccessful attempt at re-establishment. Though a legal case could be made for the continuation of refugee status

[24] Fitzpatrick (n 8) para 37. [25] ibid para 39. [26] ibid para 95.
[27] UNHCR (n 19) para 21. [28] ibid.
[29] UNHCR Executive Committee Conclusion No 18 (XXXI), 'Voluntary Repatriation' (1980).
[30] Hathaway (n 9) 3 (emphasis omitted). [31] Fitzpatrick (n 8) para 41.

if an individual's failure to re-establish themselves resulted from discrimination, persecution, or the State's unwillingness or inability to protect them, establishing a broader moral and political argument for an 'escape clause' would be challenging.

3. Article 1C(5)

Any systematic analysis of how article 1C(5) is invoked and implemented exposes the 'ceased circumstances' cessation clause as the apotheosis of the Refugee Convention's fragmented application. Part of this stems from the fact that the shortcomings in how articles 1C(5) and (6) are articulated are, as Goodwin-Gill subtly put it, 'glaring' and 'perverse'.[32] The confusing guidance on the change required to invoke article 1C(5) stems from UNHCR having set itself the impossible task of articulating a set of universal political standards that a State should reach before it is considered appropriate to cease the status of refugees from that country. This involves assessing:

> the fundamental character of the changes in the country of nationality or origin, including the general human rights situation, as well as the particular cause of fear of persecution, in order to make sure in an objective and verifiable way that the situation which justified the granting of refugee status has ceased to exist.[33]

ExCom Conclusion No 69 states that changes must be 'fundamental, stable and durable'.[34] UNHCR has argued that true stability in the country of origin requires a system of protection that extends beyond 'mere physical security and safety' to include:

> the existence of a functioning government and basic administrative structures, as evidenced for instance through a functioning system of law and justice, as well as the existence of adequate infrastructure to enable residents to exercise their rights, including their right to a basic livelihood.[35]

Despite numerous UNHCR checklists enumerating key indicators for determining whether the circumstances in connection with which a person who has been recognized as a refugee have ceased to exist,[36] State practice continues to challenge these guidelines in three main ways: on the grounds of procedural clarity and what role UNHCR should play; the relevance of certain indicators; and how exemption from cessation should be managed.

[32] Guy S Goodwin-Gill, *The Refugee in International Law* (2nd edn, OUP 1996) 84. This quote was not included in the following edition of that book in response to a concern that this was 'putting it too high': Goodwin-Gill and McAdam (n 23) 144.

[33] ExCom Conclusion No 69 (XLIII), 'Cessation of Status' (1992).

[34] ibid.

[35] UNHCR, 'Guidelines on International Protection: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the "Ceased Circumstances" Clauses)', HCR/GIP/03/03 (10 February 2003) para 15.

[36] See eg UNHCR (n 19) paras 23–31.

a. UNHCR's Role and Procedural Clarity

Significant confusion surrounds what UNHCR's involvement in cessation should be. ExCom Conclusion No 69 specifies that the organization 'should be appropriately involved' in the application of cessation, but cautions that its 'application . . . rests exclusively with the Contracting States'.[37] On paper, the organization's role is limited to an advisory one, such as issuing recommendations about the suitability of the clause's application to a particular caseload of refugees. Even these non-legally binding pronouncements, however, are objected to by States.[38] Several reasons explain this. Procedurally, while UNHCR maintains that its recommendations regarding the suitability of invoking the article 1C(5) cessation clause are intended purely to *inform* States (with whom the ultimate decision rests), the nature of these pronouncements belie this role. These recommendations often contain timelines for the implementation process and deadlines by which individuals 'will cease to be refugees',[39] which reduce State autonomy in this process. Politically, if UNHCR issues a statement confirming that country conditions would justify the invocation of article 1C(5), governments hosting refugees from that State feel pressure to respond in ways that appear consistent with this judgment. If States do not heed UNHCR's advice, this can reveal doubts about the extent of political reform in a neighbouring State, or expose the political incentives that host States have to keep refugee populations *in situ*.[40] UNHCR's recommendations thus oblige States to initiate political discussions that may have widespread, long-lasting, and undesirable diplomatic consequences.

UNHCR's track record of recommending cessation in contexts where political changes have not been fully consolidated has also undermined its legitimacy in these discussions.[41] On multiple occasions, UNHCR has supported cessation in order to show public confidence in a new regime or State, despite significant concerns about the fundamental and durable nature of change. UNHCR's initial 'Declaration of

[37] UNHCR (n 33).

[38] For example, following UNHCR's recommendation that cessation be applied to Croatian refugees, the government of Serbia responded 'expressing its disagreement with UNHCR's recommendations' and 'reiterat[ing] its objection that cessation on the ground of the ceased circumstances had been prematurely applied': UNHCR, 'Third Progress Report: Implementation of the Durable Solutions Process (Sarajevo Process) for Refugees from Croatia Displaced by the 91–95 Conflict, including Cessation of Refugee Status' (25 August 2016) fn 15.

[39] See eg UNHCR, 'UNHCR Note on the Applicability of the Cessation Clauses of the UNHCR Statute and the 1951 Convention to Refugees from Bulgaria and Romania' (October 1997) para 3.

[40] Georgia Cole, 'Beyond the Politics of Labelling: Exploring the Cessation Clauses for Rwandan and Eritrean Refugees through Semiotics' (DPhil thesis, University of Oxford 2016).

[41] Hathaway and Foster concur that '[t]here has too often been an unhealthy willingness to assume change from formal declarations or promises of reform, without carefully assessing the resultant reality on the ground': Hathaway and Foster (n 14) 482. Furthermore, promises and reforms must be related to the reasons why an applicant was originally granted asylum. Generalized improvements in access to services and the economy do not equal the end of persecution or the willingness of a State to protect affected parties.

Cessation' for the Democratic Republic of East Timor, for example, stated that changes in the country were 'of a fundamental character'.[42] The organization nonetheless aired concerns elsewhere that 'the security situation throughout East Timor is expected to remain uncertain but relatively stable up to 2003', with the peaceful elections being secured by a 'United Nations Peace-Keeping Force and Civilian Police in the most sensitive regions'.[43] The lukewarm relationship between East Timor and Indonesia, which was seen as fundamental to lasting and stable peace in the former, was captured in the statement that '[b]oth sides are optimistic that this improving relationship will be long lasting'.[44] The availability of local integration for East Timorese in Indonesia, however, led the organization to reason that that, alongside the option of repatriation, meant this population was no longer in need of international protection.[45] A decade later, the International Crisis Group noted that there were concerns at the time about 'whether the move was premature, driven too much by a desire to support the development of the new state despite concerns of insufficient protection for those who returned'.[46]

Exactly how the cessation process should be instigated and implemented nonetheless remains underdefined. Instances where the country of origin has successfully lobbied for the application of article 1C(5) to its citizen-refugees, as the Rwandan government did throughout the 2000s, have been heavily criticized from a protection perspective,[47] yet there is little guidance on what the appropriate role for the country of origin, or indeed refugees, should be. What is clear is that the invocation of article 1C(5) should always be a purposive act undertaken by States, which have the responsibility to demonstrate that there has been a change of circumstances in the country of origin, rather than cessation applying automatically upon the expiry of a temporary protection visa (or refugees themselves having to show an ongoing protection need).[48] In terms of procedural safeguards, the application of article 1C should nonetheless be seen as a 'rebuttable presumption', with States putting in place procedures to allow refugees 'to contest the evidence supporting cessation'.[49]

[42] UNHCR, 'Declaration of Cessation—Timor Leste' (22 December 2002) para 2.

[43] UNHCR, 'Country Operations Plan 2003—East Timor' (1 September 2002) 1.

[44] ibid 2. [45] UNHCR, 'Country Operations Plan 2004—Timor Leste' (1 September 2003) 3.

[46] International Crisis Group, 'Timor-Leste: Reconciliation and Return from Indonesia' (Asia Briefing No 122, 18 April 2011) 3 <https://www.crisisgroup.org/asia/south-east-asia/indonesia/timor-leste-reconciliation-and-return-indonesia> accessed 3 November 2019.

[47] Fahamu Refugee Programme, 'Rwanda: Cessation of Refugee Status is Unwarranted' Memorandum of Fact and Law' (22 September 2011) <http://www.refugeelegalaidinformation.org/sites/srlan/files/fileuploads/Memo%20of%20Fact%20and%20Law.pdf> accessed 3 November 2019.

[48] In Australia, the High Court held in the case of *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* [2006] HCA 53, (2003) 231 CLR 1 that an Afghan applicant wishing to renew their temporary protection visa had to prove their status afresh against art 1A(2), or it would otherwise automatically cease according to art 1C(5). For a detailed analysis of the flaws of this judgment, see Maria O'Sullivan, *Refugee Law and Durability of Protection: Temporary Residence and Cessation of Status* (Routledge 2019) 61–70.

[49] UNHCR (n 3) paras 37–8.

b. Assessing the Applicability of Article 1C(5)

A second major area of debate concerns what factors are relevant to an assessment of 'fundamental change'. The Australian government, for example, argues that the focus should be on whether the specific circumstances that led to the refugee claim being recognized have ceased to exist, and that the social and economic situation in the country of origin has no bearing on this.[50] In contrast, UNHCR states that '[e]conomic and social stability have relevance in so far as serious instability in the economic or social situation could generate further political unrest'.[51]

At the root of these discussions are fundamental questions concerning whether the invocation of article 1C(5) requires a separate, positive assessment of the *presence of effective protection* as well as the *absence* of the original persecutory risk, and thus how—or indeed whether—article 1C(5) mirrors article 1A(2).[52] States, including Australia, have claimed that 'the circumstances in connexion with which [an individual] has been recognized as a refugee', referred to in article 1C(5), concern only those related to the persecutory act, and that provided these have abated, it can be assumed that individuals no longer require international protection. The end of persecution is conflated with (or seen to automatically arise from) the availability of effective protection, which is not required to extend beyond protection against that threat *specifically*.

Legal scholars have challenged this to argue that there is no 'causal connection between the end of a danger of persecution and the re-availability of protection against persecution'.[53] O'Sullivan devotes her book to arguing that 'the test for cessation is not merely absence of persecution but a wider concept of "effective protection"',[54] which 'encompasses elements such as the rule of law, judicial and administrative infrastructure, human rights protections and the absence of armed conflict'.[55] Hathaway and Foster go to great lengths to articulate a positive obligation on States to identify expansive protection mechanisms in the country of origin before they can invoke cessation. Through complex legal reasoning, they locate this obligation in the fact that a refugee cannot 'avail himself of the protection of the country of his nationality', as per the third clause of article 1C(5), without an 'assessment of the availability in fact of such affirmative rights'.[56]

[50] John Vrachnas, 'The Operation and Scope of Article 1C(5) of the United Nations Convention relating to the Status of Refugees' (2005) 1 Journal of Migration and Refugee Issues 51.

[51] UNHCR (n 19) para 28.

[52] For an extensive discussion of this point, see Kneebone and O'Sullivan (n 13) para 188.

[53] Roland Banks, 'The Potential and Limitations of the Court of Justice of the European Union in Shaping International Refugee Law' (2015) 27 IJRL 213, 231.

[54] O'Sullivan (n 48) 41.

[55] ibid 51; O'Sullivan further argues that, in order for art 1C to be consistent in aims, particularly in the context of art 1C(3) referencing that an individual must 'enjo[y] the protection of the country of his nationality', an assessment of the availability and provision of protection must be made in all cessation decisions: at 52.

[56] Hathaway and Foster (n 14) 488.

While such 'affirmative rights' must be available, and not just because of a 'preferable interpretation' of the Refugee Convention, as Kneebone and O'Sullivan suggest,[57] the source and defence of these rights might be more easily derived from another clause of article 1C(5). Recognition of refugee status involves proof of several separate components, including persecution on particular grounds and an absence of State protection. Meeting a threshold in the change of 'circumstances in connexion with which he has been recognized as a refugee' thus implicitly entails demonstrating that *all* these components of article 1A(2), including that concerning State protection, are either ameliorated or restored.[58] Deriving this obligation from the second clause of article 1C(5) removes the need for Hathaway and Foster's complex legal argument.

The question this leaves unresolved is to what extent protection under article 1C(5) extends beyond the protection against persecution required under article 1A(2). In the recent ruling of the English Court of Appeal in 2018, Lady Justice Arden found that:

> the circumstances which caused the person to be a refugee have ceased to apply and there is no other basis on which he would be held to be a refugee. The recognising State does not in addition have to be satisfied that the country of origin has a system of government or an effective legal system for protecting basic human rights, though the absence of such systems may of course lead to the conclusion that a significant and non-temporary change in circumstances has not occurred.[59]

In *Abdulla v Bundesrepublik Deutschland*, which concerned the application of article 11 of the EU Qualification Directive to Iraqi refugees in Germany, the Court of Justice of the European Union (CJEU) provided guidance that protection in the country of origin should include 'an effective legal system for the detection, prosecution and punishment of acts constituting persecution and that the national concerned will have access to such protection'[60] and suggested that the relevant authorities 'may take into account . . . the extent to which basic human rights are guaranteed in that country'.[61] The guidance in *Abdulla* further suggested that determining that a refugee no longer has a well-founded fear of persecution requires a broader assessment than that their basic human rights will not be violated for any reason, whether due to the original grounds for persecution or

[57] Kneebone and O'Sullivan (n 13) para 195.

[58] The same argument applies to art 1C(6), and highlights its consistency with art 1C(5) despite the fact that art 1C(6) does not refer to the availability of protection in the country of former habitual residence. Hathaway and Foster suggest that this omission does not matter as they locate a State's obligation to assess the availability of 'affirmative rights' in the reference in art 1C(6) to refugees being 'able to return': Hathaway and Foster (n 14) 488–9. I would instead suggest that this obligation to identify a 'positive, protective relationship' (489) is absolutely fundamental to affirming that 'the circumstances in connexion with which he has been recognized as a refugee have ceased to exist'.

[59] *Secretary of State for the Home Department v MA (Somalia)* [2018] EWCA Civ 994, [2019] 1 WLR 241, para 2.

[60] Joined Cases C–175/08, C–176/08, C–178/08, and C–179/08, *Abdulla v Bundesrepublik Deutschland* [2010] ECR I–01493, para 76.

[61] ibid para 71.

for reasons that have emerged subsequently.[62] The EU Qualification Directive indeed contains provisions on the nature and content of this protection which 'do not figure in the Convention and which must be taken into account in cessation proceedings'.[63] How much the standard of protection required for the invocation of article 1C(5) extends beyond protection against persecution, however, remains unsettled in the jurisprudence and scholarship.[64]

Beyond this, article 1C(5) differs from article 1A(2) in several important ways. First, only after an individual's eligibility for refugee status has been determined can the application of article 1C(5) be considered.[65] Exemption from article 1C(5) similarly only applies to recognized refugees once cessation proceedings have been initiated against them, and should have no bearing on the initial granting of status. Secondly, while displaced persons must demonstrate that they meet the refugee definition in article 1A(2), States 'bear the burden of proving that the refugee is no longer in need of international protection'.[66] Once an individual has therefore been granted refugee status, this can only be ceased by States if they establish that the conditions of article 1C(5) have been fulfilled.[67]

Importantly, instances of voluntary repatriation must not be taken as conclusive evidence in favour of invoking cessation.[68] Using language with more than a hint of condescension towards governments in the Global South, Hathaway flags that this fact is lost on 'governments in most of the less-developed world' which:

> take UNHCR involvement in a given repatriation effort . . . as a sufficient basis . . . for the termination of their own duty to protect the refugees in question, with no real attention being paid to the actual legal criteria for cessation of status (much less to volition).[69]

It is unsurprising, however, that governments might be confused about the causal relationship between voluntary repatriation and cessation even if 'the standards and policies appropriate for each are different'.[70] In practice, the relationship appears

[62] ibid para 73; Evangelia Tsourdi, 'What Role for the Court of Justice of the EU in the Development of a European Asylum Policy? The Case of Loss and Denial of International Protection in the EU' (2013) 68 Tijdschrift voor bestuurswetenschappen en publiek recht 212.

[63] Roger Errera, 'Cessation and Assessment of New Circumstances: A Comment on *Abdulla*, CJEU, 2 March 2010' (2011) 23 IJRL 521, 528.

[64] See eg O'Sullivan (n 48) 92.

[65] See UNHCR, 'UNHCR Compilation of Case Law on Refugee Protection in International Law' (March 2008) 22–3.

[66] UNHCR (n 11) para 32.

[67] For a discussion of the importance of this point in the context of Australian case law, principally in the case of *QAAH* (n 48), see O'Sullivan (n 48) 59–70.

[68] The difference between the change of circumstances that would lead UNHCR to 'actively pursue the promotion of [voluntary repatriation]' as per paragraph (e) of ExCom Conclusion No 40 and that required to instead invoke Cessation is also unclear: UNHCR Executive Committee Conclusion No 40 (XXXVI) 'Voluntary Repatriation' (1985).

[69] Hathaway (n 9) 5.

[70] 'Summary Conclusions' (n 5) 549.

blurred. When discussing the possible invocation of the cessation clause for Chileans in 1994, UNHCR used successful repatriation as a proxy for 'the durable and fundamental nature of the changes that the Chilean institutions have undergone'.[71] Beyond exemplifying the lack of legal clarity about the relationship between return and cessation, this flags a point of much greater concern for refugee protection. In cases such as the Chilean one, UNHCR assesses the suitability of voluntary return, assists in encouraging and facilitating it based on this assessment, and analyses the 'success' of subsequent return movements against metrics it has designed. Based on the outcomes of this process, which it conceived, supported, and evaluated, UNHCR then decides to recommend cessation.[72] The organization's central role in every stage of this process, and its power to strongly encourage States to follow its recommended course of action (albeit in a non-binding way), suggests a short-circuit in refugee protection.[73] No one party should determine the rules of the game, compete in it, play referee, and then be entrusted to blow the final whistle.

A penultimate, related area of ambiguity is whether article 1C(5) can only be invoked if durable solutions are available. Experts have stated that, if the conditions for the clause's invocation have been met, it 'may be invoked without a durable solution having been found',[74] but that, '[a]s a guiding principle, cessation of refugee status should lead to a durable solution. It should not result in people residing in a host State with an uncertain status. Nor would cessation necessarily lead to return.'[75]

In its intervention in *Hoxha*, however, UNHCR stated that 'cessation should only be invoked where the refugee can and will, in fact, be returned to his country of origin'.[76] Drawing an explicit link between whether an individual can be repatriated and the suitability of cessation nonetheless seems unjustified, even if UNHCR is reticent to invoke cessation without solutions being available.[77] Cessation is not paired with any one durable solution, and should not be automatically associated with, nor arise from, return.[78] Once their status has been lost pursuant to article 1C(5), former refugees are indeed not protected under law by the same standards that would have previously applied to repatriation, resettlement, or naturalization.

[71] UNHCR, 'Applicability of the Cessation Clauses to Refugees from Chile' (28 March 1994) para 1.

[72] As Bakewell argues in the case of UNHCR discharging a role as both aid provider and protector, '[w]here refugees feel that their rights are being infringed in some way by the system ... they have few avenues for appeal when the very agency which is supposed to provide protection is co-ordinating the programmes they object to': Oliver Bakewell, 'Refugee Aid and Protection in Rural Africa: Working in Parallel or Cross-Purposes?' (2002) 21(1) RSQ 228, 237.

[73] Hathaway (n 9) 5–10.

[74] UNHCR (n 49) para 28.

[75] 'Summary Conclusions' (n 5) 549.

[76] UNHCR, 'UNHCR Intervention before the House of Lords in the Cases of Xhevdet Hoxha v Special Adjudicator and B v Immigration Appeal Tribunal' (5 January 2005) para 9.10(f) <www.refworld.org/docid/423ec5724.html> accessed 31 October 2018.

[77] UNHCR (n 35) para 6.

[78] In Germany, art 1C(5) is often used to cease an individual's refugee status, but leaves unaffected the residence/protection permit that enables them to stay within the country. O'Sullivan thus concludes that, in Germany, 'it appears that cessation is being used as a means of stripping away the rights of those refugees affected, rather than for the purpose of return to their country of origin': O'Sullivan (n 48) 2.

Finally, attempts to clarify what conditions must be in place to invoke article 1C(5) have raised new questions, including who counts as an 'actor of protection' in this context. This query has proven particularly contentious in the European context, where the EU Qualification Directive specifies that:

> Protection can be provided, where they are willing and able to offer protection, either by the State or by parties or organisations, including international organisations, meeting the conditions set out in this Directive, which control a region or a larger area within the territory of the State. Such protection should be effective and of a non-temporary nature.[79]

The EU Qualification Directive clarifies that these parties or organizations should, like a State, take 'reasonable steps to prevent the persecution or suffering of serious harm, inter alia, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm', and that the applicant must have 'access to such protection'.[80] In its guidance on the case of *Abdulla*, the CJEU suggested an expansion of the types of actors that fulfilled the criteria referred to in article 7(1)(b) of the Directive, noting that they 'may comprise international organisations controlling the State or a substantial part of the territory of the State, including by means of the presence of a multinational force in that territory'.[81] Rulings in the UK and France had already found this, deeming that both private and public entities, such as the Kosovo Force in Kosovo, may constitute 'actors of protection'.[82] Whether or not States require such entities to perform 'like a State' or to be mandated with specific responsibilities, such as by a UN body, varies across EU Member States,[83] and interpretations from outside the EU, notably in Canada and Australia, provide no further consistency on this point.[84]

Justifying the invocation of cessation based on protection provided by non-State entities is, however, deeply flawed. First, the meaning of 'the State' (and thus how a non-State entity will relate to it) is manifestly unclear. Does it need to be a bureaucratic apparatus that provides services, or a 'functioning government'[85] that provides 'political goods'?[86] Article 7(3) of the EU Qualification Directive describes international organizations as controlling 'a State or a substantial part of its territory'.[87] This introduces confusion as to whether non-State actors must have control over, and work through, a State's administrative functions and/or its territory, and whether the, or a, 'State' must be functional in the area controlled by these 'actors of protection'.[88] Furthermore, and

[79] EU Qualification Directive, preamble, para 26. [80] ibid art 7(2).

[81] *Abdulla* (n 60) para 76. [82] Errera (n 63) 530–5.

[83] Maria O'Sullivan, 'Acting the Part: Can Non-State Entities Provide Protection under International Refugee Law?' (2012) 24 IJRL 85, 101.

[84] O'Sullivan (n 48) 118. [85] O'Sullivan (n 83) 89. [86] O'Sullivan (n 48) 130–1.

[87] EU Qualification Directive, art 7(3).

[88] Even 'country of nationality', however, references both territorial and rights-bearing components as individuals 'return to countries of nationality', implying a territorial entity, and avail themselves of the protection of countries of nationality, rendering 'country' as also metonymic for a bureaucratic or 'functioning government'.

following Storey's work, O'Sullivan notes the shortcomings of adopting 'a very "statist" approach to protection [that] reflects western liberal democratic values of the centrality of State institutions that may not be relevant in other political contexts'.[89]

Secondly, while international actors such as a UN peace-keeping force or the International Committee of the Red Cross may establish a 'stable' presence and 'effective and available'[90] control over a territory, they are transient entities. In the European context, the Qualification Directive nonetheless specifies that refugee status can only cease in the context of 'a change of circumstances of a significant and non-temporary nature'.[91] If organizations like UNHCR can only provide temporary protection in the country of asylum, and are not bound by the same human rights laws as States are, it is inconsistent to see their presence, control, and actions in the country of origin as constituting a categorically different form of protection, particularly one that qualifies as durable and non-temporary.[92]

Thirdly, O'Sullivan uses the theoretical foundations of refugeehood to argue that the granting of refugee status is based upon the political relationship between citizens *and the State* breaking down. Protection provided by non-State actors cannot ameliorate this because 'it cannot repair the severed bond between citizen and state that was ruptured when persecution took place, when the protection of the state failed and refugeehood was established'.[93] In other words, it cannot ensure the rights and obligations attached to citizenship and nationality, which O'Sullivan argues are key to the restoration of effective protection.[94] While O'Sullivan's demand that this relationship be based on 'the consent of the governed'[95] would establish a benchmark higher than many States currently achieve, re-centring the relationship between citizen and State appears vital for realigning the interpretation of the Convention with its objects and purpose.

c. Exemption

Given that the Refugee Convention limits the 'exemption' paragraph of articles 1C(5) and (6) to article 1A(1) refugees, UNHCR and States have been progressively extending the humanitarian and legal case for this paragraph to cover those granted refugee status under article 1A(2) of the Refugee Convention and related regional instruments.[96] The UK Home Office has noted that '[a]pplication of the "compelling reasons" exception is

[89] O'Sullivan (n 48) 128.

[90] UNHCR (n 35) para 15.

[91] EU Qualification Directive, art 11(2).

[92] Any transition of power away from non-State entities to other actors may also create volatile conditions. For further discussion of the protection that non-State armed groups can provide, see Chapter 63 in this volume.

[93] O'Sullivan (n 83) 102.

[94] O'Sullivan (n 48) 107–8, 117.

[95] O'Sullivan (n 83) 102.

[96] In the case of the OAU Convention, UNHCR has argued that, although it does not contain this provision, 'this phrase should be read as subsumed within Article 4(e) of the OAU Convention' given that 'the OAU Convention complements the 1951 Convention and the close connection between the purposes of the African Union and the United Nations are recognized': UNHCR, 'Guidelines on Exemption Procedures in respect of Cessation Declarations' (December 2011) 4 fn 7.

interpreted to extend beyond the actual words of the provision to apply to Article 1A(2) refugees and reflects a general humanitarian principle'.[97] The EU Qualification Directive similarly extends the exemption provisions to all refugees affected by its two 'ceased circumstances' cessation clauses.[98] However, whether exemption should be made available to all refugees, either because it is customary international law,[99] or so that the Refugee Convention is aligned with UNHCR's statute, remains disputed,[100] as does what the outcome of the application of exemption should be,[101] given States and UNHCR would wish administratively costly cessation proceedings to translate into a reduction in the number of refugees requiring protection.

Efforts have also been made to expand the grounds on which individuals can claim exemption beyond 'compelling reasons arising out of previous persecution',[102] such as physical and psychological trauma, and towards 'integrative factors', such as length of stay and family ties.[103] UNHCR has drawn upon the notions of 'acquired rights' and 'legitimate expectations' to assert that social, economic, cultural, and professional ties should be given consideration in exemption decisions. It has argued that refugee status is not just declarative of a status and way of life, but is 'also constitutive of rights' around and upon which refugees build a life and that 'must be respected by States pursuant to the doctrine of acquired rights'.[104] Further to this, UNHCR has introduced the concept of 'legitimate expectations' to refer to refugees' sense that they will not be arbitrarily deprived of a status that they had not expected to lose. At the very least, it is argued that this should encourage States to provide them with alternative residency statuses or pathways to legal citizenship.[105]

These unresolved legal debates aside, the application and implementation of article 1C(5) ultimately rests more on politics than law. In the related context of withdrawing temporary protection, Fitzpatrick and Bonoan wrote in 2001 that: 'In recent practice, individual States have withdrawn temporary protection at different times, creating an impression that the assessment process is not determined by objective criteria.'[106]

[97] Home Office, 'Asylum Policy Instruction: Revocation of Refugee Status—Version 4.0' (19 January 2016) 26 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/493918/revocation_of_refugee_status_v4_0_EXT.pdf> accessed 3 November 2019.

[98] EU Qualification Directive, art 11(3).

[99] See O'Sullivan (n 48) 156–7.

[100] For an extensive discussion of legal issues on the scope of exemption, see Hathaway and Foster (n 14) 491–4.

[101] Kneebone and O'Sullivan (n 13) paras 206–9.

[102] O'Sullivan (n 48) devotes chapter six of her book to arguing that the impacts of 'previous persecution' must be understood in broader terms than the narrow view taken by current jurisprudence.

[103] O'Sullivan (n 48) 163.

[104] UNHCR (n 7) para 15(iii).

[105] O'Sullivan (n 48) 173; O'Sullivan's argument on this point is nonetheless confusing. She states that 'the cessation clauses pursue a legitimate aim—to return persons who are no longer refugees back to their country of origin': 190. As such, she wrongly collapses the cessation of refugee status and return into one act, despite there being no automatic relationship between the two, in order to use this as an argument *against* 'ceasing the status of refugees who have been resident in an asylum host State for significant periods of time', rather than arguing *for* the granting of citizenship, permanent residency, or complementary protection.

[106] Joan Fitzpatrick and Rafael Bonoan, 'Cessation of Refugee Protection' in Feller, Türk, and Nicholson (n 5) 522.

Striving for 'objectivity' in terms of assessment criteria, decision-making, and implementation is, however, an unattainable task. The financial costs and benefits of hosting refugees, the desire to expedite their repatriation in order to put a 'seal of approval' on new governing regimes, and the oscillating political pros and cons of supporting cessation all influence how the process plays out.[107] Hosting and receiving refugees has a political economy, and the 'ceased circumstances' cessation clause is an inextricable part of this.

4. The 'Ceased Circumstances' Cessation Clauses in Relation to Stateless Persons

Several features of the relationship between paragraphs 1C(5) and (6)[108] and States' responsibilities under the Convention on the Reduction of Statelessness[109] warrant consideration, though they are touched upon only briefly here. The first concerns refugees who lost their nationality upon becoming displaced, and who are unwilling or unable to re-acquire it upon return. Fitzpatrick cautioned that all decisions about article 1C(6) should be undertaken with a view to preventing these individuals' statuses from becoming 'undesirably irregular', such as through specifying that 'cessation under Article 1C(6) may not be followed by repatriation if a stateless refugee refuses to comply with the administrative protocol for re-acquisition of the nationality of the State of origin'.[110] UNHCR has also cautioned against the invocation of a cessation clause if this would lead to statelessness.[111]

Fitzpatrick's analysis nonetheless failed to account for a second situation involving individuals who were stateless in the country of former habitual residence prior to displacement, and thus have no nationality to re-acquire. In UNHCR's recommendation that article 1C(5) be applied to Romanian and Bulgarian refugees in 1997, it noted the dangers of returning those without documentation to Romania, and cautioned against the return of stateless individuals until 'the nationality issue [is] resolved with the

[107] See Yasmeen Siddiqui, 'Reviewing the Application of the Cessation Clause of the 1951 Convention Relating to the Status of Refugees in Africa' (Refugee Studies Centre Working Paper Series No 76, 2011).

[108] It is worth noting that the OAU Convention has no equivalent of art 1C(6). Its article on cessation instead contains two paragraphs similar to the exclusion clauses of the Refugee Convention (subparagraphs 1(4)(f) and (g)), which numerous commentators protest 'is not consistent with the function of cessation clauses': Kneebone and O'Sullivan (n 13) para 93.

[109] Convention on the Reduction of Statelessness (adopted 30 August 1961, entered into force 13 December 1975) 989 UNTS 175 (Statelessness Convention).

[110] Fitzpatrick (n 8) para 28; Fitzpatrick nonetheless went on to state that, 'where a refugee refuses to re-acquire a lost nationality, but the state of origin will accept his return and persecutory risks have been eliminated, cessation under Article 1C(6) might be imposed': para 29.

[111] UNHCR, 'Applicability of the "Ceased Circumstances" Cessation Clauses to Pre-1991 Refugees from Ethiopia' (23 September 1999) para 6.

Romanian authorities'.[112] A State that cancels the status of a refugee who is stateless, and returns those individuals to their country of former habitual residence, could be failing to uphold its responsibilities under the Statelessness Convention.

5. Future Applications

The use of article 1C, and particularly article 1C(5), may well increase in future years in line with 'an increased interest in utilising cessation as a mechanism to compel refugees to return to their country of origin'.[113] This has already resulted in trends towards 'partial cessation',[114] as applied by the Norwegian government to Somalis originating from Mogadishu specifically;[115] time-bound cessation, as applied by several countries of asylum to Rwandan refugees who fled the country between 1959 and 1998; and the application of the 'ceased circumstances' cessation clauses to individual cases as well as groups.[116] Alongside monitoring the legality of these developments, the relationship between the cessation clauses and both complementary protection and temporary protection requires further clarification.[117] In particular, lawyers must resist States' attempts to use the possibility of invoking article 1C(5) *in the future* to justify temporary protection statuses *now*, and the move by asylum States to use the previous invocation of article 1C(5) to justify their refusal to grant status to individuals from that State under article 1A(2).[118]

112 UNHCR (n 39) para 7.

113 O'Sullivan (n 48) 1.

114 O'Sullivan argues strongly against this territorially circumscribed application of cessation through a comparison with the internal flight alternative, and by using UNHCR's guidance on internal relocation: see ibid 96–7, 86, respectively. For a discussion on the internal flight/protection alternative, see Chapter 38 in this volume.

115 N1729590817 [2017] Norwegian Immigration Appeals Board, Grand Board; see further Utlendingsnemnd UNE, 'Grand Baord [sic]: Cessation of Refugee Status and Revocation of Temporary Residence Permits' (2 October 2017) <https://www.une.no/en/sources/stornemndavgjorelser/stornemnd—opphor-av-flyktningstatus> accessed 3 November 2019.

116 Kneebone and O'Sullivan (n 13) para 216.

117 O'Sullivan (n 48) 195–6.

118 The French government, for example, has channelled asylum seekers from States that have been subject to a declaration of cessation towards accelerated determination procedures without adequate safeguards: Fitzpatrick and Bonoan (n 106) 531 fn 171.

CHAPTER 58

REFUGEE NATURALIZATION AND INTEGRATION

FATIMA KHAN AND REUVEN (RUVI) ZIEGLER

1. Naturalization and Integration in Context

Article 34 of the Refugee Convention postulates that States '*shall as far as possible facilitate* the *assimilation* and *naturalization* of refugees. They shall, in particular, make every effort to *expedite* naturalization *proceedings* and to *reduce as far as possible* the *charges and costs* of such proceedings' (emphasis added). While the provision does not require host countries to naturalize refugees, it favours integration therein through its 'time and ties' approach to the incremental acquisition of rights. Moreover, while voluntary repatriation triggers cessation of refugee status,[1] (involuntary) expulsion and *refoulement* are generally proscribed.[2]

In 2005, UNHCR recommended that host countries provide a 'progressively wider range of rights and entitlements that are broadly commensurate with those enjoyed by its citizens and, over time, the possibility of naturalising'.[3] Whereas it is too early to appraise the impact that the Global Compact on Refugees[4] may have on refugee protec-

[1] Refugee Convention, art 1C(4). See Vincent Chetail, 'Voluntary Repatriation' (2004) 23(3) RSQ 11 (arguing that '[t]he continued emphasis upon voluntary repatriation by the General Assembly contributes to create a growing discrepancy between the institutional responsibilities of UNHCR and the legal framework provided for in the Refugee Convention').

[2] Article 32 of the Refugee Convention bars expulsion of refugees except for exceptional circumstances; art 33 lays down the fundamental principle of *non-refoulement*.

[3] UNHCR Executive Committee (ExCom) Conclusion No 104 (LVI), 'Local Integration' (2005).

[4] The Global Compact on Refugees was adopted on 13 November 2018 by 176 affirmative votes, one against (US), three abstentions (Eritrea, Liberia, and Libya), and 13 abstentions.

tion, not least given its non-binding nature, its timid reference to the prospects of host countries 'providing durable legal status and naturalization' as 'useful'[5] is noteworthy. The Compact posits that 'local integration is a sovereign decision and an option to be exercised by host countries, guided by their treaty obligations and human rights principles'[6] and omits naturalization and 'local' integration from its list of objectives.[7] In this respect, it reflects contemporary reluctance to bolster obligations in this area.

Access to host country citizenship is *the* route to full permanent political membership, bringing an end to indefinite transience, as reflected by the fact that it brings cessation of refugee status, pursuant to article 1C(3) of the Refugee Convention. Indeed, rather than local integration, it is naturalization, coupled with effective[8] State protection,[9] that constitutes a 'durable solution' on a par with resettlement and repatriation.[10] As Grahl-Madsen notes, the situation of refugees is 'abnormal and should not be regarded as permanent';[11] thus conceived, naturalization may rectify an 'anomaly'.[12]

Consistent with UNHCR's long-standing articulation, the Global Compact on Refugees refers to the Refugee Convention as 'the foundation of the international refugee protection regime'.[13] However, it refrains even from recommending ease of access to naturalization, as is arguably mandated by article 34.[14] There is no ranking or prioritization of 'durable' solutions in the Convention,[15] but the Global Compact prioritizes (voluntary) repatriation, and *de-emphasize*s the significance of acquiring host State

[5] Global Compact on Refugees, para 97. [6] ibid.

[7] ibid para 7 ('The objectives of the global compact as a whole are to: (i) ease pressures on host countries; (ii) enhance refugee self-reliance; (iii) expand access to third country solutions; (iv) support conditions in countries of origin for return in safety and dignity').

[8] For discussion, see Cathryn Costello, 'On Refugeehood and Citizenship' in Ayelet Shachar, Rainer Bauböck, Irene Bloemraad, and Maarten Vink (eds), *The Oxford Handbook of Citizenship* (OUP 2017) 717, 720. Refugees holding their country of origin's nationality are sometimes referred to in the literature as '*de facto* stateless'. See eg Carol A Batchelor, 'Statelessness and the Problem of Resolving Nationality Status' (1998) 10 IJRL 156, 172.

[9] See James C Hathaway and Michelle Foster, *The Law of Refugee Status* (2nd edn, CUP 2014) 462.

[10] See eg the reference in the Global Compact on Refugees, para 85 to 'the three traditional durable solutions of voluntary repatriation, resettlement and local integration'. See also David Weissbrodt, *The Human Rights of Non-Citizens* (OUP 2008) 168.

[11] Atle Grahl-Madsen, *Commentary on the Refugee Convention 1951 (Articles 2–11, 13–37)* (UNHCR 1997) 247.

[12] See eg Emma Haddad, *The Refugee In International Society: Between Sovereigns* (CUP 2008); see also the classic stipulation in the *Nottebohm Case* (*Liechtenstein v Guatemala*) (Second Phase) [1955] ICJ Rep 4, 23 that 'nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interest and sentiments, together with the existence of reciprocal rights and duties'.

[13] Global Compact on Refugees, para 65.

[14] cf '*Model International Mobility Convention*', according to which refugees and other forced migrants are ineligible to form political associations and, unlike other migrants, are not granted a 'right to citizenship after a specified period of legal residence in the country not exceeding ten years': Global Policy Initiative Columbia University, 'Model International Mobility Convention' (2017). <https://mobilityconvention.columbia.edu/sites/default/files/content/pdf/mimc_document_web.pdf> accessed 13 October 2020.

[15] See UNHCR, 'Solutions' <https://www.unhcr.org/solutions.html> accessed 13 October 2020.

citizenship, while seemingly adding a fourth (non-durable) 'solution' to the arsenal, entitled 'other local solutions'. This approach may represent a pragmatic acknowledgement of a reality in which naturalization of refugees and those in protracted situations is generally unavailable in many host countries.[16] Naturalization practices vary significantly even across the Contracting States to the Refugee Convention (irrespective of whether they have formally entered reservations thereto), evincing a strong Global North/Global South divide.

Practices further diverge regarding the content of 'integration' and related naturalization requirements. Here, terminology plays an important role: while article 34 of the Refugee Convention refers to 'assimilation', contemporary sources (regional instruments, policy documents, UNHCR) nearly uniformly refer to 'integration'. Does this linguistic transformation from assimilation to integration matter, given the clarifications sought and offered regarding the former in the *travaux préparatoires*?

The shift away from naturalization is coupled with an endorsement of economically 'self-reliant' refugees, aiming to facilitate meaningful livelihoods for refugees in host countries: a form of 'social citizenship', absent a secure and permanent legal status. UNHCR notes that self-reliance is 'not a durable solution in itself' but 'can be a precursor to any of the three durable solutions'.[17] *Prima facie*, the notion of refugee 'self-reliance' redefines the host country's role: from guarantor of rights to facilitator of refugee activities. Moreover, as self-reliant refugees 'contribute to the sustainable social and economic development',[18] the host country is also a potential beneficiary of their presence. Yet, it is the host country that controls access to vital components of self-reliance and effective 'local' integration. Given voluntary repatriation is cast by UNHCR as the 'preferred solution in the majority of refugee situations',[19] with no designated temporal limit for reversing this presumption, host countries are arguably being sent ambivalent messages about refugee integration, which may affect their policies.

This ambivalence is reflected in State practice on both freedom of movement and political participation rights. Intra-State freedom of movement is 'an indispensable condition for the free development of a person'.[20] Not only does article 26 of the Refugee Convention, coupled with article 12 of the ICCPR, require host countries to ensure it—but the absence of such freedom of movement significantly affects

[16] UNHCR currently estimates that 78 per cent of refugees are in protracted situations, that is, displaced for more than five years. UNHCR, 'Global Trends: Forced Displacement in 2018' <https://www.unhcr.org/statistics/unhcrstats/5d08d7ee7/unhcr-global-trends-2018.html> accessed 13 October 2020; see also UNHCR, 'Ending Statelessness' <https://www.unhcr.org/ending-statelessness.html> accessed 13 October 2020. For interrelations between statelessness and refugeehood see Chapter 44 in this volume.

[17] 'Self-reliance' has long featured in UNHCR documents. See ExCom, 'Local Integration and Self-Reliance', EC/55/SC/CRP.15 (2 June 2005) para 8.

[18] ibid para 9. [19] Global Compact on Refugees, para 87.

[20] Human Rights Committee (HRC), 'General Comment No 27: Article 12 Freedom of Movement', UN doc CCPR/C/21/Rev.1/Add.9 (2 November 1999) para 1.

effective realization of other rights, most notably the right to work and social integration.[21] Yet, post-recognition, assigned residence and encampment policies are common in both the Global South and the Global North. Refugees' rights to political participation, both formal (membership of or other forms of association with political parties, and electoral rights)[22] and informal (including involvement in consultative bodies, civil society organizations, protests and grassroots initiatives, and other means of political activism) are widely limited.[23] While the Global Compact recommends inclusion in informal contexts,[24] it remains silent on formal political inclusion.[25]

In contradistinction, while exile effectively excludes refugees, symbolically and physically, from participation in the political life of their country of origin,[26] there appears to be (renewed) interest in facilitating refugee participation in the electoral processes of such countries.[27] Now, refugees' normative claim to be included in the political life of a country that directly threatened or failed to guarantee their fundamental rights is strong—indeed, arguably stronger than other categories of migrants who voluntarily emigrate. Nevertheless, when international bodies, including UNHCR, are involved in enabling and facilitating such participation, and when host countries acquiesce to such processes,[28] they are locating the refugee as a political being vis-à-vis their country of origin. Legally and normatively, participation in country of origin and host country electoral processes need not be conceived of as mutually exclusive; nevertheless, the international community's pivoting towards facilitation of out-of-country voting is instructive.

Section 2 considers the rights/citizenship conundrum facing refugees. Section 3 frames the international law discussion around refugee naturalization. Section 4 appraises the global divide regarding naturalization practices. Section 5 addresses (local) integration and its challenges. Section 6 offers concluding thoughts on ways to address existing shortcomings.

[21] See Chapter 53 in this volume.

[22] Ruvi Ziegler, *Voting Rights of Refugees* (CUP 2017) ch 8; International Institute for Democracy and Electoral Assistance, *Political Participation of Refugees: Bridiging the Gaps* (2018) (IDEA).

[23] See GLOBALCIT, 'Conditions for Electoral Rights' (including in respect of non-citizen residents) <http://globalcit.eu/conditions-for-electoral-rights/> accessed 13 October 2020.

[24] Global Compact on Refugees, para 99.

[25] For a case for refugees' electoral inclusion in their host countries, see Ziegler (n 22) ch 8.

[26] ibid ch 6; challenges arising in respect of refugee Out-of-Country Voting, including risk of premature cessation, as per art 1C(1),(5) of the Refugee Convention (see Chapter 57 in this volume). See also IDEA (n 22) 74 (cases of *de jure* and *de facto* exclusion of refugees *qua* out-of-country voters).

[27] Geoff Gilbert, 'Political Participation of Refugees in Their Country of Nationality' (UNHCR November 2018) <https://www.refworld.org/docid/5beaf3dc7.html> accessed 13 October 2020 (considering the role of UNHCR).

[28] Refugees are often reluctant to politically engage with their country of origin as it may be perceived by host countries as re-availment of protection. See also OAU Convention, art III (prohibiting 'subversive activities' undertaken by refugees, including 'any activity likely to cause tension between Member States').

2. The Rights/Citizenship Conundrum: Does Naturalization Matter to Refugees?

Most human rights apply to 'everyone'[29] within a State's jurisdiction, including refugees.[30] In international human rights law (IHRL), exceptions to non-discrimination between citizens and non-citizens in relation to internationally recognized human rights pertain to two main areas.[31] First, as Bosniak argues, citizens have an unqualified right to territorial security in their country of citizenship: they may not be expelled, and if they exit, they have the right to re-enter.[32] This right is not generally extended to non-citizens. Secondly, whereas citizens have a prima facie right to vote in elections of their countries of nationality, neither IHRL nor international refugee law require enfranchisement of non-citizens. In many refugee-hosting countries, other significant rights, notably intra-State freedom of movement and access to employment, are also contingent on holding that country's citizenship. In other instances, refugees may perceive citizenship as a necessary step for ensuring a sense of belonging and safeguarding *de facto* integration.[33]

The general vulnerabilities experienced by non-citizens on account of their alienage from the political community of their country of origin are compounded for refugees due to the circumstances that led to their departure from their country of origin, and the indeterminacy of their stay in the host country.[34] Accordingly, for refugees, citizenship

[29] HRC, 'General Comment No 15: Rights of Aliens under the Convention', UN doc HRI/GEN/1/Rev.1(11 April 1986) para 1.

[30] Note art 5 of the Refugee Convention, according to which '[n]othing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention'.

[31] Note art 2(3) of the ICESCR, which stipulates that 'developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals'. For interrelations between international refugee law and IHRL, see Chapter 11 in this volume.

[32] Linda Bosniak, 'Status Non-Citizens' in Shachar, Bauböck, Bloemraad, and Vink (n 8) 326. While rejecting Hannah Arendt's stipulation in *The Origins of Totalitarianism* (Harcourt 1968) 296 that citizenship manifests 'the right to have rights', Bosniak notes that '[w]hatever other rights and protections an individual possesses, these are held contingent on the non-exercise of expulsion power' (328). Note, however, art 12(4) of the ICCPR which protects individuals' right to enter their 'own country', and has been interpreted by the HRC as broader than 'country of nationality', and 'might embrace other categories of long-term residents': HRC (n 20) para 20.

[33] See eg Amelia Kuch, 'Naturalization of Burundian Refugees in Tanzania: The Debates on Local Integration and the Meaning of Citizenship Revisited' (2016) 30(3) JRS 468, 484. See also Katy Long, *The Point of No Return: Refugees, Rights, and Repatriation* (OUP 2013). More generally, see David Weissbrodt and Michael Divine, 'Unequal Access to Human Rights: The Categories of Noncitizenship' in Katherine Tonkiss (ed), *Theorising Noncitizenship* (Routledge 2016) 34 (citizenship is a 'de facto gate keeper to the enjoyment of other derivative rights').

[34] Ziegler (n 22) 197.

can be instrumentally significant, notwithstanding the considerable costs of acquiring it, which may include having to forgo the citizenship of their country of origin[35] Yet, oftentimes, refugees are either not offered pathways to host country naturalization or must meet naturalization conditions that are as demanding as, or more onerous than, those generally imposed on other non-citizens.[36] Refugees may therefore be adversely affected by a reality of citizenship-contingent rights, coupled with limited access to host State citizenship.

We contend that many host countries consider naturalization to be challenging precisely because it brings the refugee into their political community,[37] whereas they may view refugees' presence as non-permanent and contest the legitimacy of their stakeholding.[38] This may, in turn, affect host countries' willingness to integrate refugees fully. Therefore, absent naturalization, the limits of local integration encompassing 'self-reliance' and a form of 'social citizenship' must be acknowledged.

3. Naturalization: Past and Contemporary Challenges

a. The Nature of the Article 34 Obligation

Brubaker defines citizenship as an 'international filing system, a mechanism for allocating persons to states'.[39] Yet, '[t]here is no global authority that sorts individuals into states'.[40] Indeed, nationality law has been referred to as 'the last bastion in the citadel of sovereignty'.[41] Nationality is acquired by birth on the territory (*jus soli*), through descent (*jus sanguinis*), or through naturalization.[42]

Article 34 of the Refugee Convention stipulates that host countries 'shall as far as possible' facilitate the assimilation and naturalization of refugees. The term 'shall' indicates

[35] See subsection 3(d).

[36] Naturalization requirements vary significantly across countries in the absence of global standardization. See GLOBALCIT (n 23).

[37] Notwithstanding an individualized, burden-reversing revocation process; ibid.

[38] cf Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (Basic Books 1983) 62 (arguing that, once first admissions decisions were made, there must be a pathway to naturalization, because 'the rule of citizens over non-citizens is probably the most common form of tyranny in human history').

[39] Rogers Brubaker, *Citizenship and Nationhood in France and Germany* (Harvard University Press 1992) 31.

[40] Rainer Bauböck, 'Genuine Links and Useful Passports: Evaluating Strategic Uses of Citizenship' (2019) 45 Journal of Ethnic and Migration Studies 1015, 1020.

[41] Peter Spiro, 'A New International Law of Citizenship' (2011) 105 AJIL 694, 746.

[42] Liav Orgad, 'Naturalisation' in Shachar, Bauböck, Bloemraad, and Vink (n 8) 349, 351 (further noting that 'The French word *naturel* is rooted in the Latin word *natio*, which means "birth"; naturalization, thus, means to make a person like a natural-born citizen' (339)). The Oxford English Dictionary (2015) defines naturalization as 'the admittance of a foreigner to the citizenship of a country'.

a requirement to act, and the (non-exhaustive)[43] examples provided—make 'every effort' to *expedite* naturalization proceedings and reduce their cost—present an expectation that, if naturalization is available for other non-citizens, naturalization conditions for refugees will be *more* favourable,[44] especially in respect of the length of residence required, the cost involved in the application process, and the procedural requirements attached thereto.[45]

In light of article 34, a host country that offers non-citizens pathways to naturalization should make them available to refugees[46] on a *non-discriminatory* basis, providing them with the necessary information on the regulations and procedures in force.[47] It is less clear whether a country that generally does not naturalize non-citizens must make an exception for refugees.[48] Grahl-Madsen claims that a host country 'cannot be compelled to grant its nationality, even after a long waiting period, to a refugee settled in its territory since naturalization confers on the naturalized citizen a series of privileges including political rights'.[49] He nevertheless concedes that '[i]f . . . a contracting state outright fails to allow any refugee to be assimilated or naturalized and is not able to show any other reason than unwillingness, the other contracting states may have a ground for complaint'.[50]

b. Forced/Semi-forced Naturalization?

Refugees ought not to be forced to naturalize. As the *travaux préparatoires* note, even long-term refugees 'may remain fundamentally attached to [their] country of origin and cherish the hope of returning . . . Nationality should not be imposed on a refugee in violence to his inmost feelings'; the Israeli representative argued that, citizenship 'if it were not voluntary . . . would be an attack upon the spiritual independence of the refugee'.[51] Refugees may resist naturalization if their country of origin is likely to denationalize

[43] Grahl-Madsen (n 11) 247.
[44] For plural citizenship, see sub-section (d).
[45] For an overview of existing naturalization conditions globally, see GLOBALCIT (n 23). Other common naturalization conditions include age, language, citizenship tests, 'good character', and 'no recourse to public funds'.
[46] cf Reinhard Marx, 'Article 34 (Naturalisation/Naturalisation)' in Andreas Zimmermann (ed), *The 1951 Convention relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (OUP 2011) 1441, 1452 (arguing that it is incumbent upon host countries, at the very least, to provide a good faith justification for the formal or *de facto* exclusion of refugees from naturalization proceedings).
[47] UNHCR, 'Positive Steps Forward in the Field of Citizenship' (2006).
[48] But see Maria O'Sullivan, *Refugee Law and the Durability of Protection* (Routledge 2019) ch 2 (arguing that temporary protection visas and time-limited residence permits for refugees, which may prevent assimilation and naturalization of refugees, conflict with the article 34 obligation). The broader question is whether offering no pathway to naturalization, including for long-term residents, is compatible with human rights obligations. See also María-Teresa Gil-Bazo, 'Refugee Protection under International Human Rights Law: From Non-Refoulement to Residence and Citizenship' (2015) 34(1) RSQ 11.
[49] Grahl-Madsen (n 11) 245.
[50] Atle Grahl-Madsen, *The Status of Refugees in International Law*, vol 1 (AW Sijthoff 1966) 246.
[51] Quoted in Hathaway and Foster (n 9) 497.

them upon receipt of host country citizenship.[52] Notwithstanding such risks, refugees may not wish to fully—and permanently—associate themselves with the political community of their host country.

The question then arises whether host countries (can) engage in semi-forced naturalization practices. We contend that conditioning enjoyment of rights on the acquisition of host country citizenship may amount to coercion, especially with respect to refugees. The proposition that, after a certain period, refugees can be made to choose between naturalization and cessation of refugee status should be rejected: an offer of naturalization should not be used as a litmus test for refugees' legitimate protection needs, nor used to provide or deny rights.

c. Assimilation

Article 34 requires host countries to facilitate *assimilation*, making no reference to the term 'integration', the preferred term in contemporary legal and political discourse. In their worst form, assimilationist policies entail extreme pressure on minorities, including refugees, to relinquish their culture and adopt the host country's culture in order to ensure a homogeneous national identity.[53] Integration, in contrast, allows for cultural differences and occurs when different groups in society can coexist as equals.[54] Refugees must, of course, 'conform' to the host country's 'laws and regulations as well as to measures taken for the maintenance of public order'.[55] But this does not mean that their rights there are contingent on forgoing their own identity, culture, and practices.

During the drafting of the Convention, the Israeli representative submitted that assimilation was a term 'well-known in sociology [that] bore an unpleasant connotation vaguely related to the use of force'.[56] 'If assimilation was not voluntary', he intimated, 'it would be an attack on the spiritual independence of the refugee'.[57] He proposed instead to use 'adaptation' or 'adjustment'.[58] Alas, assimilation was retained, notwithstanding assurances that it should be understood in the sense of integration into the economic, social, and cultural life of the host community *without* forcing refugees to forsake their own culture and way of life.[59] It is noteworthy that the term

[52] See sub-section (e).

[53] Susan K Brown and Frank D Bean, 'Assimilation Models, Old and New: Explaining a Long-Term Process' (2006) <http://www.migrationpolicy.org/article/assimilation-models-old-and-new-explaining-long-term-process> accessed 13 October 2020.

[54] Tom Kuhlman, 'The Economic Integration of Refugees in Developing Countries: A Research Model' (1991) 4(1) JRS 1, 3.

[55] Refugee Convention, art 2.

[56] *The Refugee Convention, 1951: The Travaux Préparatoires Analysed with a Commentary by Dr Paul Weis* (UNHCR 1990) 344.

[57] ibid.

[58] See Ad Hoc Committee on Refugees and Stateless Persons, 'Summary Record of the Thirty-Ninth Meeting' (21 August 1950), UN doc E/AC.32/SR.39, 28.

[59] See Brown and Bean (n 53).

'assimilation' has virtually vanished from instruments and policy documents pertaining to treatment of refugees in host countries.[60]

d. Plural Citizenship

Times have changed since the 1930 Convention on Certain Questions relating to the Conflict of Nationality (in)famously proclaimed that persons should only have one nationality.[61] Today, three-quarters of countries tolerate plural citizenship and do not require those born with more than one citizenship to choose between them.[62] Yet, much of the Global South still rejects plural citizenship.[63] In such countries, refugees wishing to naturalize while also retaining their country of origin's citizenship face a double challenge: both their host country and their country of origin must tolerate plural citizenship. Refugees may worry that forgoing their country of origin's citizenship would affect citizenship-contingent rights, including their right to return. Notwithstanding broader justifications for embracing plural citizenship,[64] it is contended that host countries that generally do not allow it should exempt refugees from the requirement to renounce their country of origin's citizenship.[65] Yet, even if they were to do so, host countries are unable to control the policies of the refugee's country of origin; 'a hard, universal rule requiring acceptance of dual citizenship is not an immediate prospect'.[66]

Ironically, if either host countries or countries of origin do not permit plural citizenship and a refugee naturalizes in the host country, the likelihood of return may *decrease*—arguably an incentive for host countries to tolerate plural citizenship. When host countries are members of supranational organizations, such as the EU or Mercosur, acquiring their citizenship brings about derivative benefits for refugees.[67]

[60] See eg ExCom Conclusion No 104 (n 3).

[61] Convention on Certain Questions relating to the Conflict of Nationality (adopted 12 April 1930, entered into force 1 July 1937) 179 LNTS 89.

[62] Peter Spiro, 'Multiple Citizenship' in Shachar, Bauböck, Bloemraad, and Vink (n 8) 621, 622; The trend is most pronounced in the Americas, Oceania, and Europe, with diminishing holdouts. See Maarten Vink, Arjan H Schakel, David Reichel, Ngo Chun Luk, and Gerard-René de Groot, 'The International Diffusion of Expatriate Dual Citizenship' (2019) 7 Migration Studies 362.

[63] Peter Spiro, 'Multiple Citizenship' in Shachar, Bauböck, Bloemraad, and Vink (n 8) 630–1.

[64] See generally Peter J Spiro, *At Home in Two Countries* (NYU Press 2016). Notably, normative challenges arising from the instrumentalization of plural citizenship acquisition (eg investor citizenship) do not ordinarily arise in respect of refugees, whose need for effective citizenship is acute. See Ayelet Shachar, 'Citizenship for Sale?' in Shachar, Bauböck, Bloemraad, and Vink (n 8) 789.

[65] This is indeed the policy of countries such as Austria, Bulgaria, Finland, Germany, Spain, and Switzerland: GLOBALCIT (n 23).

[66] Spiro (n 64) 130.

[67] See eg Rainer Bauböck, 'Political Membership and Democratic Boundaries' in Shachar, Bauböck, Bloemraad, and Vink (n 8) 60, 69 (referring to the derivative benefits of EU citizenship); Mercosur, 'Agreement on Residence for Mercosur Member States' Nationals' (6 December 2002) (unofficial translation).

e. Intergenerational Refugeehood and Statelessness

For children born to refugees, there is often a real risk of statelessness. If a refugee child is born to stateless parents and/or does not receive the citizenship of at least one of their parents (*jus sanguinis*), to avoid statelessness, *jus soli* (law of the soil) must apply. This usually entails citizenship at birth and/or naturalization upon reaching adulthood, potentially subject to residence criteria. The 75 States parties to the Convention on the Reduction of Statelessness[68] undertake in article 1 thereof to grant 'nationality to a person born in its territory who would otherwise be stateless'; yet, many host countries are not internationally committed to preventing statelessness for refugee children; their citizenship policies have alarming results, particularly in the Middle East, where statelessness is pervasive.[69]

4. Naturalization: Global North–Global South Divergences

a. Regional Instruments, Reservations to Article 34, and State Practice

Regional practices diverge significantly on the question of refugee naturalization. In 2005, UNHCR drew a distinction between 'industrialized States with developed asylum systems' where 'local integration is the predominant durable solution for recognized refugees', and (implicitly) all others.[70] By and large, there is a strong correlation between world regions where most refugees are hosted (due in no small part to expansive refugee definitions),[71] coupled with non-rejection policies,[72] and those regions where refugees are least likely to be offered their host State's citizenship (and be able to accept such an offer without having to forgo their country of origin's citizenship).

The Global Compact on Refugees notes that 'regional frameworks which may complement national laws in offering pathways to durable legal status or naturalization for refugees will be explored, where appropriate'.[73] Alas, there is no reference to *integration* or to *naturalization* in the main Global South regional instruments, namely the OAU Convention, the Cartagena Declaration, or the Bangkok Principles.[74]

[68] Convention on the Reduction of Statelessness (adopted 30 August 1961, entered into force 13 December 1975) 989 UNTS 175.

[69] See Chapter 8 in this volume.

[70] ExCom (n 17) para 17.

[71] For discussion of the OAU Convention and Cartagena Declaration's refugee definitions, see Chapters 15, 17, and 34 in this volume.

[72] See eg Bonaventure Rutinwa, 'The Tanzanian Government's Response to the Rwandan Emergency' (1996) 9(3) JRS 291.

[73] Global Compact on Refugees, para 99.

[74] Bangkok Principles on the Status and Treatment of Refugees (31 December 1966) (reaffirmed 24 June 2001, New Delhi).

In the EU, while article 34 of the Qualification Directive (recast) is arguably more detailed in respect of integration than article 34 of the Refugee Convention, it does not explicitly reference *naturalization*. Recital 47 of the Directive's preamble states that '[t]he specific needs and particularities of the situation of beneficiaries of refugee status and of subsidiary protection status should be taken into account, as far as possible, in the integration programmes provided to them including, where appropriate, language training and the provision of information concerning individual rights and obligations relating to their protection status in the Member State concerned'. However, a 2012 UNHCR report[75] notes that existing EU-level reports and policy documents do not differentiate between different types of migrants, beyond distinguishing between second country nationals (citizens of other EU countries) and third country nationals, and refugee integration is generally mainstreamed in immigration policies for the latter.[76]

States parties to the European Convention on Nationality[77] undertake in article 6(4)(g) to facilitate the acquisition of their nationality by 'stateless persons and recognised refugees lawfully and habitually resident on its territory'. Article 16 maintains that a State should not make 'the renunciation or loss of another nationality . . . a condition for the acquisition or retention of its nationality where such renunciation or loss is not possible or cannot reasonably be required'. The Explanatory Report notes that 'refugees cannot generally be expected to return to their country of origin or to request their diplomatic or consular representation to renounce or to obtain their release from their nationality'.[78]

In Africa, Botswana, Malawi, and Mozambique have made reservations to article 34 of the Refugee Convention,[79] stating that they are not bound to 'grant to refugees any more favourable naturalization facilities' than to 'aliens in general'.[80] In other African countries that have not made reservations (including Angola, Ghana, Guinea Bissau, Lesotho, Mozambique, and South Africa), the naturalization process is often more cumbersome than for other non-citizens, contrary to the spirit of article 34.[81] Legislation in large-scale refugee-hosting countries such as Kenya[82] and Tanzania[83] does not regulate their naturalization.

[75] UNHCR, 'A New Beginning: Refugee Integration in Europe' (September 2013) <https://www.unhcr.org/52403d389.pdf> accessed 13 October 2020.

[76] Such reports also do not appraise how the asylum process affects refugees' integration.

[77] European Convention on Nationality (adopted 6 November 1997, entered into force 1 March 2000) ETS 166.

[78] Council of Europe, 'Explanatory Report: European Convention on Nationality' (6 November 1997) para 99.

[79] See the list of reservations: <https://treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-2&chapter=5&Temp=mtdsg2> accessed 13 October 2020.

[80] See also Bronwen Manby, *Citizenship Law in Africa: A Comparative Study* (African Minds 2016) 128.

[81] ibid. In South Africa, the Refugees Amendment Act No 11 (2017) doubled from five to ten years the required residence period for recognized refugees before they could apply for certification of their refugee status (required for application for permanent residence). The Department of Home Affairs, 'White Paper on International Migration' (2017) 43 describes refugee status as 'inherently temporary' and 'the granting of citizenship to foreign nationals' as 'exceptional'.

[82] Kenyan Refugees Act No 13 (2006).

[83] Tanzanian Refugees Act (1998).

Indeed, instances of refugee naturalization in Africa are few and far between and have often been based on policy directives rather than legislation. Tanzania's decision to offer a pathway to naturalization to 160,000 Burundians who resided in the country since 1972 is a case in point.[84] According to Manby, '[i]t is indicative of the difficulty of naturalization that there are almost no published statistics about the numbers naturalized in most African countries',[85] leading her to posit that 'the process of bringing naturalization procedures within the frame of human rights, legitimate expectation and due process has not begun in African States (with some very few and limited exceptions)'.[86]

In the Americas, only two countries have made reservations to article 34: Honduras noted that it 'shall not be obligated to guarantee refugees more favourable naturalization facilities than those ordinarily granted to aliens in accordance with the laws of the country', while Chile states that it is unable to 'grant to refugees facilities greater that those granted to aliens in general, in view of the liberal nature of Chilean naturalization laws'.[87] Acosta argues that naturalization practices in South America reveal more favourable conditions towards citizens of other countries in the region than towards refugees coming from elsewhere.[88]

Wonk's survey of the contemporary citizenship laws of 22 countries in Asia (Afghanistan, Bangladesh, Cambodia, China, East Timor, India, Indonesia, Japan, Laos, Malaysia, Mongolia, Myanmar, Nepal, North Korea, Pakistan, Philippines, Singapore, South Korea, Sri Lanka, Taiwan, Thailand, and Vietnam) concluded that 'naturalisation patterns in Asia clearly resemble more closely those in Latin America and Africa than those in Europe'.[89] Moreover, only seven of the 22 countries (Afghanistan, Cambodia, China, East Timor, Japan, Philippines, and South Korea) have ratified the Refugee Convention, and a majority reject dual citizenship.

Meanwhile, while interdiction, border closures, and non-entrée policies often aim to prevent access and make it very difficult for refugees to enter countries in the Global North,[90] for recognized refugees there is often a pathway to full integration and, indeed,

[84] See Sreeram Sundar Chaulia, 'The Politics of Refugee Hosting in Tanzania: From Open Door to Unsustainability, Insecurity and Receding Receptivity' (2003) 16(2) JRS 147; see also Kuch (n 33).

[85] Bronwen Manby, *Struggles for Citizenship in Africa* (Zed Books 2009).

[86] ibid 342. There is no provision on nationality in The African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217; cf art 6 of the African Charter on the Rights and Welfare of the Child (adopted 11 July 1990, entered into force 29 November 1999) OAU doc CAB/LEG/24.9/49, which proclaims 'the right of every child to a name, to registration immediately after birth, and to acquire a nationality'.

[87] 'Convention relating to the Status of Refugees: Declarations and Reservations' <https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20V/V-2.en.pdf> accessed 13 October 2020.

[88] For discussion of nationality law in Latin America, see Diego Acosta, *The National versus the Foreigner in South America: 200 Years of Migration and Citizenship Law* (CUP 2018).

[89] Oliver Vonk, 'Comparative Report: Citizenship in Asia' (EUI 2017) 18 (citations omitted) <http://cadmus.eui.eu/bitstream/handle/1814/50047/RSCAS_GLOBALCIT_Comp_2017_04.pdf?sequence=1&isAllowed=y> accessed 13 October 2020.

[90] See Chapter 27 in this volume.

naturalization. Only Latvia retains a reservation to article 34[91] and a considerable number of countries apply favourable conditions to refugee naturalization, notably regarding length of residence.[92]

Taking a global perspective,[93] even where pathways to naturalization exist with favourable conditions for refugees, such as shorter residence periods, they are often limited to *Convention refugees*, excluding those with other protection statuses,[94] such as subsidiary or temporary protection. This means that, even in the Global North, many of those with recognized protection needs do not enjoy (favourable) access to naturalization.

States' divergent approaches to naturalization may partly be explained by the fact that refugee flows in the Global South are often both large and rapid, originating from conflict-torn neighbouring countries, whereas at least in some countries in the Global North, they tend to be slower, more managed, and originating further afield.[95] Where flows are (perceived to be) managed, and where the primary or exclusive basis for protection is the Refugee Convention definition, easier access to host country citizenship may ensue. For instance, both Canada[96] and Australia[97] offer permanent residence (and a pathway to citizenship) to resettled refugees upon their arrival and offer a permanent residence route to certain recognized refugees in-country (following status determination). The United States makes permanent residence available (in fact, mandatory) for refugees one year after resettlement or the grant of asylum.[98] In comparison, South Africa, a Global South country that has experienced spontaneous flows of refugees, has recently toughened naturalization requirements for refugees, making applications for permanent residence contingent on ten years' residence post-recognition, rather than five years.[99]

b. Resistance to Naturalization

Resistance to naturalization appears greater in the main refugee-hosting regions and extends beyond the rejection of plural citizenship. One obvious explanation pertains to

[91] Greece, Italy, and Malta withdrew their reservations. In Oceania, Papua New Guinea made a reservation in respect of several provisions, including art 34.

[92] For instance, the required length of residence for refugees is six years instead of eight in Germany; three years instead of six in Belgium; four years instead of five in the Netherlands and Sweden; five years instead of 10 in Italy and Spain. For select Global North practices, see Marx (n 46) paras 50–63.

[93] GLOBALCIT (n 23).

[94] Cathryn Costello, 'On Refugeehood and Citizenship' in Shachar, Bauböck, Bloemraad, and Vink (n 8) 732. See also Jean-François Durieux, 'Temporary Protection: Hovering at the Edges of Refugee Law' (2014) 45 Netherlands Yearbook of International Law 221.

[95] We thank Matthew Lister for highlighting this point. See also Matthew Lister, 'Citizenship, in the Immigration Context' (2010) 70 Maryland Law Review 175.

[96] Immigration and Refugee Protection Act (2001) (Canada).

[97] Migration Act 1958 (Cth) (1958); Migration Regulations (1994) (Australia).

[98] Immigration and Nationality Act (1980) (US) § 209.

[99] Refugees Act No 130 of 1998 (South Africa), s 27.

the multiple effects of inclusion. First, almost universally, electoral participation in national elections is contingent on citizenship. Secondly, notwithstanding IHRL provisions, full access to rights and resources is often restricted to citizens. Thirdly, citizenship offers permanent security of residence and hence operates as a constraint on host countries' future prerogative; countries also often assume that, once naturalized, refugees are unlikely to repatriate.[100] Given the above, preventing or delaying access to naturalization could be politically attractive. Put simply, if the public perceives refugees as draining or competing for resources, making that competition harder may be politically rewarding.

Many African countries require individuals wishing to naturalize to be economically solvent and not a 'burden' on the State, which creates a vicious cycle for refugees if they are denied freedom of movement and full access to employment.[101] Moreover, many of these countries were established as part of a decolonization process: they may therefore consider stricter naturalization proceedings as part of retaining greater sovereignty and control over their national identity which, in turn, may bolster xenophobic rhetoric, as refugees are often blamed for societal problems and branded as social and economic burdens.[102] In this context, it is instructive to compare approaches in Africa to those in South America, where countries gained their independence (from Spain or Portugal) in the early nineteenth century, and which tend to adopt more inclusive policies.[103]

5. Challenges of (Local) Integration

a. The Tri-dimensional Conceptualization of (Local) Integration

Ultimately, for (local) integration to be a 'durable' solution, it must culminate in pathways to naturalization, lest refugees remain perpetually vulnerable. Nevertheless, given the arguably sequential framing in article 34 ('assimilation and naturalization'), Hathaway's bifurcated approach to article 34 which assumes a 'durable legal status'[104] may be helpful for ascertaining whether, short of naturalization, the range of the rights available to refugees can 'allow the refugee to live a meaningful life in the host country'.[105]

[100] Lucy Hovil, 'Local Integration' in Elena Fiddian-Qasmiyeh, Gil Loescher, Katy Long, and Nando Sigona (eds), *The Oxford Handbook of Refugee and Forced Migration Studies* (OUP 2014) 488, 491.

[101] Manby (n 80) 86.

[102] Elisa A D'Amico, 'Xenophobia and Its Implications for Refugee Policies: A Cross-National Study' (Master of Arts thesis, Iowa State University 2018) (noting that 'xenophobic tendencies do in fact lead to a lower likelihood of a host-nation implementing an integrative refugee policy').

[103] Acosta (n 88).

[104] James C Hathaway, *The Rights of Refugees under International Law* (CUP 2005) 977–8.

[105] ExCom Conclusion No 104 (n 3).

This, in turn, may assist in appraising integration in the light of Marshall's characterization of modern citizenship as tri-dimensional: civil, political, and social.[106] 'Civil' citizenship includes 'rights necessary for individual freedom, liberty of the person, freedom of speech, thought and faith, the right to own property and to conclude valid contracts, and the right to justice'.[107] In turn, 'political' citizenship pertains to 'the right to participate in the exercise of political power, as a member of a body invested with political authority or as an elector of the members of such a body'.[108] Finally, 'social' citizenship encompasses 'the whole range from the right to a modicum of economic welfare and security to the right to share to the full in the social heritage and to live the life of a civilized being according to the standards in the society'.[109]

Compare Marshall's three citizenship dimensions with UNHCR's articulation of three dimensions of refugee integration: *legal* (a 'progressively wider range of rights and entitlements to refugees that are broadly commensurate with those enjoyed by its citizens and, over time, the possibility of naturalising');[110] *economic* (refugees are to 'improve their potential to establish sustainable livelihood, to attain a growing degree of self-reliance and to become progressively less reliant on state aid or humanitarian assistance');[111] and *social/cultural* ('preparedness on the part of the refugees to adapt to the host society, without having to forego their own cultural identity', and where 'communities [are] welcoming and responsive to refugees, and public institutions . . . are able to meet the needs of the diverse population').[112]

Hovil contends that 'local belonging' is unstable without national recognition: localized forms of integration have the potential to be undermined should external circumstances change; yet national citizenship holds little promise if individuals and groups are not accepted within a particular locality.[113] Arguably, legal rights and entitlements facilitate refugees' self-reliance and (non-forced) acculturation. The challenge lies in host countries' reluctance to accord them.

b. Intra-State Freedom of Movement

Article 26 of the Refugee Convention stipulates that a host country should grant 'refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory', and only restrict their freedom of movement to regulations that are 'applicable to aliens generally in the same circumstances'.[114] Yet, in many

[106] TH Marshall, *Citizenship and Social Class and Other Essays* (CUP 1950) 10; cf Ruth Rubio-Marin, 'The Achievement of Female Suffrage in Europe: On Women's Citizenship' (2014) 12 International Journal of Constitutional Law 4 (arguing that for women, Marshall's paradigm occurred in the inverse).

[107] Marshall (n 106) 8. [108] ibid 11. [109] ibid.

[110] ExCom Conclusion No 104 (n 3).

[111] Jeff Crisp, 'The Local Integration and Local Settlement of Refugees: A Conceptual and Historical Analysis', UNHCR New Issues in Refugee Research, Working Paper No 102 (2004) 1.

[112] ExCom (n 17) paras 19–24.

[113] Hovil (n 100) 488–9.

[114] See also ICCPR, art 12(3); HRC (n 29).

refugee-hosting countries, particularly in the Global South, refugee mobility is severely curtailed through designation of residence and/or regulation of movement. Such stipulations not only limit refugees' mobility, but also restrict their access to other rights, such as employment and education.

A considerable number of countries have made reservations to article 26. In Africa, using largely similar linguistic formulations, Angola, Malawi, Mozambique, Rwanda, Zambia, and Zimbabwe reserve their right to designate, prescribe, transfer, or circumscribe the place of residence of certain refugees, and to restrict their freedom of movement, whenever considerations of national or international order make it advisable to do so. Botswana has made a general reservation to the provision. In Asia, Iran 'considers the stipulations . . . as being recommendations only', and Papua New Guinea 'does not accept the obligations'.[115] In Europe, Latvia and the Netherlands reserve 'the right to designate a place of principal residence for certain refugees or groups of refugees in the public interest'; Moldova 'reserves the right to establish the place of residence for certain refugees or groups of refugees in the interest of the state and society'; and Spain has not precluded 'the adoption of special measures concerning the place of residence of particular refugees, in accordance with Spanish law'.[116]

Regionally, the EU Qualification Directive extends the scope of intra-State freedom of movement beyond those recognised pursuant to the Refugee Convention to also include those with subsidiary protection.[117] In contradistinction, article 2(6) of the OAU Convention appears to condone assigned residence in certain circumstances, stipulating that host countries 'shall, as far as possible, settle refugees at a reasonable distance from the frontier of their country of origin'.

Encampment is a prevailing practice in many protracted refugee situations. In 2013, the High Court of Kenya quashed a government directive requiring all refugees to move to one of Kenya's refugee camps.[118] The court held that 'refugees who have established some normalcy and residence in urban areas will have their dignity violated in the event the directives are to be effected. Family, work, neighbours, and school all contribute to the dignity of the individual.'[119] Intriguingly, in the EU, the Court of Justice of the EU has not ruled out the possibility of making provision of services to refugees contingent on assigned residence, provided that there are cogent reasons to believe this will *facilitate* integration of the group subject to such restrictions—but not solely for the purpose of distribution of social assistance burdens.[120]

[115] 'Convention relating to the Status of Refugees: Declarations and Reservations' (n 87).

[116] ibid.

[117] EU Qualification Directive (recast), art 33. Article 26 guarantees beneficiaries of international protection 'full access' to the labour market on equivalent terms as nationals, and to 'employment-related educational opportunities', implementing three provisions of the Refugee Convention: art 17 (wage-earning employment; art 18 (self-employment); art 19 (recognition of certificates in the liberal professions).

[118] *Kituo Cha Sheria v Attorney General* [2013] eKLR.

[119] ibid para 68. For critique see Kate Ogg, 'Protection from "Refuge": On What Legal Grounds Will a Refugee Be Saved from Camp Life?' (2016) 28 IJRL 384.

[120] Joined Cases C-443/14 and C-444/14, *Alo & Osso v Region Hannover* (CJEU, 1 March 2016).

As Crisp notes, it stands to reason that the 'warehousing' of refugees for years on end prevents them from developing their human potential and limits their ability to make a positive contribution to the economy and society of the country of asylum. It also means that they will lack the skills and motivation they need if it does eventually become possible for them to return to and reintegrate in their country of origin.[121] Economic integration is likely to make social integration easier, but with refugees in 'care and maintenance programmes' in refugee camps, neither is genuinely possible. Hovil cogently argues that 'local integration—and, therefore, a degree of self-reliance—can only take place if people have freedom of movement and freedom to make their own choices of where to live, how to support themselves, how to best utilize the limited resources that they have, and which markets to access'.[122] Indeed, the emphasis that recently naturalized Tanzanians (previously Burundian refugees) have placed on mobility as an incentive for naturalization sheds light on the long-term consequences that the denial of that right has for people living in protracted displacement.[123]

c. 'Self-reliance' Meets Mixed Messaging in Protracted Refugee Situations

The notion of refugee 'self'-reliance may come into tension with the host country's role as respecting, protecting, and fulfilling refugee rights under the Refugee Convention, including rights to housing (article 21), public relief (article 23), administrative assistance (article 25), and identity and travel documents that enable refugees to receive services in-country and to travel elsewhere (articles 27 and 28, respectively). It is also greatly affected by host countries' receptiveness to family unification applications. Yet, given divergent socio-economic conditions in host countries, self-reliance may displace *external* humanitarian aid, rather than (unavailable) host country assistance.

To facilitate integration and, indeed, self-reliance, UNHCR has previously postulated that the cessation clauses of the Refugee Convention should be interpreted restrictively so as to 'provide refugees with the assurance that their status will not be subject to constant review in the light of temporary changes not of a fundamental character to the situation in their country of origin'.[124] Now, as noted above, globally, 78 per cent of refugees are in protracted displacement.[125] Protracted displacement is a state of affairs marked by insecurity and inability to make future plans, absent the 'durability' that comes with security of residence.

[121] Crisp (n 111) 6.

[122] Bryan S Turner, 'Secular and Religious Citizenship', in Shachar, Bauböck, Bloemraad, and Vink (n 8) 493.

[123] Kuch (n 33) 474.

[124] UNHCR ExCom Conclusion No 69 (XLIII), 'Cessation of Status' (1992).

[125] Global Trends (n 16); see also James C Hathaway, 'The Global Cop-Out on Refugees' (2018) 30 IJRL 591 (proposing access to resettlement for those who, after five years in host countries, have no prospect of local integration or repatriation).

Yet, prioritization of repatriation is sending host countries mixed messages: as they invest in integrating refugees, they also, Janus-like, search for prospects of repatriation as soon as it is safe to do so.[126] Arguably, for refugees to become self-reliant and integrated, host countries must (psychologically and legally) accept that they are likely to remain, rather than thwart their integration, hoping that it will accelerate their departure.[127] In fact, Crisp argues that refugees who enjoy a high degree of legal, economic, and social security in their country of asylum are *better* equipped to return and reintegrate.[128]

To facilitate naturalization, refugees' legal status in host countries must gradually proceed from entry, to lawful stay, to durable (permanent or indefinite) stay. Yet, in many Global South countries, when refugees' presence is tolerated, the progressive acquisition of residence status and ensuing rights does not take place. The rights/citizenship conundrum, described in Section 2, thus comes to light.

6. Conclusion

Refugees' host countries are the gatekeepers to local integration and naturalization. Their acquiescence to refugees' presence on their territory does not necessarily open these other gates. Global practices diverge profoundly on both integration and naturalization, but a pattern emerges: it seems that countries with high 'first admission' bars (that is, barriers to accessing their territory) are more open to granting access to 'second admissions' (that is, to membership of their political community) when compared with countries to which refugees may flee relatively easily, but where there are many barriers to local integration and naturalization.

For local integration to be considered a 'durable solution' in the substantive sense, it must include pathways to naturalization. It is unhelpful to describe forms of integration that fall short of this as 'durable'. The socio-political reality is that many refugees find themselves in protracted displacement with neither a 'durable' solution in sight, nor the legal, economic, and social capacity to properly integrate in their asylum countries. They are caught in a vicious cycle in which host country citizenship is out of reach and yet determines access to rights. IHRL and international refugee law, taken together, provide a firm basis for demanding that host countries, irrespective of naturalization prospects, respect, protect, and fulfil refugees' rights—first and foremost mobility rights, given their critical enabling role—with the help and insistence of the international community.

[126] Erika Feller, 'Refugees Are Not Migrants' (2005) 24(4) RSQ 27.
[127] Hovil (n 100) 104.
[128] Crisp (n 111) 8.

CHAPTER 59

REIMAGINING VOLUNTARY REPATRIATION

MARJOLEINE ZIECK

1. Introduction

UNHCR has been charged to pursue durable solutions to the problem of refugees: voluntary repatriation to the country of origin, local integration in the country of refuge, or resettlement in a third State.[1] These durable solutions signify an end to refugee status. Indeed, in the original drafts of the UNHCR Statute, the reference was tellingly to final rather than durable solutions. The notion of finality that inheres in these solutions has recently been eroded by UNHCR when it suggested to add two solutions to the classical three: 'other local solutions', that is, arrangements that do not constitute parallel systems for refugees and fall short of naturalization, and 'complementary pathways', such as temporary stay in third States for educational or labour purposes.[2] Along with it, the idea of regaining full citizenship in the country of origin or elsewhere, key to the classical three durable solutions, is lost.

Voluntary repatriation denotes the return of refugees to their country of origin, that is, of those who are defined as unrepatriable in all the relevant legal instruments. It is therefore inherently problematic, yet the preferred, and invariably qualified as the best,

[1] Statute UNHCR, Annex to UN doc A/Res428(V) (14 December 1950) ch 1 para 1.
[2] Assistant UNHCR Protection, speech at the ATCR on 2 July 2019.

even ideal solution,[3] though for whom is never made explicit.[4] The number of refugees who voluntarily return to their countries of origin is nonetheless modest, particularly when compared to the millions who returned following the end to the Cold War.[5] At the same time, the number of refugees in the world is increasing and along with it, the pressure on voluntary repatriation is mounting. It is submitted that numbers, compounded by the lack of a responsibility-sharing mechanism,[6] rather than geopolitical interests, lie at the root of States suggesting the creation of de-escalation zones;[7] safe havens under their control in States that are otherwise still in turmoil to which the refugees they host should return;[8] or their simply arranging return on a bilateral basis with the country of origin in the absence of any beneficial change of the circumstances that forced people to flee in the first place.[9]

[3] See *inter alia*, UNHCR ExCom, 'Update on Voluntary Repatriation', UN doc EC/67/SC/CRP.13 (7 June 2016) para 1 (preferred solution); UNHCR ExCom Conclusions No 68 (1992), sub (s); No 99 (2004) sub (u); No 104 (2005), No 109 (2009) (the most preferred solution); 'Voluntary Repatriation', UN doc EC/SCP/41 (1980) para 7 (best solution); ExCom Conclusion No 74 (1994) para v (ideal solution).

[4] Postcolonial analyses explain this preference by the desire to keep the refugees in the global south, see eg BS Chimni, 'From Resettlement to Involuntary Repatriation: Towards a Critical History of Durable Solutions to Refugee Problems' (2004) 23 RSQ 55, 66 et seq. In addition or alternatively, repatriation is considered to be the ultimate success in the humanitarian management of displaced populations; Bram Jansen, 'The Accidental City. Violence, Economy and Humanitarianism in Kakuma Refugee Camp, Kenya' (PhD thesis, University Wageningen 2011) 202.

[5] 1991: 1,375,497; 1992: 1,588,906; 1993: 815,453; 1994: 2,032,900; 1995: 1,172,800; 1996: 2,002,985; 1997: 879,000; 1998: 980,990; 1999: 1,601,590; 2000: 767,000; 2001: 463,000; 2002: 2.4 million; 2003: 1.1 million; 2004: 1.5 million; 2005: 1.1 million; 2006: 734,000; 2007: 731,000; 2008: 604,000; 2009: 251,000; 2010: 197,600; 2011: 532,000; 2012: 525,900; 2013: 414,600; 2014: 126,800; 2015: 201,400; 2016: 552,200; 2017: 667,400; 2018: 593,800; 2019: 317,200 (figures compiled on the basis of UNHCR's annual statistical overview of populations of concern to UNHCR, and UNHCR's 'Global Trends Forced Displacement in 2019').

[6] As a result of which 85 per cent of the world's refugees are hosted by developing States (and 6.7 million of the total number of refugees by the least developed States). UNHCR, 'Global Trends Forced Displacement in 2019' 2.

[7] See *inter alia*, Aron Lund, 'Safe Zones. "De-escalation Zones" Unlikely to Entirely Wind Down the War in Syria' *News Deeply* (8 May 2017).

[8] See Sarah Dadouch, 'Turkey Aims to Form Safe Zones in Syria for Refugees to Return' *Reuters* (24 January 2019); 'Turkey, US Agree to Launch 1st Phase of Safe Zone Plan' *Hürriyet Daily News* (22 August 2019); Carlotta Gall, 'Turkey Wants Refugees to Move to a "Safe Zone". It's a Tough Sell' *The New York Times* (1 November 2019); 'Bangladesh Proposes Safe Zone in Myanmar for Rohingya Refugees' *Al Jazeera* (13 February 2019).

[9] Thu Thu Aung, 'Myanmar, Bangladesh Ink Rohingya Return Deal Amid Concern Over Army's Role' *Reuters* (23 November 2017). This agreement was followed by a repatriation agreement in January 2018, 'The Bangladesh–Myanmar Agreement on Rohingya Repatriation' *Refugees International* (17 January 2018). The agreement and actual repatriation met with the outspoken protest of the refugees concerned; Naimul Haq, 'Rohingya Protest Against Return to Myanmar and Halt Repatriation' *Inter Press Service* (16 November 2018). More agreements were signed, one in April 2018 between Bangladesh and UNHCR on voluntary repatriation, and another one between the UN (that is, UNHCR and UNDP) and Myanmar in June 2018. The latter was rejected by the Rohingya who had not been consulted, see Shaikh Azizur Rahman,'Rohingya Refugees Reject UN–Myanmar Repatriation Agreement' *The Guardian* (6 July 2018).

The protection that is due to refugees is for the duration of need, as defined and delimited by the Refugee Convention in its inclusion and cessation clauses.[10] Since (organized) voluntary repatriation invariably takes place when protection against *refoulement* is still called for,[11] the question arises why return should actually be promoted when the need for protection continues. Is this really what UNHCR has been charged to do? This question becomes more pressing when the evolution of the concept of voluntary repatriation as developed by UNHCR and its implementation in practice are taken into consideration. Both theory and practice—including that of States—move away from the concept as initially defined by UNHCR,[12] at the expense of the entitlement to protection of refugees.

It is therefore proposed to reimagine this solution by revisiting the past, that is, the (voluntary) repatriation practice of UNHCR's immediate predecessors, on the assumption that this practice induced the drafters to include voluntary repatriation in the UNHCR Statute.[13] It will be followed by a sketch of what the reimagined solution of voluntary repatriation would entail.

2. UNHCR's Concept of 'Voluntary Repatriation'

a. Voluntary Repatriation Is Part of International Protection

Chapter I of the UNHCR Statute provides that the High Commissioner:

> shall assume the function of providing international protection [...] to refugees who fall within the scope of the present Statute and of seeking permanent solutions for the problem of refugees by assisting Governments and, subject to the approval of the Governments concerned, private organizations to facilitate the voluntary repatriation of such refugees.[14]

The pursuit of voluntary repatriation recurs in Chapter II of the Statute which elaborates the functions of UNHCR: UNHCR shall provide for the protection of refugees falling under the competence of his Office by '[a]ssisting governmental and private efforts to promote voluntary repatriation or assimilation within new national communities'.[15] This task underlines clearly that the durable solutions, despite the apparent dichotomy

[10] Articles 1A(2) and 1C.
[11] Refugee Convention, art 33(1), alternatively on the basis of customary international law.
[12] UNHCR, 'Draft Protection Guidelines on Voluntary Repatriation' (September 1993).
[13] cf Kim Salomon, 'The Cold War Heritage: UNRRA and the IRO as Predecessors of UNHCR' in Göran Rystad (ed), *The Uprooted. Forced Migration as an International Problem in the Post-War Era* (Lund University Press 1990).
[14] Statute UNHCR, ch I, para 1.
[15] Statute UNHCR, ch II, para 8 sub (c).

between international protection and the pursuit of durable solutions in Chapter I of the Statute, are considered to be part of international protection.[16]

A subsequent paragraph provides that UNHCR shall engage in such additional activities, including repatriation and resettlement, as the General Assembly may determine, within the limits of the resources placed at his disposal.[17] This paragraph relegates the durable solutions to 'additional' activities. It would seem that this relegation is due to the expenses that may be involved in those solutions.[18] In that respect it is significant that the durable solution of 'local integration' is not so relegated, arguably since that does not entail any expenditures on the part of UNHCR.

b. Overall Legal Framework

The clear assignment given to UNHCR regarding the pursuit of durable solutions meant that UNHCR had to develop those solutions.[19] Apart from the fact that this pursuit is part of its primary task of providing international protection,[20] it arguably had to do so within the framework of the international conventions for the protection of refugees, in particular the Refugee Convention and its Protocol, even though those instruments do not address any of the durable solutions.[21] UNHCR's proceeding from those treaties is not an obvious point of departure.[22] First of all, neither UNHCR nor the UN, of which it is an integral part, are parties to those treaties. Their being a party to these treaties

[16] Initially, however, the function of international protection as detailed in ch II, para 8, was considered to be 'a long-term function which will normally only operate if repatriation, resettlement and naturalization are impossible', Appendix I to UN doc A/1385 (22 September 1950).

[17] Statute UNHCR, ch II, para 9.

[18] UNHCR was devised as a non-operational agency with a matching limited budget (amounting to US$300,000 in 1951): the current budget is US$8,667.7 million for 2020, and US$8.615.8 million for 2021, Biennial Programme Budget 2020-2021 of the Office of the United Nations High Commissioner for Refugees, UN doc A/AC.96/1191/Add.1 (8 October 2019) para 10.

[19] The result of which was referred to in 1993 as 'a coherent repatriation doctrine', UNHCR, 'Information Note on the Development of UNHCR's Guidelines on the Protection Aspects of Voluntary Repatriation', UN doc EC/SCP/80 (3 August 1993) para 2, which was subsequently laid down in UNHCR's Handbook Voluntary Repatriation: International Protection of 1996.

[20] UNHCR explains that this task, which is not defined in its Statute, means safeguarding the rights of refugees, UNHCR Global Report 2006, 18; 'UNHCR actions are firmly based in and guided by universal refugee protection principles and international human rights standards', UNHCR, 'Note on International Protection', UN doc EC/48/SC/CRP.27 (25 May 1998) para 43.

[21] Probably since the Refugee Convention was drafted at 'a time when voluntary repatriation was effectively obsolete'; Guy S Goodwin-Gill, 'Asylum: The Law and Politics of Change' (1995) 7 IJRL, 1, 8. The solution is addressed in art V of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa.

[22] In a draft of the Statute, the task assigned to UNHCR was followed by an indication of the relevant legal framework: 'In carrying out his task, the High Commissioner shall be guided by the principles contained in the Universal Declaration of Human Rights and in the preamble to the International Convention Relating to the Status of Refugees adopted by the United Nations', UN doc E/AC.7/L.60 (31 July 1950) 2.

would, however, not make sense since most of the obligations the treaties comprise are in essence of a kind that can only be discharged by territorial States, the subjects hosting refugees, rather than UNHCR which is, despite its omnipresence in the territory of States, a non-territorial entity.

Apart from the fact that implementing its own tasks in a way that would contravene the obligations of States pertaining to refugees would negatively affect, if not wholly undermine, its role as supervisor of the application of international conventions for the protection of refugees,[23] the question whether UNHCR bears any relevant obligations is not exhausted by the fact that it is not a party to the relevant treaties. The reason for which is the highly operational role UNHCR has acquired.[24] Although the Statute is cast in terms of UNHCR's *assisting* governments and private efforts to promote voluntary repatriation, UNHCR often takes the lead,[25] and States are obliged to cooperate with UNHCR in the exercise of its functions.[26] Since States are responsible for observing their treaty obligations, UNHCR's taking the lead should not frustrate that responsibility: in that sense, the obligation of States to cooperate with UNHCR in the exercise of its functions is limited by the other provisions of the Convention. In view of this, it would be incongruous if cooperation with UNHCR on the basis of article 35(1) would be the cause of the host State's contravening its obligations pertaining to the refugees it hosts.[27] That, in turn, entails that UNHCR has to observe the relevant obligations of States when taking the lead. Worth adding is the fact that the inclusion and cessation clauses in the UNHCR Statute are comparable to those laid down in the Refugee Convention, which means that the temporal demarcation of the entitlements of refugees that should be observed is the same for States and UNHCR.

UNHCR has developed the practice of concluding agreements with States (usually the country of origin, and one or more countries of refuge) on voluntary repatriation,[28]

[23] Statute UNHCR, ch II, para 8 sub (a).

[24] See Marjoleine Zieck, *UNHCR's Worldwide Presence in the Field, A Legal Analysis of UNHCR's Cooperation Agreements* (Wolf Legal Publishers 2006) ch 2.

[25] UNHCR's leading role is considered by ExCom to be a core element of voluntary repatriation, ExCom Conclusion No 74 (1994) reaffirms 'the leading role of UNHCR in promoting, facilitating, and coordinating voluntary repatriation' sub (y); see also UNHCR Handbook (n 19) 13, where UNHCR simply states that the country of asylum 'should respect the leading role of UNHCR in promoting, facilitating and coordinating voluntary repatriation'.

[26] Article 35(1), Refugee Convention (an obligation that applies irrespective of the legal basis of those functions); Atle Grahl-Madsen, *Commentary on the Refugee Convention 1951 Articles 2–11, 13–37* (UNHCR 1997) art 35, para 4.

[27] Hathaway refers to the '*de facto* dominance of UNHCR in repatriation practice', and criticizes the Convention-blind deference of States to UNHCR's repatriation practice; James C Hathaway, 'The Right of States to Repatriate Former Refugees' (2005) 20 Ohio State Journal on Dispute Resolution 175, 198 (quote), and *passim*.

[28] A sample agreement is included in Annex 4, UNHCR Handbook (n 19); for an overview of the agreements that have been concluded from UNHCR's creation until 2002 Zieck 2006 (n. 25) Annex 4, and for the period from 2002 until the fall of 2011 (almost 100 agreements), Annex to Marjoleine Zieck, 'The Limitations of Voluntary Repatriation and Resettlement of Refugees' in Vincent Chetail and Céline Bauloz (eds), *Research Handbook on International Law and Migration* (Edward Elgar 2014).

that is, agreements that govern specific return movements.[29] The key obligation laid down in those agreements is the requirement of voluntariness, and the identical temporal demarcation referred to means that this requirement only ceases to apply when the cessation clauses on changed circumstances in the country of origin can be applied:[30] '[t]he legal process provides only two choices: either to uphold the principle of voluntariness or to apply the relevant cessation clause if the conditions so warrant'.[31] Although both States and UNHCR can apply those clauses, the application by States has more impact since their decision may entail (forced) return.[32]

c. Timing

Voluntary repatriation is implemented during the time when the refugee is *ex definitio* unrepatriable, and therefore entitled to protection against *refoulement*. Since the refugee is at the material time unrepatriable, it is clear that the decision to exercise the right to return must be a voluntary one.[33] So when is voluntary repatriation warranted? According to UNHCR 'once conditions are conducive to return'.[34]

Apart from spontaneous returns, which are traditionally merely facilitated by UNHCR since these may include a return to unsafe countries of origin, those which are promoted by UNHCR are related to beneficial changes in the country of origin that tangibly foreshadow the end to the root cause of flight, and hence cessation of refugee status. UNHCR uses the time between such changes and their consolidation over time to promote voluntary repatriation and in that sense voluntary repatriation takes place at a lower threshold than cessation of refugee status by virtue of changed circumstances in the country of origin:[35] 'The idea behind promoting and subsequently encouraging

[29] These are legally binding agreements, cf *inter alia*, UNHCR, 'Voluntary Repatriation', UN doc EC/GC/02/5 (25 April 2002) para 10.

[30] Refugee Convention, art 1C(5)–(6); see UNHCR's Guidelines on International Protection No 3: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees, HCR/GIP/03/03 (10 February 2003). On cessation, see Chapter 57 in this volume.

[31] UNHCR Guidelines (n 12) 56.

[32] UNHCR's Guidelines on Cessation (n 30) provide in para 7 that 'Cessation under Article 1C(5) and 1C(6) does not require the consent of or a voluntary act by the refugee. Cessation of refugee status terminates rights that accompany that status. It may bring about the return of the person to the country of origin [...]'; 'may' but not necessarily so: when the protection as a refugee comes to an end, the host government is entitled to require the former refugee to depart its territory (James C Hathaway, *The Rights of Refugees under International Law* (CUP 2005) 920–1, 929); Hathaway (n 27), but it may also allow the continued residence of the former refugee on the basis of acquired rights or social membership on which, see Cathryn Costello, *The Human Rights of Migrants in European Law* (OUP 2015) ch 3. On repatriation without return, see Katy Long, *The Point of No Return. Refugees, Rights, and Repatriation* (OUP 2013) ch 9.

[33] On the right of return, see art 12(4) ICCPR: 'No one shall be arbitrarily deprived of the right to enter one's country.'

[34] UNHCR Handbook (n 19) 5, elaborated at 16. Subsequently, UNHCR indicated that it itself promotes the conditions conducive to return; UNHCR, 'Legal Safety in the Context of Voluntary Repatriation', UN doc EC/54/SC/CRP.12 (7 June 2004) para 1.

[35] UNHCR Guidelines (n 12) 4, 43; UNHCR Handbook (n 19) 10; cf the observation that 'successful completion of voluntary repatriation programmes often indicate that circumstances which caused flight no longer exist' and are 'relevant to declaring general cessation as foreseen in Article 1C(5)', UNHCR, 'Voluntary Repatriation', UN doc EC/GC/02/5 (25 April 2002) para 8.

voluntary repatriation is to give the refugee an opportunity to voluntarily return home with UNHCR protection and assistance *before* he or she formally ceases to be a refugee'.[36] UNHCR appears to systematically lower this threshold.

Although UNHCR initially clearly stated that one of the fundamental prerequisites for its encouraging repatriation was 'a general improvement in the situation in the country of origin',[37] the timing has since gradually been changed. In its Handbook on Voluntary Repatriation of 1996, UNHCR indicates that it promotes voluntary repatriation when it appears that, objectively, it is safe for most refugees to return and that such returns have good prospects of being durable.[38] In 2004, UNHCR's Executive Committee (ExCom) observed that 'voluntary repatriation should not necessarily be conditioned on the accomplishment of political solutions in the country of origin in order not to impede the exercise of the refugees' right to return'.[39] This particular phrasing has a ring of disingenuity since refugees may always return, but the issue really is the timing of UNHCR's organizing and promoting of such return. The New York Declaration for Refugees and Migrants repeated this particular observation in 2016,[40] and so does the Global Compact on Refugees of 2018.[41]

d. Limitations

Apart from the timing of specific repatriation operations, the overarching question as to when voluntary repatriation should be considered to be the appropriate solution has never been raised by UNHCR. Voluntary repatriation is rather viewed by UNHCR as a timeless solution that is considered appropriate, regardless of the fact that the refugees whose return is promoted are second, third, and perchance fourth generation refugees,[42] refugees with extremely tenuous links to a nominal country of origin.[43] Apart from

[36] UNHCR Guidelines (n 12) 43. [37] ibid 33. [38] UNHCR Handbook (n 19) 16.

[39] ExCom Conclusion No 101 (2004) sub (e); repeated in Conclusion No 112 (2016) para 7.

[40] UN doc A/Res/71/1 (9 September 2016), para 76.

[41] UN doc A/Res/73/12 (Part II) (17 December 2018), para 87.

[42] cf UNHCR's Executive Committee, which considers voluntary repatriation even the priority solution for those trapped in protracted refugee situations; UNHCR, 'Protracted Refugee Situations', UN doc EC/54/SCP/CRP.14 (10 June 2004) para 3; and the same applies to UNHCR's parent organ: the UN General Assembly, too, encourages UNHCR to 'actively promote durable solutions, particularly in protracted refugee situations, with a focus on sustainable, timely, voluntary, safe and dignified return', UN doc A/Res/72/150 (17 January 2018) para 42; likewise, UN doc A/Res/73/151 (10 January 2019), para 48. The reference should be taken to protracted situations such as that of Afghan refugees rather than the equally protracted ones of Palestinian and Sahrawi refugees whose return is inextricably linked to the exercise of the right to self-determination. At the end of 2019, 77 per cent of all refugees—amounting to 15.7 million—were in protracted situations, UNHCR, 'Global Trends Forced Displacement in 2019' (n 6) 24. In 2018, UNHCR estimated that about 36 per cent of those refugees lived in situations lasting for 20 years or more, UNHCR, 'Global Trends Forced Displacement in 2018'.

[43] It is a moot point, therefore, whether UNHCR's observation that voluntary repatriation 'remains the durable solution sought by the largest number of refugees' is tenable; UNHCR, 'Legal Safety Issues in the context of Voluntary Repatriation', UN doc EC/54/SC/CRP.12 (7 June 2004) para 1.

ethical limits that militate against such timelessness, the legal right to return of those who are descendants of habitual residents rather than nationals may be extremely weak, if not non-existent.[44] The passage of time should serve as a bar, in the sense that voluntary repatriation should not be pursued dogmatically at the expense of the pursuit of other, more suitable options for the refugees concerned.

A different kind of limitation is of a political nature and pertains to refugees belonging to minority populations in the country of origin. Historical research demonstrates that the repatriation of ethnic, national, and religious minorities is often the result of force rather than the voluntary exercise of the right to return.[45] In view of this fact, it is a moot point whether voluntary repatriation should invariably be pursued: as in the case of protracted refugee situations, the question should be posed whether the return of the refugees concerned would be in their—rather than States' or UNHCR's—interest. It is worth recalling that UNHCR initially stated that the promotion and facilitation of voluntary repatriation should be guided by the 'principle of the best interest of the refugee'.[46] Apart from the fact that it has never been repeated, it is, considering the limitations referred to, a moot point whether that principle informed UNHCR's voluntary repatriation practice, which often compromises the rights of refugees.[47] Refugees themselves have not generally been given a voice in the organization of voluntary repatriation operations:[48] refugees are not, for instance, involved in the conclusion of voluntary repatriation agreements nor do they participate in the commissions that are established on the basis of those agreements,[49] charged with addressing many practical issues that affect their return.

[44] Marjoleine Zieck, 'Refugees and the Right to Freedom of Movement: From Flight to Return' (2018) 39 Michigan Journal of International Law 21, 109–11.

[45] Howard Adelman and Elazar Barkan, *No Return, No Refuge. Rites and Rights in Minority Repatriation* (Columbia University Press 2011); cf Myron Weiner, 'The Clash of Norms: Dilemmas in Refugee Policies' (1998) 11 JRS 433, 449 (cautioning against undoing ethnic cleansing by insisting on the refugees' right to return).

[46] UNHCR Guidelines (n 12) 30; see also 38: 'The principle objective in the promotion of voluntary repatriation is the interest of the refugee.' The idea seems to stem from the early days of UNHCR's existence, cf Jacques Vernant's survey of 1951 who argued the need for an international organization 'acting as a guardian to the refugees' (The Refugee in the Post-War World, Preliminary Report of a Survey of the Refugee Problem, 1951, 24).

[47] See Tor Krever, '"Mopping-up": UNHCR, Neutrality and *Non-Refoulement* since the Cold War' (2011) 10 Chinese Journal of International Law 587 on UNHCR's 'pursuit of State, not refugee, interests', in the post-Cold War era.

[48] Occasionally refugees take the lead: the Rohingya refugees in Bangladesh recently prevented their return by means of protests—'There will be no repatriation without talking to us first', the Rohingya stated in response to a third attempt to return them to Myanmar; Vidya Krishnan, 'Tensions Flare as Bangladesh Tries to Send Rohingya Home' *The New Humanitarian* (21 August 2019); see also Lund (n 7); in the past Salvadoran and Guatemalan refugees clearly defined the time and terms of their return, Marjoleine Zieck, *UNHCR and Voluntary Repatriation of Refugees, A Legal Analysis* (Martinus Nijhoff 1997) 121–2.

[49] Apart from the fact that it stands to reason to give refugees a voice, particularly since they can rarely enforce their rights, their voice could counter the pressure that may be exerted by UNHCR, NGOs, and the host State to consent to premature voluntary repatriation; for an illustration, see Jansen (n 4) 207, 211, 220–1 relating to the voluntary repatriation of South Sudanese refugees from Kenya.

3. Practice

a. Timing

In practice, the timing of voluntary repatriation operations is problematic. First of all, UNHCR has been confronted with situations where return to circumstances that had not or had hardly been changed was, all things considered, a better option than prolonged stay in the country of refuge on account of sub-standard conditions of asylum. Nonetheless, the true nature of the return was concealed by UNHCR, and the, in essence, enforced mode of return was passed off as a voluntary return movement.[50] Cases in point are the return of the Rohingya in 1978[51] and 1993,[52] that of Cambodian refugees in 1981,[53] Ethiopian refugees from Djibouti in 1983,[54] and Rwandan refugees from Zaire and Tanzania in 1996.[55] However, from 1996 onwards, UNHCR decided to designate this type of return as 'imposed return',[56] making it clear what is being implemented. Years later, the same pragmatic practice, that is, of organizing return when the security situation in the country of asylum becomes more dangerous than that prevailing in the country of origin, was qualified as 'an evacuation to save lives'.[57]

Another practice that is hard to reconcile with voluntary repatriation, but is nonetheless passed off as voluntary return, consists of operations where return is coupled to a pre-determined date on which the cessation clauses pertaining to changed circumstances will be invoked, or is otherwise tied to the end of legal stay in the country of refuge. It corresponds with the way UNHCR links voluntary repatriation to cessation: the former is a prelude based on beneficial changes in the country of origin that may lead to cessation in due course. In practice, the cessation date is set, and the time until then is

[50] This practice should be distinguished from 'emergency repatriation operations', that are not passed off as voluntary repatriation exercises; cf the emergency repatriation of Liberian refugees (who were harassed by the local population who accused them of siding with the rebels) in Côte d'Ivoire to Liberia in 2003; UNHCR, 'Emergency Repatriation for Liberians in Western Ivorian Crisis; Top UNHCR Official Plans Visit' (14 January 2003).

[51] Jeff Crisp, ' "Primitive People": The Untold Story of UNHCR's Historical Engagement with Rohingya Refugees', *Humanitarian Practice Network* (October 2018).

[52] ibid. [53] Zieck (n 48) ch 6.

[54] Jeff Crisp, 'The Politics of Repatriation: Ethiopian Refugees in Djibouti, 1977–83' (September 1984) Review of African Political Economy No 30, 73.

[55] Joel Boutroue, 'Missed Opportunities: The Role of the International Community in the Return of the Rwandan Refugees from Eastern Zaire, July 1994–December 1996', Working Paper (June 1998); David Orr, 'Rwandan Refugees Flee from Repatriation' *Independent* (13 December 1996); UNHCR since acknowledged that the operation amounted to *refoulement*, Jeff Crisp and Katy Long, 'Safe and Voluntary Refugee Repatriation: From Principle to Practice' (2016) 4 Journal on Migration and Human Security 141, 145.

[56] Chimni (n 4) 63.

[57] UNHCR, 'Voluntary Repatriation', UN doc EC/GC/02/5 (25 April 2002) para 17. The emergency evacuation of Sierra Leonean refugees in Guinea in 2000–01 is a case in point.

used for voluntary repatriation.[58] An example of the former is the return of Rwandan refugees in Uganda,[59] and of the latter, the periodically enforced return of Afghan refugees from Pakistan,[60] which is tied to the temporally limited validity of the Proof of Registration (PoR) card that entitles the Afghans to reside in Pakistan (the latest extension dates of 27 June 2019, extending the validity of the PoR card until 30 June 2020).[61] A comparable practice is simply announcing a date before which return should be effectuated. Examples of this practice include UNHCR's commitment to realize the return of Rohingya refugees to Myanmar before 31 December 1995,[62] and the public announcement by the Tanzanian government that Rwandan refugees were expected to return home by 31 December 1996.[63]

A comparable time limit that drives the timing of voluntary repatriation is based on the conviction that refugees are part of the solution of the problem that gave rise to their flight. Illustrative for this conviction is the timing of the airlift of 43,000 Namibian refugees in 1989, preceding the independence of Namibia, to enable them to take part in the elections,[64] and the organized repatriation of Cambodian refugees in 1992–93 with a view to securing their participation in the national elections.[65]

Announcing a date on which the camps where the refugees live will be closed, and thus cause their repatriation, is another way of setting a temporal limit. Illustrative is the envisaged return of over a quarter of a million mostly Somali refugees from Kenya by means of closing the Dadaab camp. Although the Kenya High Court ruled in 2017 that closing Dadaab is unconstitutional since returning the refugees would be in breach of Kenya's international obligations, closure and hence enforced return was nonetheless (re)scheduled for August 2019.[66]

The timing of voluntary repatriation operations may alternatively be induced by the creation of safe areas in the country of origin. Examples are the return of the Kurds to Northern Iraq in 1991,[67] and the contemporary proposals to return Syrian refugees to de-escalation or safe zones in Syria.[68] Obviously, such returns have

[58] But see the decision of the Botswana High Court of January 2016 that halted this type of enforced return, Khonani Ontebetse, 'Botswana, Namibia, UNHCR in Refugee Repatriation Row' *Sunday Standard* (11 January 2016).

[59] Jane Some, 'Rwandan Refugees Still Reluctant to Repatriate' *The New Humanitarian* (14 March 2012).

[60] Human Rights Watch, 'Pakistan Coercion, UN Complicity, The Mass Forced Return of Afghan Refugees' (31 February 2017).

[61] Notification of the Government of Pakistan, Ministry of States & Frontier Regions (27 June 2019) <http://www.safron.gov.pk/frmDetails.aspx> accessed 13 January 2020.

[62] Long (n 32) 13.

[63] Hathaway (n 32) 933; see the 'Message to All Rwandese Refugees in Tanzania from the Government of Tanzania and UNHCR' (December 1996) (text available in (1997) 9 IJRL 328): the text consistently refers to repatriation rather than 'voluntary repatriation'.

[64] UNHCR Guidelines (n 12) 14.

[65] Zieck (n 48) para 8.2.3.

[66] Human Rights Watch, 'Kenya: Reverse Move to Close Refugee Camp. No Forced Returns of Refugees' (27 March 2019). At the time of writing—November 2019—it was not clear whether Kenya would pursue this.

[67] Zieck (n 48) ch 7.

[68] See Lund (n 7) and (n 8).

nothing to do with the idea of refugees voluntarily re-availing themselves of the protection of their country of origin and are therefore a travesty of the notion of voluntary repatriation.

The last timing worth mentioning is in essence a lack of any timing when voluntary repatriation proceeds from the premise that a solution to the root cause of flight is not a pre-condition to return. Illustrative for this are the words of Lebanese President Aoun: 'Lebanon will continue to work to ensure the return of Syrian refugees to safe areas in Syria, and we will not wait for a political solution to the Syrian crisis as it may take long.'[69] It is symptomatic of the pressure that host States exert, and to which UNHCR on occasion succumbs.[70] Countries of origin too may exert pressure on States to return their citizens, demonstrating to the world at large that they have their house in order and deserve to (re)gain international legitimacy.[71]

Obviously, all those variants have corresponding negative repercussions for the degree to which return will be voluntary: if temporal limits are set and expulsion is the next step even when following a temporal reprieve by means of a voluntary repatriation fig leaf, there is obviously no choice, and the result is *refoulement*. The same applies to situations where facilities are reduced or cut off entirely: in case refugees are dependent on those facilities, they have no genuine choice either.[72] A comparable lack of choice is inherent to debt-induced repatriation[73] and forcing refugees to sign voluntary repatriation forms.[74]

A less immediately obvious practice but nonetheless one that effectively undermines the voluntariness of entire operations is UNHCR's practice regarding those who refuse to return in an organized repatriation operation, usually designated as the residual caseload. They are subjected to status re-determination that proceeds from an *ex nunc* assessment of the circumstances in the country of origin, and hence to denial of refugee

[69] 'Lebanese President Pledges Safe Return of Syrian Refugees' *Arab News* (26 February 2019). Similarly, the Russian ambassador in Lebanon who stated that repatriation 'should be implemented regardless of political differences and without linking it directly to a political settlement'; Samar Kadi, 'Syrian Refugees' Repatriation a Slow, Long-Term Process' *MEO* (29 December 2018). A variant of this theme is simply denying that the refugees concerned are in need of international protection; Patrick Wintour, 'Thousands of Syrian Refugees Could Be Sent Back, Says Lebanese Minister' *The Guardian* (15 June 2019).

[70] Human Rights Watch, 'The UN Should Just Say No to Returning Refugees to Danger' (27 February 2017).

[71] 'Uganda Moves to Expel Burundian Refugees' *DW* (15 February 2017), that is, following a request of Burundi. The desire to gain international legitimacy also seems to drive Syria's President; Jesse Marks and Lina Kreidie, 'Assad Needs UN Assistance to Repatriate Refugees' *Atlantic Council* (31 November 2018). See also Andrew Wolman, 'Chinese Pressure to Repatriate Asylum Seekers: An International Law Analysis' (2017) 29 IJRL 84, for a repatriation practice geared to controlling dissent and preventing separatism.

[72] See Katy Long, 'Back to Where You Once Belonged. A Historical Review of UNHCR Policy and Practice on Refugee Repatriation', PDES/2013/14, 19–21 for examples.

[73] Keven Sieff, ' "What Other Choice Do I Have"? How Debt-Ridden Refugees Are Being Forced to a War Zone' *The Washington Post* (15 December 2017).

[74] Human Rights Watch, 'Turkey Forcibly Returning Syrians to Danger. Authorities Detain, Coerce Syrians to Sign "Voluntary Return" Forms' (26 July 2019).

status usually followed by (enforced) return,[75] This fate has repercussions beyond the individual refugees concerned since it signifies that return was the ultimate end of the operation, and it turns the solution of voluntary repatriation into a mode of cessation *sui generis*.

The result is a practice that appears (far) removed from a voluntary return if and when conditions in the country of origin warrant return. The question is whether the applicable legal norms, in particular that of protection against forced return, justify such a pliant and little principled voluntary repatriation practice. On the assumption that the Statutory assignment to pursue voluntary repatriation derives from the experience and practice in the wake of the Second World War,[76] resort will be taken to this period of time. What did voluntary repatriation mean at the time? In addition, could it be argued that the then prevailing understanding of voluntary repatriation—rather than the current malleable one—should be adhered to? What if it is adhered to? Would it better align with the obligations of States under the Refugee Convention and Protocol? What would be lost and what would be gained?

4. Back to the Origins: Post Second World War

The issue of return became prominent in the wake of the Second World War on account of the large numbers of displaced persons in Europe, the Middle East, and Asia.[77] The allied States assumed that all those who were displaced would want to return home. Organizing the repatriation of all displaced persons and refugees after the termination of the War was the responsibility of the Allied Forces. They came very well prepared. The plan of the Supreme Headquarters Allied Expeditionary Force (SHAEF) was ready on 3 June 1944, and was adjusted in December that year to the advance into Germany.[78]

[75] In the UNHCR Guidelines (n 12) 6, 48, 64, this practice was not considered to be acceptable, and those who would opt not to avail themselves of voluntary repatriation would remain refugees, enjoy continued asylum, and were not to be subjected to status re-determination until such time as the relevant cessation clause is applicable. This clear stance was not included in the UNHCR Handbook (n 19), and along with this change, status re-determination, and involuntary return, became practice. Examples of this practice are the treatment of the residual caseload in two voluntary repatriation operations considered qualified as exemplary operations by UNHCR, namely Cambodian and Mozambican refugees, see Zieck (n 48) 311–12, 415–16.

[76] Repatriation did not play a significant role in the interbellum; Claudena Skran, *Refugees in Inter-War Europe* (OUP 1995) 48.

[77] Numbering over 30 million in Europe, Michael Marrus, *The Unwanted. European Refugees in the Twentieth Century* (OUP 1985) 297; no reliable figures could be found for the Middle East and Asia.

[78] Malcolm Proudfoot, *European Refugees: 1939–52. A Study in Forced Population Movement* (Faber and Faber 1956) 111, 147 (the text of the 16 April 1945 version of this plan—Administrative Memorandum Number 39—is included in this book as appendix B).

The SHAEF plan clearly indicated that displaced persons of United and Associated Nations (ie the States that had been fighting the Axis powers during the War and friendly powers) who refused to return were not to be returned to their countries of nationality or districts of former residence.[79] If the reasons for refusal were substantial, provision would be made for their resettlement, if not, the military authorities could not take further responsibility for their care and maintenance (and the same applied to those who refused to accept provision for their resettlement).[80]

The United Nations Relief and Rehabilitation Administration, UNRRA, established in November 1943 to plan, coordinate, administer, or arrange for the administration of measures for the relief of victims of war in any area under the control of any of the United Nations through the provision of food, fuel, clothing, shelter and other basic necessities, medical, and other essential services,[81] gradually assumed responsibility for the repatriation of displaced persons and refugees albeit under military control.[82] UNRRA was soon confronted with resistance to return.[83]

The issue of return became a bone of contention,[84] also in the recently established United Nations. On 29 January 1946, the General Assembly adopted resolution 8(I), which provided that: 'no refugees or displaced persons who have finally and definitely, in complete freedom, and after receiving full knowledge of the facts (…) expressed valid objections to returning to their countries of origin (…) shall be compelled to return to their country of origin.'[85]

The Constitution of the International Refugee Organization (IRO), the organization charged with encouraging and assisting the early return of those persons who were its concern, having regard to the principles set out in resolution 8(I),[86] provided that refugees and displaced persons would become its concern either if they could be repatriated, and its help would be required in order to provide for their repatriation, or if they expressed valid objections to return.[87] Valid objections comprised (fear of) persecution,

[79] Para 30 of the revised version of the plan dating of 16 April 1945 (it is not clear whether the option to refuse return was also part of the original version dating of December 1944). The return of Soviet citizens and POWs had been made mandatory by virtue of the Yalta agreements of 11 February 1945 (concluded between Britain and the Soviet Union, and the US and the Soviet Union; see Nikolai Tolstoy, *Victims of Yalta* (Hodder and Stoughton 1977); Mark Elliott, *Pawns of Yalta. Soviet Refugees and America's Role in Their Repatriation* (University of Illinois Press 1982).

[80] SHAEF plan (version of 16 April 1945) paras 30, 31.

[81] Article I(2) sub (a), Agreement for United Nations Relief and Rehabilitation Administration of 9 November 1943.

[82] That is, no longer under SHAEF, which had been terminated on 13 July 1945, but under the zonal military authorities (French, UK, and US zones); Proudfoot (n 78) 230–4.

[83] Kathryn Hulme, *The Wild Place* (Plunkett Lake Press 1953) chs 4, 13; Adam Seipp, *Strangers in the Wild Place. Refugees, Americans, and a German Town, 1945–1952* (Indiana University Press 2013) 84–5, 92, 96; Elliott (n 79) 156–7.

[84] Ernest Penrose, 'Negotiating on Refugees and Displaced Persons, 1946' in Raymond Dennett and Joseph Johnson (eds), *Negotiating with the Russians* (World Peace Foundation 1951).

[85] UN doc A/Res/8(I) (29 January 1946) (c) (ii).

[86] Article 2(1) (a), IRO Constitution; repeated in Annex I, art 1 sub (b) to the Constitution.

[87] Part I, section C, art 1(1), IRO Constitution.

objections of a political nature judged by the IRO to be valid,[88] and compelling family reasons arising out of previous persecution or compelling reasons of infirmity or illness.[89] Those with valid objections to return were not expected to return; they would either settle in the country of refuge or resettle in third countries.[90] The IRO was thus not charged with voluntary repatriation but with repatriation or early return, albeit within the prohibitive constraints of valid objections.[91]

The system of the Refugee Convention and the UNHCR Statute differs from that of the IRO in the sense that the beneficiaries (refugees and displaced persons) and the eligibility criteria (conditions under which refugees and displaced persons will become the concern of the organization) were defined separately in the IRO Constitution but were merged in the new instruments. Those who satisfy the relevant definition of refugee—defined as persons with a well-founded fear of persecution, one of the IRO eligibility criteria—are entitled to the rights listed in the 1951 Convention, including in particular the protection against *refoulement*, and are the concern of UNHCR. Following the logic of the IRO Constitution, only local integration and resettlement elsewhere would be options for them.

UNHCR's Statute nonetheless comprises voluntary repatriation, and the question is what exactly is meant by that? Proceeding from IRO practice, it could simply mean that refugees cannot be forced to return,[92] so in effect a reminder of what the General Assembly had indicated in its resolution 8(I) (more was not needed in view of the fact that UNHCR—unlike the IRO—was created as a non-operational agency). It would explain why voluntary repatriation was not included in the Refugee Convention since that is wholly geared to protecting those who are by definition unrepatriable, and explicitly prohibits States to forcibly return refugees. Along with the adoption of the new legal regime, new questions arise. Since return is not an option for those who are unrepatriable—the beneficiaries of UNHCR are similarly defined as unrepatriable persons—why suggest it to them nonetheless? Is UNHCR's argument that the return of refugees (rather than former refugees) enables it to provide them with protection and assistance before they formally cease to be refugees legally decisive?

[88] It had been suggested to replace the phrase 'valid objections' by 'expressed the desire not to', a suggestion that was refuted since it would render the objections wholly subjective while the validity of the refugee's motives should be decided upon by the IRO; Vernant (n 46) 33.

[89] Part I, section C, art 1(1) sub (a), IRO Constitution.

[90] Article 2(1) sub (b), IRO Constitution.

[91] cf Louise Holborn, *The International Refugee Organization. A Specialized Agency of the United Nations. Its History and Work 1946–1952* (OUP 1956) 340 ('The western policy of voluntary repatriation, based on the principle of international responsibility for refugees and those who, on conscientious grounds, were unwilling to seek the protection of their national governments or return to their jurisdiction, was embodied in the Constitution'; 'The principal aim of the repatriation policy laid down in the Constitution was to reduce the number of those in exile by securing the repatriation of those who were not in danger or exposed to injustice on account of their beliefs' 314); John G Stoessinger, *The Refugee and the World Community* (University of Minnesota Press 1956) 66.

[92] 'The UNHCR, founded with a central mandate of the right not to be returned'; Paul White, 'No Return No Refuge: Rites and Rights in Minority Repatriation' (2012) 24 IJRL 660, 662; see also Chimni (n 4) 61.

5. Reimagining Voluntary Repatriation

UNHCR took the Statutory assignment to pursue voluntary repatriation as the voluntary return of unrepatriable persons, which of necessity puts a heavy premium on the voluntariness of return. Nothing in the Statute militates against adopting an alternative understanding of voluntary repatriation that is closer to the practice of UNHCR's predecessors: providing assistance to refugees and displaced persons who are repatriable (that is, do no longer have a well-founded fear of persecution), and protection—and alternative solutions—to those who are not repatriable. In terms of the time-line UNHCR applies now, it would mean that repatriation would take place not preceding cessation of refugee status but following cessation of refugee status.[93] If this, arguably, original, understanding and function of voluntary repatriation would be adopted,[94] what would that signify and entail?

It would mean that return would only be an option when there are no valid objections to return anymore in the sense of the definition of refugee. It would signify a clear set of limits: no return of any refugee before the end to their refugee status following the application of the cessation clauses pertaining to changed circumstances in the country of origin. Any return that is forced and has so far been masked by a thin veneer of voluntary repatriation should give way to a clear verdict of *refoulement*. For the States hosting refugees, it would mean that they have to refrain from organizing any return preceding a formal (individual) determination that cessation is warranted. The yardstick would be that of the relevant cessation clauses.

For UNHCR it would signify that it would continue to facilitate return when refugees want to return even when they are still refugees and conditions in the country of origin have not changed. It could, in addition, assist in the return of former refugees upon cessation of their status on account of changed circumstances in the country of origin. As indicated earlier, promoting and encouraging the voluntary repatriation of refugees was considered by UNHCR as giving them an opportunity to voluntarily return home with UNHCR protection and assistance before they cease to be refugees. The tacit implication of which is that UNHCR cannot extend such protection and assistance when the refugees have lost their status. It arguably can. First of all, UNHCR itself claims its man-

[93] It would seem that early UNHCR practice resembles the suggested course of action; see the General Assembly resolutions on refugees from Algeria in Morocco and Tunisia which simply refer to their (orderly) return, UN docs A/Res/1389(XIV) (20 November 1959); 1500(XV) (5 December 1960); 1672(XVI) (18 December 1961); likewise pertaining to 'refugees in Africa', UN doc A/Res/2040(XX) (7 December 1965).

[94] The Statutory assignment to assist governmental and private efforts to promote voluntary repatriation was taken to mean the following by the first High Commissioner: 'The intent of this provision is that whenever a refugee no longer regards himself as such and the reasons for which he has become a refugee has ceased to exist, he should be assisted in availing himself of the protection of the government of his country of origin'; Gerrit Jan van Heuven Goedhart, 'The Problem of Refugees' (1954) 82 Collected Courses of the Hague Academy of International Law 261, 309.

date includes a role with respect to the return—or integration—of persons who lost their refugee status as a result of the fifth and sixth cessation clauses 'for a period of grace'.[95] In addition, the actual return of the former refugees—following a proper application of the cessation clauses—is a task the International Organization for Migration is well equipped for, specialized as it is in travel logistics pertaining to the movement of refugees and migrants.[96] Secondly, UNHCR's mandate comprises assisting and monitoring returnees, that is former refugees, after they have returned.[97] If a formal extension of UNHCR's mandate would nonetheless be required to sustain a prolonged role in the country of origin in the sense indicated, this could easily be effectuated by the General Assembly, in the same way it extended UNHCR's mandate into the country of origin for the benefit of returnees.[98]

A possible drawback of adjusting UNHCR's repatriation practice could be the durability aspect of voluntary repatriation. Actual return would take place following a fundamental change in circumstances in the country of origin. The threshold of the relevant clauses has been raised considerably by UNHCR and its Executive Committee.[99] If that rather exacting threshold is observed—and here UNHCR's supervisory function would be vital—much of what is currently done to secure durability would not be required since it is already part of meeting that threshold, and hence should have been taken care of preceding return. Many of the issues that need to be addressed in the country of origin, such as reclaiming property, restitution, reparations, compensation for losses, access to justice, etc are, moreover, the responsibility of the country of origin,[100] rather than UNHCR.

Adjusting voluntary repatriation in the sense indicated does not change or otherwise affect the obligations of States under the Refugee Convention and Protocol, and it, in addition reduces the risk of reverse movements that are inherent to any premature return; that is, a return preceding the time loss of refugee status is justified on account of changed circumstances in the country of origin.

[95] UNHCR's Guidelines on Cessation (n 30) para 25 (viii); cf Botswana that grants former Namibian refugees a period of grace following cessation of their refugee status, which enables them to return with UNHCR assistance to Namibia; Terttu Newaka, 'Botswana to Deport over 800 Namibian Refugees' *The Namibian* (13 September 2019).

[96] See Constitution of IOM, art 1(1).

[97] Despite the fourth cessation clause that provides that the competence of UNHCR 'shall cease to apply to any person defined in section A above if (…) (d) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution (…)'.

[98] The UNGA endorsed this extension as formulated by ExCom in Conclusion No 40 (1985) sub (l) in UN doc A/Res/40/118 (13 December 1985) sub (7).

[99] See UNHCR's Guidelines on Cessation (n 30) in particular also the requisite restoration of protection, paras 15–16; Hathaway (n 32) 920; James C Hathaway and Michelle Foster, *The Law of Refugee Status* (CUP 2014) 478, 481–9.

[100] On the responsibilities of the countries of origin, cast in terms of a just return, see Megan Bradley, *Refugee Repatriation. Justice, Responsibility and Redress* (CUP 2013).

CHAPTER 60

RESETTLEMENT

SUSAN KNEEBONE AND AUDREY MACKLIN

1. Introduction

This chapter examines and critiques refugee resettlement, ostensibly a 'durable solution' to displacement. Contemporary resettlement is practised mainly by high-income liberal democracies of the Global North, the same States that reluctantly receive asylum seekers coming mainly from the Global South. This tension between asylum and resettlement explains many of the features of contemporary resettlement practices, with asylum legally regulated, and resettlement usually framed as a matter of discretion.

We understand asylum as linking the provision of refuge from harm with the opportunity to create a new home elsewhere. The object of resettlement is also integration in a new 'third' country. It is traditionally referred to as the third durable solution, preceded by 'local integration in the country of first asylum',[1] and voluntary repatriation (or return) to the country of origin. These first two solutions are underwritten by the legal prohibition on *refoulement*, while resettlement is presented as a 'voluntary',[2] or 'non-legal obligation'[3] of States. Resettlement lacks 'a binding legal framework',[4] and, in comparison to asylum, falls 'outside the realm of international law'.[5] While asylum seekers

[1] Gary Troeller, 'UNHCR Resettlement as an Instrument of International Protection: Constraints and Obstacles in the Arena of Competition for Scarce Humanitarian Resources' (1991) 3 IJRL 564, 565.

[2] Expert Council's Research Unit, 'What Next for Global Refugee Policy? Opportunities and Limits of Resettlement at Global, European and National Levels' (SRV Research Unit 2018) Policy Brief 9 <https://www.svr-migration.de/wp-content/uploads/2018/06/SVR-FB_Resettlement_EN.pdf> accessed 28 May 2020.

[3] Naoko Hashimoto, 'Refugee Resettlement as an Alternative to Asylum' (2018) 37(2) RSQ 162, 163.

[4] Adèle Garnier, Liliana Lyra Jubilut, and Kristin Bergtora Sandvik, 'Introduction: Refugee Resettlement as Humanitarian Governance' in Adèle Garnier, Liliana Lyra Jubilut, and Kristin Bergtora Sandvik (eds), *Refugee Resettlement: Power, Politics and Humanitarian Governance* (Berghahn Books 2018) 8.

[5] Hashimoto (n 3) 165.

have a 'right to seek asylum',[6] refugees cannot claim a right in international law to be resettled.

This incongruity between asylum and resettlement matters legally and politically. Asylum seekers make a claim of right based on States' international legal commitments. In contrast, refugees seeking resettlement make a moral appeal to humanitarian discretion. And because resettlement can furnish real benefits to refugees (safe passage, protection, and support) that asylum seekers do not enjoy, States appear virtuous when endorsing resettlement over asylum. But because it is not backed up by an enforceable legal duty, States can wield resettlement against asylum for rhetorical and political purposes, while actually resettling few or no refugees. Although resettlement is presented as an equal alternative to local integration and voluntary return, resettlement is weaker because it remains untethered to obligation. The conundrum—which we do not resolve—is how one can justify this normative asymmetry amongst the three 'durable solutions'.

Integration is central to resettlement's character as a durable or lasting solution for individual refugees. The first Executive Committee (ExCom) Conclusion specifically referring to resettlement dates from 1976—25 years after the making of the Refugee Convention.[7] It exhorts States '[t]o offer resettlement opportunities to those who ha[ve] been unable to obtain permanent residence in the State of *first asylum*'.[8] UNHCR's Resettlement Handbook (2011)[9] describes resettlement as:

> [t]he selection and transfer of refugees from a State in which they have sought protection to *a third State* which has agreed to admit them—as refugees—with permanent residence status.[10]

In this framing, protection in the host country (typically in the Global South) is succeeded by integration in the resettlement country (in the Global North). This reflects the use of resettlement in the late twentieth century, and the incapacity of States in the Global South to satisfy the settlement needs of asylum seekers.[11] It conjures up the image of refugees who reach States of first asylum, and stay there. This leaves asylum seekers who leave countries of first asylum to seek refugee protection in Europe, North America, or Australia/New Zealand dangling awkwardly at the edges of the frame delimiting the three durable solutions.

The appearance of the term 'durable solutions' in UNHCR ExCom Conclusions dating from the 1980s[12] was animated by concern about the prevention of 'secondary

[6] See Chapter 48 in this volume.

[7] UNHCR, ExCom Conclusion No 2 (XXVII), 'Functioning of the Sub-Committee and General Conclusion on International Protection' (1976).

[8] ibid para (h)(ii).

[9] UNHCR, 'UNHCR Resettlement Handbook' (2011).

[10] ibid para 3 (emphasis added).

[11] Hashimoto (n 3) 165. See also Garnier, Jubilut, and Sandvik (n 4) 10, who contend that refugee resettlement is not 'codified in hard international law'.

[12] eg UNHCR ExCom Conclusion No 23 (XXXII), 'Problems Related to the Rescue of Asylum Seekers in Distress at Sea' (1981) para 57(3).

movements' from countries of first asylum in the context of the Indochinese crisis.[13] States in the Global North offered resettlement as an instrument of international 'responsibility-sharing', to relieve the burden of asylum on host countries in the Global South. However, as noted above, current resettlement practices must be interpreted in light of their relationship to asylum in the Global North. States use resettlement strategically to pit resettled refugees against asylum seekers. They do this discursively by delegitimizing asylum seekers as undeserving compared to resettled refugees, and literally (in the case of Australia) by establishing a global quota of refugees who will be admitted in a given year, and subtracting asylum seeker arrivals from the spaces available for resettled refugees.

The preamble and article 35 of the Refugee Convention hint at an obligation to resettle, by invoking obligations to cooperate with UNHCR on the 'problem of refugees' and the need to share the 'burden' of this problem.[14] However, the Convention neither addresses collective solutions,[15] nor enshrines an individual right to access asylum[16] except by default through *non-refoulement*. Asylum seekers do not appear in policy discourse in resettlement States of the Global North as potential subjects of durable solutions, even as they remain hyper-visible in policy agendas. The Refugee Convention primarily recognizes individual refugee status,[17] although echoes of the resettlement experiences in the inter-war years (1921–39) are audible in its emphasis on travel,[18] identity documents,[19] employment rights[20] for refugees and asylum seekers, and transfer of assets for asylum seekers admitted 'for the purpose of resettlement'.[21] In contrast, UNHCR is mandated to develop solutions for 'groups and categories of refugees'.[22] The Statute establishing UNHCR in 1950, 'calls upon' 'governments' to cooperate with UNHCR 'especially by' admitting refugees to their territories (to seek asylum), and providing refugees with 'travel and other documents' to 'facilitate their resettlement'.[23] Chapter 1, paragraph 1 of the Statute describes the role of UNHCR as working with States in 'seeking permanent solutions'.

[13] UNHCR ExCom Conclusion No 58 (XL), 'The Problem of Refugees and Asylum Seekers Who Move in an Irregular Manner from a Country in Which They Have Already Found Protection' (1989).

[14] See art 35 and preambular clauses 4, 5, 6 of the Refugee Convention regarding cooperation between States and UNHCR. Article 31(2)—the right to freedom of movement to obtain 'admission into another country' also recognizes resettlement.

[15] OAU Convention, art II(4)—'African solidarity and cooperation … to lighten the burden of the Member State granting asylum'; art II(5)—temporary protection pending resettlement. See Sharpe, Chapter 15 in this volume, who explains how the combination of arts II(4) and II(5) was employed in the 1970s and 1980s to resettle refugees to Tanzania, Zambia, and Zimbabwe.

[16] Note that OAU Convention, arts II(1) and (2) specifically mention a right to asylum.

[17] Contrast art 1C(5) and (6) of the Refugee Convention which are applied to both groups and individuals.

[18] Refugee Convention, art 28. [19] ibid art 27. [20] ibid art 17. [21] ibid art 30.

[22] UNGA, 'Statute of the Office of the United Nations High Commissioner for Refugees' (14 December 1950) Annex to GA Res 428(V) UN doc A/RES/428(V) (UNHCR Statute) ch 1, para 2.

[23] ibid preambular clauses 2(c), (d), and (f). See also the High Commissioner activities—ch II 8 (c)—promoting of voluntary repatriation and assimilation and subsection (e)—transfer of assets for resettlement; ch II 9—repatriation and resettlement.

To reveal and explore this tension between asylum and resettlement, and examine resettlement's shifting and problematic role in refugee protection, we first survey its historical development (Section 2). We, then turn to three key aspects of contemporary practice (Section 3), namely its relationship with sovereignty, its decision-making processes, and States, treatment of resettled refugees.

2. A Brief History of Resettlement: From the Pilgrims of Plymouth to Asylum 'Trade-offs'

a. Early Refugee Population Movements

Resettlement is linked to the early history of refugees. Refugees fleeing religious and other persecution have long been associated with group and community movement leading to the creation of new settlements and colonies. For example, after the Revocation of the Edict of Nantes in 1685, many Huguenots fled from France *en masse* to the Channel Islands and the United Kingdom, as well as to new colonies further afield. The East Coast of what is now the United States received the Pilgrims of Plymouth and other groups from England and Europe in the early seventeenth century. Free settler communities coexisted with these 'self-selecting' movements of refugee communities. By contrast, later, in particular in the post-war period (1946–52), resettlement became an individual solution for displaced persons and refugees.

The eighteenth and nineteenth centuries were a period of great population movement, particularly in the service of the project of creating colonial settler societies. Some recent scholarship repositions resettlement alongside population management and relocation of groups of people as a remedy to the problem of 'over-population' in Europe. It argues that population transfer became 'normative' in the context of colonization; that when resettlement was proposed for Jewish (and other groups of) refugees in the inter-war years in the twentieth century, 'it was evolutionary rather than novel'.[24]

b. Resettlement in the Inter-war Years

In the inter-war years, State responses to refugees included the development of international institutions. Europe faced a crisis of mass displacement after the First World

[24] Jane McAdam, 'Relocation and Resettlement from Colonization to Climate Change: The Perennial Solution to "Danger Zones"' (2015) 3(1) London Review of International Law 93, 95.

War.[25] This period was marked by the breakdown of old multinational empires in the Balkans and expansionist tendencies of nation-States in Eastern Europe, leaving large stateless, homeless populations. It was also an era of institutional experimentation, beginning with the establishment of the first High Commissioner for Refugees (HCR) by the League of Nations (LN) in 1921.[26] The needs of this displaced population were evident, in that they needed work to survive and identity documents to regularize their (often stateless) status so they could travel or migrate onwards for employment. During Fridtjof Nansen's tenure as HCR (1921–30), thousands of Greek, Bulgarian, and Armenian refugees were resettled with the support of participating governments.[27] The ILO (1925–29) acted as a clearing house and labour exchange.[28] It established a Refugee Section to provide information on employment matching between countries, and extended resettlement beyond Europe to Canada and Brazil.[29] Skran described refugee settlement in this period as involving emigration, economic opportunities, and the linkage of refugee assistance with economic development.[30]

The main focus of solutions in this period was on the resettlement of *groups* of displaced persons, which increasingly meant Jewish persons. In their case, anti-Semitism amplified economically motivated opposition to resettlement. In the 1930s, the effects of the Depression, the rise of Nazi Germany and the prospect of another world conflict eroded support for resettlement. During this period US President Franklin D Roosevelt established a secret project—the 'M' project—to find resettlement sites and establish colonies for Jewish refugees.[31] Other efforts to address the plight of Jewish refugees failed, such as the creation of dedicated institutions and conferences, including the 1938 Evian Conference.[32]

Overall, in this period, refugee protection policy grew increasingly politicized and allied to the interests of powerful States: while governments supported refugee protection for security and foreign policy reasons as much as for pure humanitarian concerns, they were 'more likely to aid refugees fleeing from enemies than friends'.[33]

[25] Emma Haddad, *The Refugee in International Society* (CUP 2008) 99: by 1926 there was a refugee population of 26 million and more than 20 million persons displaced within States.

[26] Gil Loescher, *The UNHCR and World Politics: A Perilous Path* (OUP 2001) 25; Laura Barnett, 'Global Governance and the Evolution of the International Refugee Regime' (2002) 14 IJRL 238, 242.

[27] Loescher (n 26) 25 quoting Claudena Skran, *Refugees in Inter-War Europe: The Emergence of a Regime* (Clarendon Press 1995).

[28] The ILO also held a conference in 1938 on the Organisation of Migration for Settlement—it recommended the creation of a Permanent International Committee on Migration for Settlement, but with the outbreak of war in 1939 this did not eventuate. See McAdam (n 24) 107–9.

[29] Katy Long, 'When Refugees Stopped Being Migrants: Movement, Labour and Humanitarian Protection' (2013) 1 Migration Studies 4, 10.

[30] Cited by Loescher (n 26) 25.

[31] McAdam (n 24) 95, 117–20. Also note the narrative of 'nation-building': 111, 118.

[32] Loescher (n 26) 30–4; McAdam (n 24) 109–12; Rieko Karatani, 'How History Separated Refugee and Migrant Regimes: In Search of Their Institutional Origins' (2005) 19 IJRL 517, 527–8, citing Eric Estorick, 'The Evian Conference and the Intergovernmental Committee' (1939) 203 The Annals of American Academy of Political and Social Science 136–41.

[33] Loescher (n 26) 27.

c. The War and Aftermath

It was estimated that 20 to 30 million persons were displaced during the Second World War, with another 9.5 million Germans and another 4 million 'war fugitives'.[34] Two main initiatives, both of which were financed by the British and the US governments, were created to deal with this displacement. The US-favoured Intergovernmental Committe on Refugees (IGCR) (1938–47) arose out of the Evian Conference.[35] In 1946, IGCR began to look into resettlement possibilities for persons displaced during the Second World War.[36] However, it had resettled only 38,000 displaced persons by July 1947 when the International Refugee Organisation (IRO) took over.[37] United Nations Relief and Rehabilitation Agency (UNRRA) was established by governments to implement repatriation,[38] but it also engaged in resettlement activities[39] although the numbers resettled were 'very low'.[40] During its existence from 1942 to 1946, it assisted seven million displaced persons with repatriation.[41] Despite the 'modest scale'[42] of resettlement in this period, it was an established solution. Resettlement institutions needed political support and funds, which enabled the Great Powers to steer their direction and activities.

The Great Powers exerted their influence steadily, and refugee protection took on a more individualized approach. Hathaway acknowledges that 'even in this largely humanitarian phase, the nation-state philosophy and promotion of national economic goals'[43] were decisive factors. In a Europe under reconstruction, the divisions that would define the Cold War emerged. McAdam suggests that it was the political failure of proposed large-scale resettlement schemes, including the potential for ghettoization, that led to post-war refugee resettlement becoming an individualized solution.[44] In the same vein, individual refugee status under the Refugee Convention replaced group-defined protection, and an individual right to asylum was enshrined in international law under the UDHR.

The IRO (1946–52) arose out of both the IGCR and UNRRA. Its mission was planned resettlement on a 'large scale'[45] for 'genuine refugees and displaced persons'.[46] Within a

[34] ibid 34.

[35] Kim Salomon, *Refugees in the Cold War: Towards a New International Refugee Regime in the Early Postwar Era* (Lund University Press 1991) 170. Note the 'M' project (1942–45) ended with the death of President Franklin D Roosevelt.

[36] ibid 178. [37] ibid.

[38] James C Hathaway, 'The Evolution of Refugee Status in International Law: 1920–1950' (1984) 30 ICLQ 348, 370–2.

[39] Salomon (n 35) 178–85: A Resolution adopted at the Council in 1946 referred to UNRRA's role to 'facilitate resettlement' in addition to repatriation.

[40] ibid 185: between April to December 1946, 8,300 people were moved from Western Germany; 6,100 were resettled in the US, and 1,100 in the UK.

[41] Long (n 29) 14. [42] ibid 166.

[43] James C Hathaway, 'A Reconsideration of the Underlying Premise of Refugee Law' (1990) 31(1) Harvard International Law Journal 129, 138.

[44] McAdam (n 24) 95.

[45] IRO Constitution 1946, art 10. Reflecting the politics of resettlement, the preamble and provisions of the Constitution privilege return ahead of resettlement, see art 2(1)(a) and (b).

[46] ibid preamble, clause 2.

year, it resettled the caseload of 1 million it inherited from UNRRA,[47] 31.7 per cent of eligible persons going to the US; 17.5 per cent to Australia; 12.7 per cent to Israel; 11.9 per cent to Canada, and 8.3 per cent to the UK.[48] These States took advantage of the IRO's mass resettlement programme to fill their needs for post-war reconstruction. The refugees, generally known as Displaced Persons, were accepted as labour migrants for the construction and agriculture sectors, often under conditions tantamount to indentured labour.[49] Participating governments were selective in the persons to whom they offered resettlement,[50] including restrictions based on race. Most resettlement countries preferred Baltic refugees, for instance.[51] IRO resettlement was tested towards the end of its operation when it had to find settlement places for 150,000 so-called 'hard core' cases, mainly deemed unfit for labour. This led to change in the framing of resettlement, from mainly economic to humanitarian.[52]

d. Resettlement and the Cold War Era

The IRO era normalized resettlement as dictated by the selective practices of destination States, rather than as a matter of refugee rights. Later, during the Cold War, resettlement was used strategically in localized contexts. Two key refugee crises during the Cold War period, after the Refugee Convention entered into force, demonstrated the use of resettlement strategically to relieve the 'burden' on countries of first asylum. These were, first, the responses to the Hungarian exodus in 1956, and then the 'Indochinese crisis' commencing in the 1970s and 1980s.

The first crisis arose out of the USSR repression of the Hungarian uprising in 1956, which caused an exodus of 200,000 people, mainly to Austria.[53] Austria, still hosting 'left-over' refugees from the Second World War, appealed to UNHCR for assistance. UNHCR's call for resettlement places was successful, with only 410 refugees left in Austria and the others resettled across 36 other States globally.[54] This episode presaged contemporary resettlement practices in two respects. First, States applied various selection criteria, ranging from none, to exclusion of communists and criminals, to a preference for certain categories of entrants, such as women and children, Jewish refugees, or workers.[55] Secondly, the refugees were admitted with diverse legal statuses, from temporary to permanent residence and even 'transit asylum'.[56]

[47] Loescher (n 26) 40. [48] ibid.

[49] Andrew Markus, 'Labour and Immigration 1946–9: The Displaced Persons Program' (1984) 47 Labour History 73, 88; Long (n 29) 14–15; Kristin Bergtora Sandvik, 'A Legal History: The Emergence of the African Resettlement Candidate in International Refugee Management' in Garnier, Jubilut, and Sandvik (n 4) 50.

[50] Markus (n 49) 80.

[51] Sandvik (n 49) 50–1, points out that the US imposed national quotas based on the Asian Exclusion Act 1924.

[52] Long (n 29) 15.

[53] Marjoleine Zieck, 'The 1956 Hungarian Refugee Emergency, an Early and Instructive Case of Resettlement' (2013) 5(2) Amsterdam Law Forum 45.

[54] ibid 59–60. [55] ibid 54–5. [56] ibid 56–8.

The exodus of three million people in the 1970s and 1980s from the conflict in Indochina[57] led to a resettlement arrangement brokered by the UN Secretary-General in 1979, and later in 1989, with the decade-long Comprehensive Plan of Action (CPA).[58] The importance of these arrangements is that countries in the region, which were not parties to the Refugee Convention agreed to provide temporary 'first' asylum on the basis that States outside the region would grant resettlement on a permanent basis. Proponents praised the CPA for manifesting international solidarity, or burden-sharing, through resettlement on a global scale.[59] Although commentators differ on the 'success' of these arrangements, it is generally agreed that resettlement was 'the engine that powered the many moving parts of the CPA'.[60] In each case, resettlement was used to preserve asylum in the first country of refuge. Under the CPA, asylum adjudication was generally conducted on an individualized basis and thus the norm of an individual right to asylum was respected.

While the preferential resettlement offered by Western States to Hungarian refugees exemplifies resettlement's utility in waging ideological Cold War battles,[61] the resettlement of Indochinese refugees suggests acceptance of political responsibility for the flight of refugees consequential to a proxy Cold War. Scholars note the popularity of resettlement in the 'civilized West' during this period when a 'rescue' narrative of refugee escapees from communism prevailed.[62] The end of the Cold War generated a new narrative, largely led by UNHCR, that altered the rationales and uses of resettlement, and its position in relation to asylum.

e. Resettlement since the 1990s

By the late 1990s, the arrival of migrants and refugees from the Global South, dubbed the 'phenomenon of mixed flows',[63] was increasingly problematized as the 'asylum/ migration' nexus.[64] In a context where refugee movement to the Global North was

[57] Susan Kneebone and Felicity Rawlings-Sanaei, 'Introduction: Regionalism as a Response to a Global Challenge' in Susan Kneebone and Felicity Rawlings-Sanaei (eds), *New Regionalism and Asylum Seekers: Challenges Ahead* (Berghahn Books 2007) 11–16.

[58] International Conference on Indo-Chinese Refugees, 'Declaration and Comprehensive Plan of Action', UN doc A/CONF.148/2 (13 June 1989).

[59] Rick Towle, 'Processes and Critiques of the Indo-Chinese Comprehensive Plan of Action: An Instrument of Burden-Sharing?' (2006) 18 IJRL 537, 569–70.

[60] William Courtland Robinson, 'The Comprehensive Plan of Action for Indochinese Refugees, 1989–1997: Sharing the Burden and Passing the Buck' (2004) 17(3) JRS 319, 323–4; cf Joanne van Selm, 'Refugee Resettlement' in Elena Fiddian-Qasmiyeh, Gil Loescher, Katy Long, and Nando Sigona (eds), *The Oxford Handbook of Refugee and Forced Migration Studies* (OUP 2014) 513.

[61] Note the flight from Czechoslovakia post-1968 and the Cuban crisis in the 1960s.

[62] Alexander T Aleinikoff, 'State Centred Refugee Law: From Resettlement to Containment' (1992) 14 Michigan Journal of International Law 120, 125; BS Chimni, 'From Resettlement to Involuntary Repatriation: Towards a Critical History of Durable Solutions to Refugee Problems' (2004) 23(3) RSQ 55.

[63] UNHCR, 'The Strategic Use of Resettlement: A Discussion Paper Prepared by the Working Group on Resettlement', UN doc WGR/03/04.Rev3 (2003) para 24.

[64] Stephen Castles, 'The Migration–Asylum Nexus and Regional Approaches' in Kneebone and Rawlings-Sanaei (n 57) 31.

increasingly securitized and merged into international migration,[65] and attempts to contain refugees in regions of origin expanded, support for asylum contracted in wealthy States.[66] UNHCR, in particular ExCom, narrowed its focus, exhorting States to furnish 'adequate' resettlement places as 'an instrument of protection' for specific members of 'vulnerable groups'[67] (eg 'refugee women at risk'[68]), those in 'urgent or emergency'[69] situations, or other 'compelling'[70] protection cases. Between 1976 (the year of the first UNHCR ExCom Conclusion on Resettlement) and 2001, ExCom issued 16 statements about resettlement as an instrument of international burden-sharing and protection.[71]

In the 1990s, UNHCR attempted to counter the 'containment trend' and revitalize the use of resettlement. UNHCR issued guidelines on resettlement in 1990 and, following an influential 1994 review,[72] published the first UNHCR Handbook[73] on resettlement in 1997. In the late 2000s, UNHCR launched the Global Consultations on International Protection,[74] leading to a focus on the 'Strategic Use of Resettlement', which involved

> the planned use of resettlement in a manner that maximizes the benefits, directly or indirectly, other than those received by the refugees being resettled. Those benefits might accrue to other refugees, the hosting state, or other states or the international protection regime in general.[75]

While emphasizing 'that the first purpose of resettlement must always be the provision of individual protection for those who cannot secure asylum in the first asylum country',[76] subsequent examples of regional burden-sharing revealed States' primary intention to repel and deter asylum seekers.[77]

[65] Stephen Castles, 'Towards a Sociology of Forced Migration and Social Transformation' (2003) 37(1) Global Refugees: Sociology 13.

[66] Matthew Gibney, 'Forced Migration, Engineered Regionalism and Justice Between States' in Kneebone and Rawlings-Sanaei (n 57).

[67] Such groups included 'boat people' fleeing the Indochina crisis (UNHCR ExCom Conclusion No 23 (1981)) and 'disabled refugee children' (UNHCR ExCom Conclusion No 47 (1987)).

[68] The first reference is in UNHCR ExCom Conclusion No 54 (1988) followed by No 60 (1989), No 64 (1990), and No 85 (1998).

[69] UNHCR ExCom Conclusion No 55 (1989) and No 67 (1991).

[70] UNHCR ExCom Conclusion No 68 (1992).

[71] UNHCR ExCom Conclusion No 67 (1991) and No 85 (1998).

[72] John Frederiksson and Christine Mougne, *Resettlement in the 1990s: A Review of Policy and Practice* (UNHCR 1994).

[73] It was subsequently updated in 2002, 2004, and 2011.

[74] Kneebone and Rawlings-Sanaei, 'Introduction: Regionalism as a Response to a Global Challenge' in Kneebone and Rawlings-Sanaei (n 57) 18–19.

[75] UNHCR ExCom, 'The Strategic Use of Resettlement: A Discussion Paper Prepared by the Working Group on Resettlement', EC/53/SC/CRP.10/Add.1 (3 June 2003) para 6.

[76] ibid para 8.

[77] See eg Susan Kneebone, 'Outing Off-Shore Processing: The High Court of Australia Defines the Role of the Refugee Convention' (2012) 26(2) Journal of Immigration, Asylum and Nationality Law 156.

This goal continues to animate resettlement in the twenty-first century, underpinning reciprocal agreements such as those between Australia and the US[78] and the EU and Turkey.[79] Under these agreements, one State/region is permitted to repel asylum seekers, and instead admit a stipulated number of resettled refugees. These seemingly senseless refugee 'swaps' are a sovereignty spectacle, where control is reasserted by 'choosing' to resettle rather than being 'obliged' to protect those who arrive as asylum seekers. Beyond the EU–Turkey deal, the European Commission has repeatedly attempted to coordinate national resettlement practices, both by increasing targets and proposing the adoption of binding legislation, but has failed in both endeavours.[80] One of the most egregious illustrations concerns migrants and refugees in Libya who are intercepted and returned if they attempt to leave irregularly for Italy.[81] They are then subject to arbitrary detention and grave human rights abuses in Libya. In response, UNHCR has evacuated some refugees and asylum seekers from Libya to Niger and Rwanda under its Emergency Transit Mechanism, amid putative undertakings of resettlement to European States. But resettlement has largely failed to materialize, leaving refugees in Niger and Rwanda where protection is inadequate.[82]

In addition to the resettlement of groups of refugees under strategic 'trade-offs',[83] resettlement countries have offered places to specific groups arising from particular emergencies, often where there is perceived 'proximity'[84] in terms of geography, causation or 'identity' between the refugees and inhabitants of the resettling State. Referred to as situations of 'enhanced responsibility'[85] or international solidarity in certain conflict

[78] Under the Australia–US agreement, asylum seekers have been unlawfully detained in offshore processing centres to prevent them from seeking asylum in Australia. See also Times Staff, 'Read President Trump's Full Remarks at the U.N. General Assembly, Annotated' *LA Times* (19 September 2017).

[79] Bernard Ryan, 'The Migration Crisis and the European Union Border Regime' in Marise Cremona and Joanne Scott (eds), *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law* (OUP 2019); European Stability Institute, 'The EU–Turkey Statement Three Years On' (*ESI Core Facts*, 15 April 2019) <https://www.esiweb.org/pdf/ESI%20core%20facts%20-%20EU-Turkey%20Statement%20three%20years%20on%20-%2015%20April%202019.pdf> accessed 15 September 2019.

[80] Sergio Carrera and Roberto Cortinovis, 'The EU's Role in Implementing the UN Global Compact on Refugees Contained Mobility vs. International Protection' (2019) CEPS Paper in Liberty and Security in Europe No 2018-04, 6–10 <http://aei.pitt.edu/97083/> accessed 28 May 2020.

[81] See eg Council of Europe Commissioner for Human Rights, 'Third Party Intervention under Article 36, paragraph 3, of the European Convention on Human Rights, Application No. 21660/18, *S.S. and others v. Italy*' (15 November 2019) paras 11, 23, 35.

[82] 'Spirited Away: The Fading Importance of Resettlement in the Emergency Transit Mechanism in Rwanda' (28 October 2019) <https://reliefweb.int/report/rwanda/spirited-away-fading-importance-resettlement-emergency-transit-mechanism-rwanda> accessed 15 May 2020; Sharpe in this volume suggests these evacuations may be 'in line with the spirit of' art II(4) of OAU Convention discussed above n 15. See Chapter 15 in this volume.

[83] Betsy Fisher, 'Doors to Safety: Exit West, Refugee Resettlement, and the Right to Asylum' (2019) 117(6) Michigan Law Review 1119.

[84] Maria O'Sullivan, 'The Ethics of Resettlement: Australia and the Asia-Pacific Region' (2016) 20(2) International Journal of Human Rights 241.

[85] Joanne van Selm, 'Strategic Use of Resettlement: Enhancing Solutions for Greater Protection' in Garnier, Jubilut, and Sandvik (n 4) 38 notes the shift in terminology around the time UNHCR revised its Handbook in 2011.

situations, these include the 1999 evacuation/resettlement of Kosovars to various NATO Member States following the NATO bombing of Serbian forces in Kosovo, and the resettlement of Syrian refugees from Lebanon and Jordan. Additionally, strategic resettlement includes 'enhanced legal'[86] and 'complementary' pathways, a term which UNHCR has embraced in recent policy.[87]

3. Contemporary Resettlement Practices in Critical Perspective

a. Sovereignty, Resettlement, and Asylum

Across destination States in the Global North, asylum seekers are portrayed as imposing themselves on a receiving State, in contrast to the passive refugees awaiting selection for resettlement. In this sense, resettlement does not disturb the conviction that States ought to possess unfettered sovereign discretion to choose individual entrants; asylum challenges it. The arrival of asylum seekers (allegedly) signifies a loss of State control over who enters, but the contrast is false. In reality, the voluntary assumption of the legal obligation of *non-refoulement* by ratifying the Refugee Convention is also a paradigmatic sovereign act.[88] Nevertheless, the appeal of choosing refugees from afar partly explains the attractiveness of refugee swaps, extraterritorial asylum processing, and regional disembarkation platforms.[89] They offer the prospect of converting by stealth a legal duty of *non-refoulement* into desultory and optional resettlement.

In political environments hostile to asylum seekers, some States play resettlement off against asylum. Australia set the precedent by creating a single refugee admissions quota and deducting asylum arrivals from potential resettlement spaces in a zero-sum calculus. The US under President Trump followed suit by justifying a reduction in resettlement on the basis that the government needed to redirect resources from resettlement to the backlog of asylum applications.[90]

Statistically, the odds of resettlement today are miniscule. Both the total number of refugees worldwide, and those categorized by UNHCR as requiring resettlement,

[86] Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European Agenda on Migration' COM (2015) 240 final, para 3.2.

[87] UNHCR, 'The Three Year Strategy (2019–2021) on Resettlement and Complementary Pathways' (June 2019).

[88] Jane McAdam, 'Introduction: Asylum and the Universal Declaration of Human Rights' (2008) 27(3) RSQ 3, 5; María-Teresa Gil-Bazo, 'Asylum as a General Principle of International Law' (2015) 27 IJRL 3.

[89] See text accompanying notes 77–82 for examples.

[90] Secretary of State Michael Pompeo, 'Presidential Determination on Refugee Admissions for Fiscal Year 2020' (*US Department of State*, 2 November 2019) <https://www.state.gov/presidential-determination-on-refugee-admissions-for-fiscal-year-2020/> accessed 8 November 2019.

have increased greatly since 2014, yet available resettlement spaces are declining overall. In 2017, only one in 21 refugees identified by UNHCR as requiring resettlement departed for a resettlement State. By the end of the second decade of the twenty-first century, UN High Commissioner for Refugees Filippo Grandi lamented that 'only about half of one percent of the world's 26 million refugees . . . are resettled to any country'.[91] UNHCR refers less than 5 per cent of over 20 million refugees worldwide for resettlement; less than 10 per cent of those referred are typically offered a resettlement place, and that number dropped below 5 per cent in 2018.[92] Yet, the mere possibility of resettlement produces a hypothetical queue, which real asylum seekers are accused of jumping.

Ironically, the cost of resettlement can be also harnessed in the service of a 'humanitarian alibi',[93] in the form of a utilitarian argument that expenditures on humanitarian relief in countries of first asylum are preferable because they deliver greater good to greater numbers than resettlement for a select few in the Global North.[94]

b. Resettlement Decision-making

As of 2019, 29 States actively participate in refugee resettlement.[95] Historically, established leaders in global refugee resettlement have been the US, Canada, Australia, and the Nordic States, but the US slashed its resettlement ceiling under President Trump to the lowest level since the Refugee Act of 1980.[96] In any given year, Canada or Australia resettle the most refugees per capita. It is notable that the top three resettlement States are settler societies with sophisticated migration regimes and long histories of immigrant incorporation. Resettlement States rely to varying degrees on UNHCR for identification, refugee status determination, referral and dossier preparation for prospective resettlement cases. Some States also conduct independent selection through their own embassies or special missions. UNHCR may contract

[91] UNHCR, 'UNHCR Troubled by Latest US Refugee Resettlement Cut' (2 November 2019) <https://www.unhcr.org/news/press/2019/11/5dbd87337/unhcr-troubled-latest-refugee-resettlement-cut.html> accessed 2 November 2019.

[92] 'Less than 5 per cent of Global Refugee Resettlement Needs Met Last Year' (19 February 2019) <https://www.unhcr.org/news/briefing/2019/2/5c6bc9704/5-cent-global-refugee-resettlement-needs-met-year.html> accessed 8 November 2019.

[93] Joanne van Selm, 'The Strategic Use of Resettlement: Changing the Face of Protection?' (2004) 22(1) Refuge 39, 44.

[94] This rationale is articulated in EU initiatives: see text and notes 79 to 81 above.

[95] UNHCR, 'UNHCR Projected Global Resettlement Needs 2021' (20 June 2020) https://reliefweb.int/report/world/unhcr-projected-global-resettlement-needs-2021#:~:text=In%202021%2C%20UNHCR%20estimates%20that%20global%20resettlement%20needs,to%20be%20in%20need%20of%20resettlement.%20This%20increase > accessed 16 October 2020.

[96] The ceiling for 2021 was set at 15,000. See US Department of State, 'Transmission of the President's Report to Congress on the Proposed Refugee Admissions for Fiscal Year 2021' (30 September 2020), https://www.state.gov/transmission-of-the-presidents-report-to-congress-on-the-proposed-refugee-admissions-for-fiscal-year-2021/, accessed 14 October 2020.

with international NGO partners to assist in their own referral process, with the International Organization for Migration (IOM) often providing logistical support.

The governance of resettlement reflects its character as an exercise of humanitarian discretion rather than legal entitlement.[97] Accordingly, there is little hard law regulating international or domestic practice. UNHCR's Resettlement Handbook establishes a permissive soft law framework which, in principle, may discipline the drift towards arbitrariness and abuse of power by structuring and guiding the exercise of discretion.[98] However, as Sandvik notes in the resettlement context, soft law brings 'a host of new irregularities' in part arising out of 'the insurmountable challenges of offering "international protection" to the large refugee population' and in part from UNHCR's organizational culture. In this context, informal administrative techniques pervade the 'survival strategies' of UNHCR protection officers.[99] The Handbook commits UNHCR to external transparency and internal accountability in its resettlement process, recognizing in particular the importance of sustaining resettlement States' confidence.[100] In 'Combating Fraud and Corruption in the Resettlement Process',[101] it emphasizes that resettlement spaces are a scarce and precious resource whose distribution invites significant moral hazard.[102] Bribery and corruption scandals involving cash for resettlement places have positioned refugees both as potential perpetrators and victims of unscrupulous practices.[103] Where resettlement is understood as a 'demonstration of generosity'[104] to the refugee and an 'expression of solidarity' with other States, it follows that States will not subject their own conduct to external accountability. Resettlement States are not accountable to each other or to UNHCR for fulfilment of their resettlement undertakings.

Nor is UNHCR answerable to refugees about its resettlement procedures or decisions.[105] While the Handbook pays detailed attention to evidence, documentation, interview techniques, and confidentiality, refugees remain objects, not subjects, of

[97] Tom de Boer and Marjoleine Zieck, 'The Legal Abyss of Discretion in the Resettlement of Refugees: Cherry-Picking and the Lack of Due Process in the EU' (2020) 32 IJRL 1.

[98] Kristin Bergtora Sandvik, 'Blurring Boundaries: Refugee Resettlement in Kampala—between the Formal, the Informal and the Illegal' (2011) 34(1) Political and Legal Anthropology Review 11, 27; de Boer and Zieck (n 97).

[99] Sandvik, 'Blurring Boundaries' (n 98) 27.

[100] UNHCR, 'Resettlement Handbook' (n 9) section 4.2.

[101] ibid section 4.4.

[102] See eg ibid in section 4.2: 305, 308, 311, 328 (home visit).

[103] See eg Samuel Siringi, 'United Nations Refugee Agency in Kenya Probes Refugee Extortion Claims' (2001) 357 The Lancet 2034; Sally Hayden, 'UN Refugee Organization Reopens Corruption Probe after NBC News Report' (24 November 2019) <https://www.nbcnews.com/news/world/u-n-refugee-organization-reopens-corruption-probe-after-nbc-news-n1084181> accessed 15 May 2020.

[104] UNHCR, 'Resettlement Handbook' (n 9) 5.

[105] A recent example is the emergent practice of collecting and sharing biometric data from refugees under conditions of ambiguity regarding consent, the scope of distribution, and future use. See Chris Burt, 'UNHCR Reaches 7.2M Biometric Records but Critics Express Concern' (*Biometric Update*, 24 June 2019) <https://www.biometricupdate.com/201906/unhcr-reaches-7-2m-biometric-records-but-critics-express-concern> accessed 28 October 2019; Chris Burt, 'DHS to Store Tens of Thousands of Refugee Biometric Records from UNHCR' (*Biometric Update*, 21 August 2019) <https://www.biometricupdate.com/201908/dhs-to-store-tens-of-thousands-of-refugee-biometric-records-from-unhcr> accessed 28 October 2019.

governance. Procedures aim at efficient and accurate distribution of a scarce resource amongst a large population, not at legitimating the exercise of authority or recognizing refugees' dignity interest in fairness. Refugees may not apply for resettlement, and attempting to exercise agency in this way may actually impugn their credibility.[106] After initial screening, they may submit documents to support their account, but the utility and function served by documents remains random and obscure.[107]

Refugees are not entitled to see or respond to adverse evidence, to obtain reasons for decision, or to appeal a decision not to refer them for resettlement. Perhaps ironically, decision-makers tasked with resettlement referral seem no less susceptible to a culture of suspicion about refugees' credibility than adjudicators in national asylum regimes, even as national authorities seek to discredit asylum seekers by comparison to the 'authentic' refugees in camps.[108] Refugees' experience of an opaque system that does not afford them procedural fairness 'is partly explained by what soft-law regulation is not—namely, an instrument for upholding individual rights'.[109] Refugees who hope for resettlement in a stable and prosperous country are investing in a dream that is acutely potent, exceedingly remote, potentially indeterminate, and beyond control or even comprehension. The psycho-social toll on individual refugees and communities who endure this agonizing limbo can be profound and debilitating.[110]

As noted above, political interests and ideological commitments may orient the direction of national preferences.[111] A preference for refugees whom the nation-State understands as proximate in a relevant sense—ideologically, religiously, or ethnically—may also play a role. A State may embrace refugees whom it accepts some responsibility for creating (as in the case of the US and Indochinese, or Canada and Kosovars) and reject resettlement of those whom it disavows any role in producing (as in the case of the US and Chilean refugees of the 1970s). Apart from these explicitly political considerations, States may emphasize particular geographical location and/or refugee profiles (eg unaccompanied minors, women at risk, sexual minorities, or those with urgent medical needs). When States embark on Selection Missions, they accept files prepared by UNHCR and, in some cases, by designated NGOs that operate in the field.

[106] UNHCR, 'Information on Travelling Abroad (Resettlement) with UNHCR' (October 2015) <https://www.refugees-lebanon.org/uploads/poster/poster_144474398335.pdf> accessed 23 May 2020, quoted in de Boer and Zieck (n 97).

[107] Marnie J Thomson, 'What Documents Do Not Do: Papering Persecution and Moments of Recognition in a Congolese Refugee Camp' (2018) 60(1) Anthropologica 223.

[108] Audrey Macklin, 'Disappearing Refugees' (2005) 36 Columbia Human Rights Law Review 365, 365–70.

[109] Sandvik, 'Blurring Boundaries' (n 98) 17.

[110] See Cindy Horst, 'Buufis amongst Somalis in Dadaab: The Transnational and Historical Logics behind Resettlement Dreams' (2006) 19(2) JRS 143; Nadia el-Shaarawi, 'Living an Uncertain Future: Temporality, Uncertainty, and Well-Being among Iraqi Refugees in Egypt' (2015) 59(1) Social Analysis: The International Journal of Anthropology 38.

[111] See text accompanying notes 33, 58, 61, and 90.

However, resettlement States' criteria or interpretation of criteria can and do deviate from UNHCR priorities.

Representatives of resettlement States indicate the number and desired composition of the resettlement cohort; UNHCR then supplies files from their inventory of resettlement referrals, and States meet, interview, and select refugees for resettlement.[112] The Handbook does articulate a principle of formal equality: 'when UNHCR submits a refugee with a certain profile within a given population for resettlement, it should, as a general rule, be willing to submit all cases with a similar profile'.[113] This is probably best read as aspirational, as it would be impossible to comply with this norm, given the paucity of resettlement places.

The UNHCR screens all refugees for resettlement, and triages cases suitable for resettlement into sub-categories of urgency. Ordinary cases may take months or years from referral to departure. There are now seven resettlement classes listed (in contrast to the loosely defined 'vulnerable groups' described in the earlier ExCom Conclusions). In addition to the category of women and girls at risk, these are: those with specific protection needs who are at threat of *refoulement*; survivors of torture and/or violence; those with specific medical needs, in particular where life-saving treatment is unavailable in the country of refuge; family reunification; children and adolescents at risk; and those for whom there is lack of foreseeable alternative durable solutions.[114] Although resettlement is represented as a 'humanitarian' endeavour, the selection criteria applied by many States reproduce all three pillars of contemporary migration regimes: humanitarian, family, and economic. The first captures the refugee's need for resettlement. Kinship arises in the demarcation of the family unit for purposes of resettlement, and also in the weight attached to reuniting a refugee with relatives in the destination State. Economic criteria may inflect an assessment of the refugee's 'integration potential' based on human capital factors such as education, skills, and language ability; this evaluation may also include coded indicators that purport to measure 'values', 'attitudes', and 'cultural affinity'.

UNHCR does not endorse the evaluation of resettlement candidates according to economic or social indicia of 'integration potential' but cannot preclude States from using them. UNHCR can only rely on moral suasion to discourage States from selecting on the basis of invidious preferences. The Handbook acknowledges that '[d]iscriminatory selection criteria adopted by some resettlement States can limit the access to resettlement for refugees most at risk, and have a negative impact overall on the global resettlement programme.'[115] There is irony in the fact that States may discriminate in their resettlement selection for reasons that the Refugee Convention

[112] UNHCR, 'Resettlement Handbook' (n 9), section 7.7—the Handbook does not explain how UNHCR selects files for review by State Selection Missions.

[113] ibid 37.

[114] ibid.

[115] UNHCR, *Resettlement Handbook* (n 9) 70.

identifies as grounds of persecution[116] and which international human rights law would regard as suspect.[117]

Post-9/11 securitization has distorted many features of national migration regimes, including resettlement. Muslim and Middle-Eastern refugees, especially single men, have been prominent targets of discrimination in resettlement. The US explicitly publicizes the religious identification of refugees in its annual resettlement statistics.[118] Christian refugees almost always exceed Muslim refugees; their proportion increased dramatically after 2016. UNHCR may informally request a State to reconsider a decision to reject a resettlement referral, but there is no official recourse to an appeal. In principle, refusal of resettlement is an administrative decision that could attract judicial review under national law according to administrative law principles.[119] In practice, legal accountability under national law for resettlement decisions seldom arises because decisions are rendered extra-territorially to people who lack information, legal representation or means to pursue a legal challenge. Where judicial reviews do occur, as happens in Canada from time to time, most applicants are supported by an NGO, relative, or sponsor, suggesting the critical role played by domestic resettlement allies.[120] *Turani*[121] is a rare UK case in which a domestic court allowed a claim of discrimination brought by Palestinian refugees from Syria who were denied access to the UK resettlement scheme for Syrians.

In recent years, economists have turned their attention to devising algorithmic models for allocating refugees to different States. These mechanisms variously apply to asylum seekers and/or refugees seeking resettlement, and include quotas (sometimes tradable) and matching mechanisms that enable both States and refugees to rank their preferences.[122] Detractors deplore the appearance of refugee commodification in some of these matching schemes, while promoters contend that selection processes which are

[116] *Turani v Secretary of State for the Home Department* [2019] EWHC 1586 (Admin) discussed below is a rare exception.

[117] See Max Gabriel Cherem, 'May States Select Among Refugees?' (2020) 13(1) Ethics & Global Politics 33.

[118] See Brittany Blizzard and Jeanne Batalova, 'Refugees and Asylees in the United States' (*Migration Information Source*, 13 June 2019) <https://www.migrationpolicy.org/article/refugees-and-asylees-united-states> accessed 28 October 2019.

[119] At the international level, UNHCR may informally request a State to reconsider a refusal, and may propose the candidate to another resettlement State. In common law countries, the judicial review can be sought for breach of procedural fairness, reasonable apprehension of bias or abuse of discretion.

[120] For a discussion of judicial reviews of negative Canadian resettlement decisions, see Shauna Labman, *Crossing Laws Border: Canada's Refugee Resettlement Program* (UBC Press 2019) 56–80.

[121] *Turani* (n 116). The UK only accepted UNHCR referrals, and UNHCR does not refer Palestinians for resettlement because they fall under UNRWA's mandate: see Anne Irfan, 'Rejecting Resettlement: The Case of the Palestinians' (2017) 54 Forced Migration Review 69.

[122] Jesús Fernández-Huertas Moraga and Hillel Rapoport, 'Tradable Refugee-Admission Quotas (TRAQs), the Syrian Crisis and the New European Agenda on Migration' (2015) 4(23) Journal of European Labor Studies 1; Will Jones and Alexander Teytelboym, 'The Local Refugee Match: Aligning Refugees' Preferences with the Capacities and Priorities of Localities' (2017a) 31(2) JRS 152; Will Jones and Alexander Teytelboym, 'The International Refugee Match: A System that Respects Refugees' Preferences and the Priorities of States' (2017b) 36(2) RSQ 84.

transparent, comprehensive, efficient, and take refugees' preferences seriously will optimize the volume and distribution of resettlement opportunities.

c. National Integration Regimes

Each State's resettlement mechanism is unique, although there are common elements across jurisdictions.[123] The national executive or legislature typically sets a quota or range of refugees who will be selected for resettlement in a given year. They may consult in advance with sub-State government and civil society actors, as well as international and non-governmental partners and stakeholders.[124] Domestic laws enable and structure resettlement, but do not usually mandate it, thereby limiting opportunities to challenge discretionary decision-making by national actors.

Most resettlement States confer refugee status on resettled refugees before or upon arrival, as well as permanent resident status. Some extend permanent resident status immediately, while others provide a temporary or renewable status that may eventually be converted to permanent residence if certain conditions are fulfilled. As long as refugee status remains intact, a resettled refugee is protected from *refoulement* under the Refugee Convention. Refugee status formally ceases upon voluntary naturalization,[125] in which cases resettlement acts as a gateway to the genuinely durable solution of a new nationality. Resettled refugees are generally afforded a secure right of residence.[126] However, resettlement often drifts away from durability where, for example, resettled refugees are merely accorded temporary migration status, or where their refugee status is subject to cessation provisions.[127]

The goal of the resettlement process is integration, which involves reciprocal adaptation by newcomer and receiving State. From the State perspective, integration is often equated with 'self-sufficiency', which in turn denotes that the refugee is not a fiscal burden. A liberal model of economic self-reliance is baked into national resettlement schemes, whatever its role in initial selection: the refugee boards the plane as a passive

[123] For individual country reports on resettlement programmes, see UNHCR, 'Resettlement Handbook and Country Chapters' (April 2018) <https://www.unhcr.org/protection/resettlement/4a2ccf4c6/unhcr-resettlement-handbook-country-chapters.html?query=resettlement%20handbook> accessed 28 October 2019; see also Amanda Cellini, 'Annex: Current Refugee Resettlement Program Profiles' in Garnier, Jubilut, and Sandvik (n 4).

[124] For example, in Canada although resettlement is governed nationally, the province of Quebec is authorized to operate its own refugee resettlement programme.

[125] Refugee Convention, art 1C(3).

[126] See generally European Resettlement Network, 'Resettlement, Relocation or Humanitarian Admissions?! We Explain the Terminology…' (2019) <https://www.resettlement.eu/page/resettlement-relocation-or-humanitarian-admission-we-explain-terminology> accessed 8 November 2019.

[127] eg Refugee Convention, art 1C(5) ('changed circumstances'). Denmark appears to contemplate this: Cecilie Lund Kristiansen and Morten Skaerbaek, 'Efter halvanden måned som minister har Tesfaye ændret holdning til kvoteflygtninge' (*Politiken*, 14 August 2019) <https://politiken.dk/indland/art7333443/Efter-halvanden-måned-som-minister-har-Tesfaye-ændret-holdning-til-kvoteflygtninge> accessed 8 November 2019.

recipient of global humanitarian benevolence, and disembarks as an incipient self-supporting market actor in a national order.

Although resettlement is primarily an enterprise led by the State, virtually all governments collaborate with sub-State entities and non-governmental organizations for delivery of settlement and integration programmes. In this sense, most arrangements are more like 'public–private partnerships',[128] as are community sponsorship programmes for resettlement. Although Canada pioneered this concept, many other countries have now introduced their own models of 'private' or 'community' resettlement.[129] One rationale for such schemes is that they enhance the integration prospects of the resettled refugees through the support and transfer of social capital from citizen-volunteers to newcomers.[130]

Some States have developed initiatives which seek to develop non-humanitarian pathways for migrants who also happen to be refugees. Talent Beyond Boundaries matches refugees possessing technical or professional skills with employers in destination countries in order to facilitate their admission as economic immigrants.[131] Latin America operates a model regional 'solidarity' resettlement scheme.[132] It proceeds from a historical framing of refugee protection as asylum,[133] but also incorporates labour mobility as a solution.[134] The Solidarity Resettlement Programme co-exists with Mercosur's Labour Mobility Programme; work permits rather than asylum are favoured.[135] These and other 'complementary pathways' offer the prospect of supplementing traditional modes of refugee resettlement, but their merits depend on the security, status, and settlement support that they provide. These pathways also pose a risk of eroding publicly supported refugee integration if they detract from the number of refugees resettled on the basis of non-economic criteria.

[128] Suzan Ilcan, 'Privatizing Responsibility: Public Sector Reform under Neoliberal Government' (2009) 46(3) Canadian Review of Sociology 207.

[129] Jennifer Bond and Ania Kwadrans, 'Resettling Refugees through Community Sponsorship: A Revolutionary Approach Built on Traditional Legal Infrastructure' (2019) 35(2) Refuge 86.

[130] Judith Kumin, 'Welcoming Engagement: How Private Sponsorship Can Strengthen Refugee Resettlement in the EU' (*Migration Policy Institute*, December 2015) 6.

[131] See Talent Beyond Boundaries, 'The Pilot Project' (2019) <https://talentbeyondboundaries.org/pilot-project.html> accessed 28 October 2019.

[132] Stefania Eugenia Barrichello, 'Refugee Protection and Responsibility Sharing in Latin America: Solidarity Programmes and the Mexico Plan of Action' (2016) 20(2) International Journal of Human Rights 191.

[133] Tristan Harley, 'Regional Cooperation and Refugee Protection in Latin America: A "South–South" Approach' (2014) 26 IJRL 22, 24.

[134] See Brazil Declaration, 'A Framework for Cooperation and Regional Solidarity to Strengthen the International Protection of Refugees, Displaced and Stateless Persons in Latin America and the Caribbean' (3 December 2014) <https://www.acnur.org/fileadmin/Documentos/BDL/2014/9865.pdf> accessed 8 November 2019.

[135] For a description of responses to Venezuelan displacement, see Mixed Migration Centre, 'Waning Welcome: The Growing Challenges Facing Mixed Migration Flows from Venezuela. A Field Assessment Study in Colombia and Peru' (4 September 2019) <http://www.mixedmigration.org/resource/waning-welcome-the-growing-challenges-facing-mixed-migration-flows-from-venezuela/> accessed 1 November 2019.

4. Conclusion

Resettlement portrays sovereignty in its most flattering light. States assert control over selection and admission of refugees, but exercise their sovereign power to advance humanitarian goals. While it is universally accepted that asylum is grounded in international law principles, resettlement's provenance is doubted, even though it shares *non-refoulement* as a substrate. In our view, the Refugee Convention endorses the inter-war practice of State-managed refugee resettlement and anticipates its continuance as an expression of *non-refoulement*. The history of resettlement shows its genesis in State power and supporting institutions. One might optimistically describe law's relationship to resettlement as inchoate but not absent. Soft law guides UNHCR and its partners. Individual States may enact enabling legislation, though there is little accountability through judicial review or otherwise. At present, asylum is a call to justice and law; resettlement is a response in the key of humanitarianism and discretion.

In principle, law could enhance resettlement's capacity to contribute meaningfully to a global regime of equitable responsibility-sharing and solidarity, and to promotion of relationships of dignity and respect between refugees and agents of power. The current prospects for realizing these goals seem dim. Meanwhile, the number of available resettlement places remains miniscule relative to both need and the burden on countries of first asylum. The disquieting deployment of resettlement to the detriment of asylum seekers further corrodes responsibility-sharing and solidarity. None of this detracts from the value and benefits of resettlement to resettled refugees and to receiving States, or resettlement's symbolic importance. And nothing precludes States from doing better.

CHAPTER 61

ONWARD MIGRATION

KATY LONG

1. Introduction

This chapter considers an important question about the relationship between displacement and migration: how does 'onward migration', or 'onward movement', fit into existing frameworks for refugee protection? This is examined not only in relation to those seeking asylum, but also in relation to the experiences of refugees during exile and the durable solutions that might bring displacement to an end. Should refugees and asylum seekers be able to choose their country of destination, even if arriving there involves crossing through other States that might be able to offer 'effective protection'? Do 'durable solutions' require refugees to stop moving, or can migration play a part in solving their displacement?

Interest in facilitating refugee mobility has always been in tension with political interests in stopping, or even reversing, refugee movements. Fridtjof Nansen, the first League of Nations High Commissioner for Refugees, pursued refugee repatriation as the 'ideal' solution, even as he recognized the limits of such a policy in practice. But he also developed the so-called Nansen Passport to facilitate onward migration as an alternative, since valid identity documents would permit travel to reunite with family or secure employment. Archival materials make it very clear that prior to the adoption of the Refugee Convention in 1951, refugees were essentially thought of as a special category of migrant whose needs could best be met through facilitated onward emigration.[1]

In some respects, this approach can still be seen in some regions today. Under the Economic Community of West African States (ECOWAS) Free Movement Protocols,

[1] Katy Long, 'Early Repatriation Policy: Russian Refugee Return 1922–1924' (2009) 22 JRS 133; Claudena M Skran, *Refugees in Inter-War Europe: The Emergence of a Regime* (OUP 1995); Katy Long, 'When Refugees Stopped Being Migrants: Movement, Labour and Humanitarian Protection' (2013) 1 Migration Studies 4.

for instance, West African citizens have the right to move, work, and reside across the region, which has provided a basis for some Sierra Leonean and Liberian refugees to pursue local integration.[2] Venezuelans may still enter the EU and travel freely through the Schengen Area without a visa,[3] despite the fact that they might be asylum seekers fleeing political persecution. This is in stark contrast to the stringent visa requirements imposed on other populations with high levels of displacement, such as Afghanistan and Iraq.[4]

Perceptions of refugees' onward movement are often influenced by domestic concerns about immigration. As a result, many States tend to view their 'refugee problem' as the act of (frequently unauthorized) border-crossing and the consequent disruption that the arrival of asylum seekers and refugees may bring in terms of local policy agendas. From this perspective, refugee movements *are* the problem because they threaten to undermine national control of immigration, and onward movement in search of better protection should be heavily circumscribed.

By contrast, advocates of refugee mobility point to the important role that migration can play in helping refugees to secure effective protection. They point to patterns of mobility that may predate conflict and crisis—such as Afghan seasonal migration to Pakistan—and explain how opportunities to migrate through other channels (as a worker or a student, for instance) may provide a helpful alternative to the asylum process.[5]

[2] Protocol relating to Free Movement of Persons, Residence and Establishment (adopted 29 May 1979) 1906 UNTS 58; Supplementary Protocol on the Code of Conduct for the Implementation of the Protocol on Free Movement of Persons, the Right of Residence and Establishment (adopted 6 July 1985) 1906 UNTS 69; Supplementary Protocol on the Second Phase (Right of Residence) of the Protocol on Free Movement of Persons, the Right of Residence and Establishment (adopted 29 May 1986) 1906 UNTS 81; A/SP.1/6/89 Supplementary Protocol Amending and Complementing the Provisions of Article 7 of the Protocol on Free Movement, Right of Residence and Establishment (adopted 30 June 1989) 2375 UNTS 346; Supplementary Protocol on the Implementation of the Third Phase (Right to Establishment) of the Protocol on Free Movement of Persons, the Right of Residence and Establishment (adopted 29 May 1990) 1906 UNTS 100. See further Aderanti Adepoju, Alistair Boulton, and Mariah Levin, 'Promoting Integration through Mobility: Free Movement under ECOWAS' (2010) 29(3) RSQ 120. See also Chapter 15 in this volume.

[3] See 'ETIAS Visa Waiver for Venezuelans' <https://www.etiasvisa.com/etias-requirements/venezuelans> accessed 13 March 2020.

[4] 'Nationals of Countries With Visa-Free Access Lodge Over a Quarter of Asylum Applications in EU' (*Schengen Visa Info*, 15 May 2019) <https://www.schengenvisainfo.com/news/nationals-of-countries-with-visa-free-access-lodge-over-a-quarter-of-asylum-applications-in-eu/> accessed 2 December 2019.

[5] See eg Alessandro Monsutti, 'Afghan Migratory Strategies and the Three Solutions to the Refugee Problem' (2010) 27(1) RSQ 58; Immigration and Refugee Board of Canada, 'Brazil and Haiti: Situation of Haitians in Brazil, Including Rights and Obligations; Permanent Resident Status; Documents Issued to Haitians, Including Foreigner Identity Cards (Cédula de Identidade de Estrangeiro, CIE); Treatment of Haitians in Brazil, Including Access to Employment and Education, State Protection and Support Services (2010–June 2018)', (21 June 2018) <https://www.refworld.org/docid/5b615cfe4.html> accessed 2 December 2019.

2. Definitions

Disputes about refugees' onward movement often start with debates about definitions. It is well-established that the lines between 'refugee', 'forced migrant', and 'migrant' are often blurry, and such overlap is crucial when considering refugees' onward movement.[6] Even when fleeing persecution and conflict, many refugees are able to exercise some agency in choosing exactly when and where to go, weighing up economic, social, and security factors. Equally, some who move for work, education, or family reunion—as 'migrants', rather than beneficiaries of international protection—may have had no choice but to leave their country of origin, yet remain outside the asylum system, either with some other immigration status or irregularly.[7]

In this chapter, 'forced migrant' is used as a broad term to encompass all those who move *because they have to*, whether fleeing persecution, conflict, or poverty, and whether moving in search of protection, as a 'legal' migrant, or irregularly. The term 'asylum seeker' is used to describe those who move across borders in order to seek international protection but whose claim has not yet been assessed. The term 'refugee' is used to describe forced migrants whose asylum claims have been recognized and who have been granted refugee status. As this chapter makes clear, the legal and political framework governing onward migration varies significantly depending on whether an individual is a refugee, an asylum seeker, or a forced migrant outside the asylum system.

This is in part because the term 'onward migration' is itself problematic and heavily politicized. Labelling any movement after initial flight as 'onward migration' or 'secondary movement' often reflects less the reality of a refugee's journey—which may involve crossing through multiple States, in multiple stages, in order to find effective protection—than the political interests of States anxious to control and limit disorderly movement. Sometimes, a long journey may have been intended from the outset—as, for instance, with Congolese who cross to Brazil to travel northwards and claim asylum in the United States. At other times, the journey may not have been planned but may have resulted from inadequate or deteriorating conditions in the first asylum country. For this reason, blanket use of terms like 'transit country' can be an oversimplification, either overlooking the fact that even a stay of several years in one country (eg Brazil for Congolese travelling north to the US) may always have been intended to be temporary, or failing to reflect that protection gaps may leave refugees unable to find effective protection at their first destination, forcing them to continue on.[8]

[6] Amongst the seminal works on this topic are Andrew Shacknove, 'Who is a Refugee?' (1985) 95 Ethics 274; Roger Zetter, 'More Labels, Fewer Refugees: Remaking the Refugee Label in an Era of Globalization' (2007) 20 JRS 172. See also Chapter 7 in this volume.

[7] See eg Nicholas Van Hear, Oliver Bakewell, and Katy Long, 'Push–Pull Plus: Reconsidering the Drivers of Migration' (2018) 44 Journal of Ethnic and Migration Studies 927.

[8] Katy Long, 'The Last Cola in the Desert', *The Documentary* (*BBC World Service*, 3 September 2019) <https://www.bbc.co.uk/programmes/w3csz5f0> accessed 2 December 2019.

Nevertheless, it can be helpful to think about the term 'onward movement'—often used interchangeably with 'secondary migration'—at three different stages of a refugees' journey. First, it is often used to refer to refugees, asylum seekers, and other forced migrants who, after crossing one international border, do not remain in that country but instead move on to a preferred final destination. Examples might include Libyans or Syrians trying to reach Germany or Sweden via Italy and Turkey during the so-called Mediterranean 'crisis' in 2015–16, or Guatemalans and Salvadorans seeking refuge in the US having travelled through Mexico. This type of onward migration is often irregular, with people travelling without visas or other papers and seeking to evade authorities, and it can lead to dangerous outcomes. Rarely, governments may issue temporary transit papers to facilitate this type of movement.[9]

Secondly, the term 'onward migration' can be used to describe the further movement of those already in exile. Often this refers to internal movement, such as refugees moving from a camp like Dadaab in Kenya to Nairobi in search of work or better services, or from a resettlement hub in the US (like Dallas) to a town like Cactus in Texas, with a meatpacking plant and readily available jobs. Such migration may be clandestine and irregular, or legally authorized, or may be permitted but accompanied by the loss of benefits and services associated with an assigned location.[10]

Thirdly, 'onward migration' has increasingly become associated with new thinking on approaches to solving displacement—in other words, with durable solutions. States' concerns about the uncontrolled movement of people, particularly the kind of disorganized or clandestine movements that can characterize flight from persecution, help to explain why 'solving' displacement has usually been presented as a question of stopping—or even reversing—migration.

The three traditional durable solutions for refugees—repatriation, local integration in a first country of asylum, and resettlement in a third country—typically have been framed as the end of movement.[11] However, over the past decade, a number of researchers have argued that this framing is problematic, both empirically and theoretically.[12] There has also been growing interest in so-called 'complementary' pathways for refugees,

[9] For a discussion on some of the main drivers of onward or transit migration and difficulties in defining and framing this movement, see eg UN Human Rights Council, 'Situation of Migrants in Transit', UN doc A/HRC/31/35 (27 January 2016) paras 4–10. See also David J Cantor, Luisa Feline Freier, and Jean-Pierre Gauci, *A Liberal Tide: Towards A Paradigm Shift in Latin American Migration and Asylum Policy-Making?* (Institute of Latin American Studies 2015).

[10] See eg Karen Jacobsen, 'Refugees and Asylum Seekers in Urban Areas: A Livelihoods Perspective', (2006) 19 JRS 273; Stevan Merrill Weine and others, 'Secondary Migration and Relocation among African Refugee Families in the United States' (2011) 50 Family Process 27; Kyle Anne Nelson and Christine Marston, 'Refugee Migration Histories in a Meatpacking Town: Blurring the Line between Primary and Secondary Migration' (2019) 20 Journal of International Migration and Integration 1.

[11] Katy Long, *The Point of No Return: Refugees, Rights, and Repatriation* (OUP 2013).

[12] ibid. See also BS Chimni, 'From Resettlement to Involuntary Repatriation: Towards a Critical History of Durable Solutions to Refugee Problems' (2004) 23(3) RSQ 55; Richard Black and Khalid Khoser (eds), *The End of the Refugee Cycle? Refugee Repatriation and Reconstruction* (Berghahn Books 1999); Nicholas Van Hear, 'Refugees in Diaspora: from Durable Solutions to Transnational Relations' (2006) 23(1) Refuge 9.

such as private refugee sponsorship, temporary labour mobility, and student visas.[13] These are referenced in the 2018 Global Compact on Refugees, which commits to 'increasing significantly their availability and predictability'.[14] The search for new and alternative migration pathways for refugees in part reflects the increasing body of scholarly work showing that the movement of people across borders is often not linear but instead circular, seasonal, and temporary, and that such continual and ongoing migration can contribute to broader development and peace-building goals in settings of mass displacement (such as in Haiti following the 2010 earthquake).[15]

This chapter therefore considers the legal and political framing of onward migration at different junctures. The first section considers the rights of asylum seekers and refugees to engage in onward migration as part of a search for effective, durable protection. The chapter then explores potential challenges—both legal and political—for refugees who migrate through complementary pathways as a 'fourth durable solution' to displacement. The final section draws some broad conclusions about the place of onward migration in addressing displacement, and the broader tension that this specific debate reflects in a world of unequal bordered States and restricted human mobility.

3. Seeking Asylum and Onward Migration

The ability to cross an international border is central to the activation of the international refugee regime. By definition, a refugee is someone who is *outside* the country of his or her nationality or former habitual residence.[16] A person normally becomes a refugee by leaving their country,[17] and being outside it is a prerequisite for accessing other refugee rights. Article 13(2) of the UDHR provides that '[e]veryone has the right to leave any country, including his own', which is reinforced by article 12 of the ICCPR.

Not all States are equal when it comes to refugee protection. First, there are significant differences in terms of how asylum cases are determined.[18] Refugee recognition rates

[13] Katy Long, 'Home Alone? A Review of the Relationship between Repatriation, Mobility and Durable Solutions for Refugees', UNHCR Policy Development and Evaluation Service, PDES/2010/02 (2010); Cathrine Brun and Anita H Fábos, 'Mobilizing Home for Long-Term Displacement: A Critical Reflection on the Durable Solutions' (2017) 9 Journal of Human Rights Practice 177; Katy Long and Sarah Rosengaertner, 'Protection through Mobility: Opening Labor and Study Migration Channels to Refugees' (Migration Policy Institute 2016).

[14] Global Compact on Refugees, para 95. See also paras 94–6.

[15] eg Michael A Clemens and Hannah Postel, 'Temporary Work Visas as US–Haiti Development Cooperation: A Preliminary Impact Evaluation' (2017) 6 IZA Journal of Labor and Development 4.

[16] Refugee Convention, art 1A(2).

[17] There are, of course, exceptions to this. For instance, a refugee *sur place* may claim asylum many years after having migrated to a third country for reasons of work or education. In some cases—such as that of Palestinian refugees—third, fourth, and even fifth generation refugees have inherited their refugee status from great-great grandparents, and have never engaged in any kind of migration at all.

[18] See Chapter 32 in this volume.

for similar caseloads can vary wildly from one State to another. In 2017, for instance, 85 per cent of Afghan asylum seekers were recognized by France as refugees, compared to 36 per cent by the United Kingdom and just 1½ per cent by Bulgaria.[19]

Secondly, the rights and opportunities afforded to asylum seekers and refugees once they are registered can also vary considerably between States. For instance, in Uganda, refugees are allowed to move freely and to work, while in Kenya they are required to live in camps and are not permitted to work.[20] Additionally, asylum seekers may have preferences about where they would like to claim refugee status based upon factors other than protection alone, such as family and diaspora connections, the size of the labour market, language skills, the availability of social protection programmes and safety nets, and the relative openness of the country of destination.[21] For these reasons, considerable numbers of asylum seekers engage in onward movement, often following well-established routes (such as the route from South and Central America north towards the United States and Canada).

Do asylum seekers have a right to migrate from the first country they arrive in when looking for protection? Article 31 of the Refugee Convention underlines that 'illegal' entry is no barrier to a refugee making an asylum claim, nor a justification for imposing penalties on that person, if he or she comes '*directly* from a territory where their life of freedom was threatened'. The issue of what constitutes 'coming directly' is key. Experts have generally considered that the term 'should be understood not only in its literal (temporal or geographical) sense, as refugees are not required to have travelled without pause or transit and without crossing other countries from their country of origin'.[22] In other words, if a refugee's intention has always been to claim asylum in country A, but he

[19] 'Asylum Recognition Rates in the EU/EFTA by Country, 2008–2017' (*Migration Policy Institute*, March 2018) <https://www.migrationpolicy.org/programs/data-hub/charts/asylum-recognition-rates-euefta-country-2008-2017> accessed 16 March 2020; data drawn from 'First Instance Decisions on Applications by Citizenship, Age and Sex Annual Aggregated Data (Rounded)' (*Eurostat*, 5 March 2020) <http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_asydcfsta&lang=en> accessed 16 March 2020.

[20] Lucy Hovil, 'Uganda's Refugee Policies: The History, the Politics, the Way Forward' (Rights in Exile Policy Paper, International Refugee Rights Initiative 2018); Hanibal Goitom, 'Refugee Law and Policy: Kenya' (*Library of Congress*, March 2016) <https://www.loc.gov/law/help/refugee-law/kenya.php> accessed 12 November 2019. See also Chapter 53 in this volume, and case law challenging encampment in Kenya: *Kituo Cha Sheria v The Attorney General* (High Court of Kenya, 26 July 2013).

[21] See eg Marie McAuliffe and Dinuk Jayasuriya, 'Do Asylum Seekers and Refugees Choose Destination Countries? Evidence from Large-Scale Surveys in Australia, Afghanistan, Bangladesh, Pakistan and Sri Lanka' (2016) 54 International Migration 44; Heaven Crawley, 'Chance or Choice? Understanding Why Asylum Seekers Come to the UK' (Refugee Council 2010) <https://www.refugeecouncil.org.uk/wp-content/uploads/2019/03/rcchance.pdf> accessed 1 December 2019.

[22] UNHCR, 'Onward Movement of Asylum-Seekers and Refugees: Discussion Paper prepared for the Expert Roundtable on Onward Movement' (25 September 2015) para 21 <https://www.refworld.org/docid/563080eb4.html> accessed 5 September 2019; 'Summary Conclusions: Article 31 of the 1951 Convention (Geneva Expert Roundtable, 8–9 November 2001)' in Erika Feller, Volker Türk, and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (CUP June 2003) 255, para 10(b); UNHCR Executive Committee Conclusion No 15 (XXX) 'Refugees without an Asylum Country' (1979) para (h)(iii); UNHCR, 'Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum-Seekers (Lisbon Expert Roundtable, 9–10 December 2002)' (February 2003) para 11.

or she crossed into country B and was later delayed in country C due to lack of funds, the asylum claim is not necessarily invalid.

However, it is equally clear that there are limits to such an approach. It is generally understood that article 31 'does not however cover situations where a refugee has found asylum, or where there [sic] may have had a reasonable opportunity to seek and enjoy protection in a previous country en route, or if he or she had settled in another country'.[23] The difficulty lies in determining whether the details of each specific case constitute 'reasonable opportunity' or 'settlement'. Transiting through country B within a 24-hour period is very different from working in country C for several years, but experts have also argued that 'no strict time limit for the passage through or stop in another country can be applied to the concept of "coming directly" '. The result is a careful balancing of the rights of asylum seekers and States, such that 'there is no obligation under international law for a person to seek international protection at the first effective opportunity . . . [but] there is equally no unfettered right for a person to choose that country'.[24]

States have generally agreed—at least in theory—that refugees do have a right to expect and enjoy 'effective' protection in a 'safe third country',[25] meaning that if the first country they arrive in cannot meet their protection needs, they are justified in continuing their journey to one that can. UNHCR Executive Committee Conclusion No 58 deals with refugees who have moved in an irregular manner from a country of first asylum (where they have found protection), and notes that they can only be returned to that country if they will then be 'permitted to remain [in the third country], and . . . treated in accordance with recognized basic human rights standards until a durable solution is found for them'.[26] However, the meaning of 'effective protection' is vague, and as one commentator noted in 2005, 'these days, everybody seems to talk about "effective protection", but without ever defining its precise meaning'.[27]

Just as with voluntary repatriation in safety and dignity,[28] the methods used to determine 'effective protection' have often resulted in elastic standard-setting. Politicians

[23] UNHCR 2015 (n 22) para 22; see also Summary Conclusions (n 22) para 10(c).

[24] UNHCR 2015 (n 22) paras 21, 17.

[25] See Chapter 28 in this volume.

[26] UNHCR Executive Committee Conclusion No 58 (XL), 'The Problem of Refugees and Asylum-Seekers Who Move in an Irregular Manner from a Country in Which They Had Already Found Protection' (1989) para f(ii).

[27] Catherine Phuong, 'The Concept of "Effective Protection" in the context of Irregular Secondary Movements and Protection in Regions of Origin' (Global Migration Perspectives No 26, Global Commission on International Migration 2005) 2 <https://www.refworld.org/docid/42ce51df4.html> accessed 5 September 2019.

[28] The phrase 'voluntary repatriation in safety and dignity' does not appear in the Convention but reflects evolving approaches to refugee return. The insistence on voluntary return predates the Convention (see 'Question of Refugees', UNGA res 8(I) (12 February 1946) para c(ii)), and the phrase 'in safety and dignity' has been used by UNHCR since 1992 (see eg UNHCR, 'Discussion Note on Protection Aspects of Voluntary Repatriation', EC/1992/SCP/CRP.3 (1 April 1992) <http://www.refworld.org/docid/3ae68cd314.html> accessed 13 March 2020). For a discussion of how these standards have often proven to be elastic in practice, see Katy Long, 'Back to Where You Once Belonged: A Historical Review of UNHCR Policy and Practice on Refugee Repatriation', UNHCR Policy Development and Evaluation Service, PDES/2013/14 (2013).

anxious to prevent asylum seekers from moving onwards often claim that they have left 'safe' countries.[29] For instance, in 2019, US President Donald Trump and Guatemalan President Jimmy Morales sought to designate Guatemala as a 'safe third country' for asylum seekers heading north towards the US.[30] This drew fierce criticism and was immediately subject to legal challenges on the basis that Guatemala—a country beset by violence and corruption—does not have the capacity to operate a 'full and fair' asylum system.[31] Similar criticisms have dogged the 2016 'safe third country' arrangement between the EU and Turkey, given serious concerns about Turkey's capacity to provide protection.[32] The language of the EU–Turkey statement, promising the readmission of all who 'illegally and directly entered the territory of the Member States after having stayed on, or transited through, the territory of Turkey', underlines the preoccupation of the EU Member States with effectively ending the independent movement of asylum seekers and refugees.[33]

Nevertheless, the view remains prevalent that asylum seekers should seek protection in the first 'safe' country they reach and secure 'effective' protection there, and that all onward movement is a problem to be discouraged. This is particularly obvious when intra-EU mechanisms for responsibility-sharing and establishing common asylum standards are examined.

4. Dublin III and Onward Migration

The so-called Dublin Regulation (Dublin III) is a cornerstone of the Common European Asylum System (CEAS), establishing Member States' responsibilities vis-à-vis asylum seekers who arrive in the EU.[34] The various instruments adopted as part of the CEAS are intended to set out common standards for processing and receiving asylum seekers

[29] See Chapter 28 in this volume.

[30] Michael D Shear, Zolan Kanno-Youngs, and Elizabeth Malkin, 'After Tariff Threat, Trump Says Guatemala has Agreed to New Asylum Rules', *The New York Times* (26 July 2019) <https://www.nytimes.com/2019/07/26/world/americas/trump-guatemala-asylum.html> accessed 20 March 2020.

[31] See eg Lauren Carasik, 'Trump's Safe Third Country Agreement with Guatemala Is a Lie', *Foreign Policy* (30 July 2019) <https://foreignpolicy.com/2019/07/30/trumps-safe-third-country-agreement-with-guatemala-is-a-lie/> accessed 13 March 2020; see Chapter 16 in this volume.

[32] Agreement between the European Union and the Republic of Turkey on the Readmission of Persons Residing without Authorization OJ L134, (7 May 2014) 3–27 (EU and Turkey Agreement); for a summary of key points see Council of the European Union, 'EU–Turkey Statement' (18 March 2016) <https://www.refworld.org/docid/5857b3444.html> accessed 15 November 2019. It should be noted that in exchange for Turkish readmission of asylum seekers, the EU agreed to admit an equal number of *recognized* Syrian refugees from Turkey, as well as providing €3 billion in development aid.

[33] EU and Turkey Agreement (n 32) 3–27, art 4(1)(c).

[34] Council Regulation (EU) No 604/2013 of 26 June 2013 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in One of the Member States by a Third-Country National or a Stateless Person (recast) [2013] OJ L180/31 (Dublin III); see Chapter 19 in this volume.

within the EU, and Dublin III is intended to allocate responsibility for doing so. It is based on the presumption that 'Member States, all respecting the principle of *non-refoulement*, are considered as safe countries for third-country nationals'.[35] Working in combination with the EURODAC Regulation, which established a Europe-wide fingerprinting database for unauthorized EU entrants, Dublin III sets out 'the criteria and mechanisms for determining the Member State responsible for examining an application for international protection'.[36] The main criterion relates to the presence of family members in other Member States;[37] others include the person having a valid residence document for a particular Member State,[38] or being the first EU Member State whose territory the asylum seeker entered irregularly.[39] The practical impact is to tie asylum seekers to one Member State, and to prevent (or drive underground) onward migration, which may be characterized as 'absconding' from the asylum process and thus as grounds for detention.[40]

Both the European Council on Refugees and Exiles and UNHCR have stated on numerous occasions that the Dublin system fails to provide fair, efficient, or effective protection.[41] Indeed, critics argue that its responsibility allocation mechanism was a contributing factor in the humanitarian crisis in Greece in 2015, when the country's fragile asylum system was overwhelmed by large numbers of Syrians and other forced migrants, resulting in hundreds of thousands of people being held in overcrowded, violent, and insanitary camps.[42] Commentators have also suggested that 'the Syrian refugee crisis turned into what was perceived as a European refugee crisis *due* to the European policy of prohibiting refugees from travelling legally to the EU'.[43]

EU Member States were extremely reluctant to commit to more meaningful responsibility-sharing arrangements, however. Hungary's anti-migration government, for instance, refused to receive back asylum applicants who had crossed into other EU

[35] Dublin III (n 34) preambular para 3. See further Chapter 28 in this volume.

[36] Dublin III (n 34) art 1. [37] ibid arts 7–11. [38] ibid art 12. [39] ibid art 13.

[40] ibid art 28.

[41] European Council on Refugees and Exiles, 'To Dublin or Not to Dublin?' (Policy Note No 16, 2018) <https://www.ecre.org/wp-content/uploads/2018/11/Policy-Note-16.pdf> accessed 12 November 2019; see also UNHCR, 'UNHCR Observations on the Current Asylum System in Bulgaria' (2 January 2014) 5 <https://www.refworld.org/docid/52c598354.html> accessed 15 November 2019; Blanca Garcés-Mascareñas, 'Why Dublin "Doesn't Work"' (2015) 135 Notes Internacionals CIDOB 1.

[42] Elspeth Guild, Catherine Costello, Madeline Garlick, and Violeta Moreno-Lax, 'The 2015 Refugee Crisis in the European Union' (CEPS Policy Brief No 332, Centre for European Policy Studies, September 2015) 4–9; Massimo Bordignon and Simone Moriconi, 'The Case for a Common European Refugee Policy' (Policy Contributions No 8, Bruegel 2017). Such allocation 'is premised on the false idea of a level playing field, which is maintained by a system of coercion, leading to constant stress and obstructive behaviour on the part of both asylum askers and the Member States': Maarten den Heijer, Jorrit Rijpma, and Thomas Spijkerboer, 'Coercion, Prohibition, and Great Expectations: The Continuing Failure of the Common European Asylum System' (2016) 53 Common Market Law Review 607, 607.

[43] Hemme Battjes, Evelien Brouwer, Lieneke Slingenberg, and Thomas Spijkerboer, 'The Crisis of European Refugee Law: Lessons from Lake Success' (2016) 6 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2783247> accessed 16 March 2020.

Member States.[44] Germany responded by invoking the 'sovereignty clause' of Dublin III and agreeing to process Syrian asylum applications already lodged in other Member States.[45] While it is difficult to measure the precise effect of this offer on the movement of asylum seekers towards Germany, it is clear that opponents of German Chancellor Angela Merkel's decision saw it as critical—an interpretation that helped to trigger a domestic political backlash and provided other EU Member States, such as the Czech Republic, with a justification for effectively abandoning Dublin III altogether, arguing that the rules had proven 'ineffective'.[46] A plan to distribute protection obligations more equitably across the EU by relocating 160,000 refugees from Greece and Italy also failed. Only 34,705 people had moved by the time the initiative ended in 2017.[47] Denmark and the UK refused to participate in the scheme at all, while Hungary and Poland accepted no refugees, Austria accepted 45, Slovakia took 16, and the Czech Republic accepted only 12.[48]

This refusal to countenance even organized, orderly, onward movement of asylum seekers and refugees is indicative of the very limited interest of wealthy and powerful States (not directly adjacent to refugee-producing countries) to host large numbers of asylum seekers and refugees. One consequence of this is that, in political terms, the onward movement of asylum seekers has become an easy target for politicians running on anti-migration platforms, who point to smuggling, trafficking, and the disorderly movement of asylum seekers and other forced migrants as emblematic of a breakdown in order that can only be remedied by imposing more restrictive controls.

Increasingly xenophobic and nationalist politics across a number of EU Member States further undermines the likelihood of establishing new and better-functioning systems to share responsibility. However, since it is not in the interests of first asylum States, such as Italy and Greece, to prevent onward movement, many forced migrants are able to continue their journeys through Europe with relative ease, albeit clandestinely. Some have resorted to desperate measures to avoid being traced if they

[44] Krisztina Than and Shadia Nasralla, 'Defying EU, Hungary Suspends Rules on Asylum Seekers', *Reuters* (24 June 2015) <https://uk.reuters.com/article/uk-europe-migrants-austria-hungary/defying-eu-hungary-suspends-rules-on-asylum-seekers-idUKKBN0P31ZB20150623> accessed 13 March 2020.

[45] Adam Taylor, 'Germany's Small Yet Important Change to the Way it Deals with Syrian Refugees', *The Washington Post* (26 August 2015) <https://www.washingtonpost.com/news/worldviews/wp/2015/08/26/germanys-small-yet-important-change-to-the-way-it-deals-with-syrian-refugees/> accessed 13 March 2020.

[46] Emma Graham-Harrison and Daniel Nolan, 'Czech Republic Abandons "Ineffective" European Asylum Rules', *The Guardian* (2 September 2015) <https://www.theguardian.com/world/2015/sep/02/refugees-stranded-budapest-train-station-hungary> accessed 13 March 2020; Jörg Michael Dostal, 'The German Federal Election of 2017: How the Wedge Issue of Refugees and Migration Took the Shine off Chancellor Merkel and Transformed the Party System' (2017) 88 The Political Quarterly 589.

[47] Associated Press, 'Auditors Urge EU to Quickly Fix Migrant Policy Shortfalls', *The Washington Times* (13 November 2019) <https://www.washingtontimes.com/news/2019/nov/13/auditors-urge-eu-to-quickly-fix-migrant-policy-sho/> accessed 13 March 2020.

[48] 'Member States' Support to Emergency Relocation Mechanism' (*CIRE*, 30 October 2018) <https://www.cire.be/wp-content/uploads/2017/01/state_of_play_-_relocation_en.pdf> accessed 16 March 2020.

move from one Member State to another, such as burning or scarring their fingers so that they cannot be tracked through the EURODAC system.[49]

5. Refugee Rights and Onward Migration

Once a refugee's claim to international protection has been recognized, a number of provisions in the Refugee Convention support their right to freedom of movement. First, pursuant to article 26, they have the right to move within their country of asylum. Secondly, they have the right to request travel documents from that State 'for the purpose of travel outside their territory'.[50] These provisions reflect the fact that even after refugees have been granted international protection, they may have valid reasons to move. For instance, in Uganda, refugees may often 'commute' between rural refugee settlements (where some members of the family may remain, collecting rations and tending to crops) and urban areas like Kampala to seek work, attend school, or obtain healthcare. In the US, the secondary movement of refugees has long been recognized, with many refugee communities establishing themselves in States like Nebraska and Kansas around meatpacking plants.[51]

However, States frequently seek to restrict refugees' movement. Security concerns have been used by States to justify refugee encampment (in a proscribed and usually segregated area), particularly in places where terrorists or insurgents have close links to a refugee population. Examples include Kenyan treatment of Somali refugees, and Kurdish authorities' detention and screening of Arab refugees from Islamic State-controlled areas in 2015. In other cases, concerns may be political or socio-economic: Germany, for instance, does not use physical barriers but may still limit refugees' legal rights of residence to specific areas, or prevent refugees from moving into municipalities with structural economic difficulties or a comparatively high number of migrants and refugees.[52]

[49] See eg Harriet Grant and John Domokos, 'Dublin Regulation Leaves Asylum Seekers with Their Fingers Burnt', *The Guardian* (7 October 2011) <https://www.theguardian.com/world/2011/oct/07/dublin-regulation-european-asylum-seekers> accessed 13 March 2020.

[50] Refugee Convention, art 28. Under ICCPR, art 12(2), every person has the right to leave any country.

[51] Eleanor Ott, 'Get Up and Go: Refugee Resettlement and Secondary Migration in the USA', UNHCR New Issues in Refugee Research, Research Paper No 219 (2011); Sarah Dryden-Peterson and Lucy Hovil, 'A Remaining Hope for Durable Solutions: Local Integration of Refugees and their Hosts in the Case of Uganda' (2004) 22(1) Refuge 26.

[52] Michael Kalkmann, 'Freedom of Movement', in 'Country Report: Germany' (Asylum Information Database April 2019) 118–19 <https://www.asylumineurope.org/reports/country/germany/content-international-protection/movement-and-mobility/freedom-movement> accessed 5 September 2019.

Circumscribing refugees' freedom of movement (almost always alongside the limiting of other social and economic rights, such as access to the labour market) can become a driver of what is more classically understood as onward movement: refugees who are unable to move between a camp and a city (or to look for work legally) decide to migrate more permanently, whether internally or across an international border. In so doing, they often move irregularly, without work authorization or the identity documents to legally cross an international border.

In theory, article 28 of the Refugee Convention should assist with this last requirement by providing access to travel documents needed for international travel, thus facilitating the legal onward movement of recognized refugees who wish to migrate to a third country.[53] For instance, a recognized Afghan refugee living in Italy should be able to apply for and use a Convention Travel Document (CTD) to migrate to Canada as a student or under a labour migration programme (provided he or she meets other conditions). However, as with passports, the costs of acquiring a CTD may prove prohibitive in practice, particularly for refugees with limited funds. Even when a refugee is able to afford a CTD, many States are extremely slow to process applications, and officials may simply refuse to do so or demand an additional (corrupt) payment. Even when a refugee can obtain a CTD, the document can be difficult to travel with compared to a passport. Many officials are unfamiliar with them and reluctant to admit those using them.[54]

The International Civil Aviation Organization's requirement that all travel documents be machine readable, alongside an increasing focus on the biometric identification capacity of passports, have further limited the capacity of some States to issue CTDs accepted for international travel. Evidence suggests that over 40 per cent of refugees have no access to any kind of travel document. This means that they have no legal means of moving across an international border for reasons other than seeking international protection.[55]

As a result, refugees often apply for visas using their own national passports or irregularly obtained passports from their country of first asylum in preference to CTDs.[56] But this strategy has risks—even in cases where refugees can apply for or still

[53] See generally Marjoleine Zieck, 'Refugees and the Right to Freedom of Movement: From Flight to Return' (2018) 39 Michigan Journal of International Law 19; Jens Vedsted-Hansen, 'Art. 28 1951 Convention' in Andreas Zimmermann (ed), *The 1951 Convention relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (OUP 2011).

[54] See further Long and Rosengaertner (n 13).

[55] European Council on Refugees and Exiles, 'Unravelling Travelling: Travel Documents for Beneficiaries of International Protection' (October 2016) <https://www.refworld.org/docid/58208d324.html> accessed 5 September 2019.

[56] During field research in Kampala in 2012, for example, the author documented two cases of Somali refugees who were long-term residents of Uganda who had travelled to the UK and Canada to take advantage of educational scholarships using irregularly acquired Ugandan passports. See also UNHCR and International Labor Organization, 'Labour Mobility for Refugees: Workshop in Geneva, 11–12 September 2012: Summary Conclusions' (25 October 2012) <https://www.refworld.org/docid/508e4fa72.html> accessed 5 September 2019.

hold a passport from their home country. The use of a passport by a refugee to travel across an international border has in the past been taken as evidence that an individual has voluntarily re-availed him- or herself of the protection of the country of origin and is therefore no longer in need of refugee status.[57]

6. Using Migration as an Alternative Solution

In the past decade, a growing body of research has stressed the importance of refugee mobility as a fourth durable solution to displacement.[58] This has stemmed from work on refugees' right to freedom of movement within existing global frameworks, and concerns about the large number of refugees trapped in protracted displacement for decades, with little prospect of being able to repatriate, integrate locally, or resettle elsewhere.

Empirically, evidence shows that refugee movement does not necessarily end with repatriation, local integration, or resettlement.[59] In some cases, continued movement arguably reflects the failure of a 'solution'—such as the large-scale secondary displacement of Afghan returnees back to Pakistan and Iran and/or to other regions of Afghanistan due to economic fragility and insecurity. However, in other cases, such onward migration can represent a positive and pragmatic choice that does amount to a real solution, such as recognized refugees in the EU moving within that region to Member States with more robust labour markets, larger diaspora communities, or where they speak the language.[60]

In addition, a number of researchers have noted that while all three traditional durable solutions envisage permanent settlement, this similarity is superficial. They argue that the fundamental common core of the three durable solutions is, in fact, the restoration of meaningful citizenship, either by the refugee becoming a member of a new community (through local integration or resettlement) or through the reconstitution of a political community that is able and willing to protect the (former) refugee in the country of origin, with this social contract restored through the act of physical

[57] See Refugee Convention, art 1C(1).

[58] See eg Katy Long and Jeff Crisp, 'Migration, Mobility and Solutions: An Evolving Perspective' (2010) 35 Forced Migration Review 56.

[59] Monsutti (n 5).

[60] Anna Lindley and Nicholas Van Hear, 'New Europeans on the Move: A Preliminary Review of the Onward Migration of Refugees Within the European Union' (2007) Centre on Migration, Policy and Society Working Paper No 57; Rosa Mas Giralt, 'Onward Migration as a Coping Strategy? Latin Americans moving from Spain to the UK Post-2008' (2017) 23 Population, Space and Place <https://onlinelibrary.wiley.com/doi/epdf/10.1002/psp.2017> accessed 13 March 2020; Jill Ahrens, Melissa Kelly, and Ilse Van Liempt, 'Free Movement? The Onward Migration of EU Citizens Born in Somalia, Iran, and Nigeria' (2016) 22 Population, Space and Place 84.

return. Physical migration is only a symptom of political alienation; in itself, it is neither the cause nor the cure for displacement.[61]

As a result, there has been a surge of interest in the use of mobility—onward migration—as a 'fourth solution' to displacement. The failure of the international community to respond to the resettlement needs of large numbers of Syrian refugees (in particular) in 2015–16 influenced calls for more 'complementary pathways' for refugees, with the 2016 New York Declaration for Refugees and Migrants stating the intention to 'expand the number and range of legal pathways available for refugees to be admitted to or resettled in third countries' and considering the potential 'opportunities for labour mobility for refugees, including through private sector partnerships, and for education, such as scholarships'.[62]

Two years later, the Global Compact on Refugees reiterated that 'pathways for the admission of persons with international protection needs can facilitate access to protection and/or solutions', defining such pathways to include 'humanitarian visas, humanitarian corridors and other humanitarian admission programmes; educational opportunities for refugees (including women and girls) through grant of scholarships and student visas, including through partnerships between governments and academic institutions; and labour mobility opportunities for refugees, including through the identification of refugees with skills that are needed in third countries'.[63] A number of programmes that fall within this framework are being piloted or are already operational, including the Global Refugee Sponsorship Initiative to expand private and community sponsorship of refugees in need of resettlement, scholarships for refugee education (such as those operated by the Windle Trust), and skills-matching for labour migration (such as the initiative as operated by Talent Beyond Boundaries).[64]

Other initiatives predate the 2015 'crisis'. In 2012, Brazil began granting humanitarian visas to Haitians affected by the 2010 Haitian earthquake, and in 2013 the programme was extended to cover Syrian refugees. These humanitarian visas allowed those in search of protection (with a valid passport and the ability to pay passage to Brazil) to travel legally to Brazil where they could then apply for asylum. Over 8,500 humanitarian visas were issued in the three years to 2016, including over 2000 to Syrian refugees.[65] This model for facilitating the legal movement of asylum seekers to third countries was widely praised by refugee advocates, but critics pointed to the fact that, upon arrival, visa holders still needed to apply for asylum in order to be afforded international

[61] This line of reasoning follows from Hannah Arendt, *The Origins of Totalitarianism* (2nd edn, Houghton Mifflin Harcourt 1973); see longer discussion in Long (n 11). See also Cathryn Costello, 'On Refugeehood and Citizenship' in Ayelet Shachar and others (eds), *The Oxford Handbook of Citizenship* (OUP 2017).

[62] New York Declaration, paras 77, 79.

[63] Global Compact on Refugees, para 95.

[64] See eg *The Global Refugee Sponsorship Initiative* <http://refugeesponsorship.org> accessed 16 March 2020; *The Windle Trust* <https://windle.org.uk/about-windle> accessed 16 March 2020; *Talent Beyond Boundaries* <https://talentbeyondboundaries.org> accessed 16 March 2020.

[65] Liliana L Jubilut, Camila Sombra Muiños de Andrade, and André de Lima Madureira, 'Humanitarian Visas: Building on Brazil's Experience' (2016) 53 Forced Migration Review 76.

protection (or otherwise seek some other form of legal status).[66] However, since Brazil's humanitarian visas were established by Executive order, their future remains uncertain in light of the election of President Bolsonaro in 2018 on an anti-migrant platform. Even so, in October 2019, Brazil announced a simplified process through which Syrians can continue to apply for humanitarian visas.[67]

Despite States' rhetorical commitment to improving refugees' access to migration opportunities, in practice onward migration is still viewed as a problem rather than a tool. Borders often become more securitized and less permeable after conflict (for example, in Afghanistan and the Horn of Africa), even though transnational, seasonal labour migration networks long pre-dated the conflict (and displacement). Attempts in 2003–05 to incorporate a 'migration and development' strategy into planning for Afghan refugee repatriation, envisaging the continued presence of Afghan workers in Iran and Pakistan so as to secure sustainable return of the majority of the refugees (by providing access to labour markets and income unavailable in post-conflict Afghanistan), met with limited success.[68]

Additionally, increased interest in complementary pathways for refugee migration must be balanced against the sharp decline in global resettlement numbers since 2017.[69] This has primarily been driven by drastic shifts in US policy. In November 2016, President Obama set the refugee ceiling for 2017 at 110,000; seven days after taking office in January 2017, President Trump cut this number to 50,000. In October 2019, the US resettlement cap was set at an historic low of 18,000 places.[70]

The concept of migration as a solution to displacement has, in fact, a long history. In the 1920s, the International Labor Organization (ILO) was tasked with operational responsibilities for settling refugees, and embarked upon a process of matching refugees' skills against job shortages, especially in South America.[71] As the contemporary

[66] Claire Higgins, 'Safe Journey and Sound Policy: Expanding Protected Entry for Refugees' (Policy Brief No 8, Kaldor Centre for International Refugee Law, 2019) 15–16 <https://www.kaldorcentre.unsw.edu.au/sites/default/files/Policy_Brief_8_Protected_Entry.pdf> accessed 13 March 2020.

[67] Agência Brasil, 'Brazil Simplifies Humanitarian Visa Application for Syrians', *Brazil-Arab News Agency (ANBA)* (10 October 2018) <https://anba.com.br/en/brazil-simplifies-humanitarian-visa-application-for- syrians/> accessed 1 December 2019.

[68] UNHCR, 'Towards a Comprehensive Solution for Displacement from Afghanistan' (Discussion Paper, 2003) <http://www.unhcr.org/refworld/docid/3f1be2224.html> accessed 1 December 2019; Vicky Tennant, 'Afghan Situation Regional Policy Review' (Internal Document, UNHCR 2008) (on file with author).

[69] UNHCR, 'Projected Global Resettlement Needs 2019' (2018) 9 <https://www.unhcr.org/5b28a7df4.pdf> accessed 12 November 2019. From a 20-year high of 163,200 refugees submitted for global resettlement in 2016, only 75,200 were submitted in 2017, primarily due to the drop in US numbers.

[70] International Crisis Group, 'How to Save the US Refugee Admissions Program' (September 2018); Ted Hesson, 'Trump Officials Pressing to Slash Refugee Admissions to Zero Next Year', *Politico* (18 July 2019) <https://www.politico.com/story/2019/07/18/trump-officials-refugee-zero-1603503> accessed 13 March 2020; 'President Donald J. Trump's Humanitarian and Responsible Approach On Refugees Protects the Welfare of American Citizens' (*The White House*, 26 September 2019) <https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-humanitarian-responsible-approach-refugees-protects-welfare-american-citizens/> accessed 12 November 2019.

[71] See Long 2013 (n 1) 7.

refugee regime was established in the 1950s, the Provisional Intergovernmental Committee for the Movement of Migrants from Europe (PICMME) was established and was initially viewed as the organization most likely to 'resolve' Europe's displaced persons crisis by dealing not only with the transportation of refugees, but also of migrants, from overpopulated and underdeveloped areas of Europe to the Americas and Australasia. By 1989, PICMME had become the International Organization for Migration.[72]

However, several of the obstacles that limited the success of these earlier schemes to settle refugees as labour migrants in the 1920s and 1950s remain today. First, the success of any plan to organize refugee migration through labour migration channels is dependent upon the economic and political climate. The ILO's efforts in the 1920s, for example, ended with the Great Depression. Post-2015, the strength of anti-migrant political parties in Europe, Australia, and North America has limited attempts to develop wide-scale refugee-as-worker initiatives. Secondly, relatively few refugees are highly skilled workers in shortage occupations with the requisite language skills to qualify to move as an *immigrant* under existing immigration laws in most States.[73] To enable such movement, States would either have to make exceptions on humanitarian grounds, or accept that this type of migration is likely to benefit only relatively few refugees. Thirdly, there are serious concerns that labour markets that do have a significant demand for relatively low-entry migrant labour (such as Qatar and the United Arab Emirates) have often failed to meet basic standards relating to working conditions, pay, and even basic health and safety standards. This makes it ethically very difficult for the international community to promote such migration pathways as alternatives to the three traditional durable solutions.

The idea of using migration pathways as a means of 'solving' refugee 'crises' also raises a serious question regarding refugees' right to be protected against *refoulement*. Immigrants are usually admitted to a country on a conditional basis and only qualify for permanent residency, naturalization, and some degree of protection against deportation after some years of living in a host country. If they breach their visa conditions—which may tie them to a specific employer/sponsor—migrants can be swiftly removed to their country of origin.

However, refugees must not be sent to any country where they have a well-founded fear of being persecuted.[74] While some States—most notably Canada and Australia—do allow for labour migrants or family members of those already in the country to apply for

[72] Jérôme Elie, 'The Historical Roots of Cooperation between the UN High Commissioner for Refugees and the International Organization for Migration' (2010) 16 Global Governance 345.

[73] On the variable education and skills levels of refugees, see eg Kristina Stoewe, 'Education Levels of Refugees: Training and Education in the Main Countries of Origin' (Institut Der Deutschen Wirtshaft, 29 January 2018) <https://www.iwkoeln.de/fileadmin/user_upload/Studien/Report/PDF/2017/IW-Report_2017_37_Education_Levels_of_Refugees.pdf> accessed 12 November 2019; Lucie Cerna, 'Refugee Education: Integration Models and Practices in OECD Countries' (2019) OECD Education Working Paper No 203 <http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=EDU/WKP(2019)11&docLanguage=En> accessed 14 November 2019.

[74] See also Chapter 36 in this volume.

entry as permanent residents, policy in a number of other similar States (such as the US and the UK) are moving in the opposite direction, towards more temporary and precarious labour migration and family reunification.

7. Conclusion: Structural Asymmetry of Borders in a Mobile World

The complexities of how onward movement fits into the realities of refugee protection today reflect the fundamental asymmetries of a system of global governance in which the right of individuals to move across international borders is highly regulated. The right to leave one's country is recognized as a universal human right, but the right to enter any other country is not. While refugee and human rights law precludes States from sending people who fear persecution or other serious harm to places where they are at risk, accessing such protection remains challenging.

Since a refugee's right to seek asylum is a carve-out from States' otherwise unfettered discretion in immigration matters, some States have repeatedly sought to limit its scope of application. Attempts by States to circumscribe the onward migration of asylum seekers and refugees is highly problematic because, rather than reducing the demand or need for such onward migration, the movements themselves are criminalized, creating new markets for smugglers and traffickers, and for irregular migration and employment.[75]

In recent years, researchers and policymakers have tried to develop new approaches that take the fact of human mobility as a starting point—whether the person on the move is in search of protection or opportunity, asylum or employment, education or family reunion. This is reflected in international agreements as well, including the 2018 Global Compact on Refugees. However, in practice, there is currently almost no political will to use migration as a solution to displacement, except for a very small number of highly skilled refugees.

In conclusion, this chapter returns to the question posed at the beginning: how does onward migration fit into existing frameworks for refugee protection? One answer is that the capacity to move lies at the core of how refugee protection is imagined: the ability to seek asylum rests upon the ability to move across borders. In a world in which all States offered protection to refugees, there would be little need for refugees to engage in onward movement beyond the first border crossed—and little reason for States to fear it. Yet, the manifest inequalities within the global regime—not only concerning States' approaches to asylum, but also more generally with respect to wealth and economic opportunity (often deeply rooted in history and geography)—mean that refugees and

[75] See Chapter 7 in this volume.

asylum seekers will continue to engage in onward mobility. Without a change in approach, States will continue to fear such movement and attempt to heavily circumscribe or even outlaw it.

This means the challenge for the international refugee protection regime is to try to restore a delicate balance between the existing system of bordered States, around which international order and global governance is organized, and the reality of human mobility in an increasingly interconnected, but ever more unequal, world.

PART VIII

ACCOUNTABILITY FOR DISPLACEMENT AND REFUGEE RIGHTS VIOLATIONS

CHAPTER 62

RESTITUTION AND OTHER REMEDIES FOR REFUGEES AND INTERNALLY DISPLACED PERSONS

MEGAN BRADLEY

1. Introduction

Most refugees and internally displaced persons (IDPs) never receive any formal redress for the wrongs they have suffered. Yet over the past 30 years, significant progress has been made in advancing international norms on remedies for refugees and IDPs, and experiences in countries from Bosnia and Kosovo to Rwanda and Iraq have strengthened understanding of the challenges involved in translating these principles into practice. Efforts have focused predominantly on the restitution of housing, land, and property (HLP), with the assumption that this is the most pertinent remedy for forced migrants, particularly because it may help enable return as the 'preferred' solution to displacement.[1]

This chapter assesses these developments and the state of research on this pivotal challenge. It reviews the approaches taken in major peace treaties, court decisions, and

[1] See eg Anneke Smit, *The Property Rights of Refugees and Internally Displaced Persons: Beyond Restitution* (Routledge 2012); Guilia Paglione, 'Individual Property Restitution: From Deng to Pinheiro—and the Challenges Ahead' (2008) 20 IJRL 391; Megan Bradley, *Refugee Repatriation: Justice, Responsibility and Redress* (CUP 2013). On the purported preferability of return, see Megan Bradley, 'Is Return the Preferred Solution to Refugee Crises?' in David Miller and Christine Straehle (eds), *The Political Philosophy of Refuge* (CUP 2019).

standards such as the 1998 Guiding Principles on Internal Displacement,[2] the 2005 UN Principles on Housing and Property Restitution for Refugees and Displaced Persons (the Pinheiro Principles),[3] the 2009 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (the Kampala Convention),[4] and the 2010 Inter-Agency Standing Committee (IASC) Framework on Durable Solutions for Internally Displaced Persons.[5] It then reflects on five intertwined challenges: (i) developing appropriate data collection techniques and evidentiary standards; (ii) balancing the rights of 'secondary occupants' and people in protracted displacement; (iii) mitigating risks associated with HLP restitution; (iv) developing a better understanding of how gender, race, class, and other intersecting power relations influence redress; and (v) moving beyond a narrow focus on property restitution to consider the wider range of losses associated with displacement.

The laws and standards examined here should inform policy and practice at local, national, and international levels, and may bolster refugee and IDP protection. But they are also fraught with tensions, and efforts to implement them come up against thorny political questions. For example, should homes and lands be restored to the displaced if this would exacerbate inequality and instability, or lead to further displacement? How should efforts to redress displaced persons' HLP claims relate to broader post-conflict land reform processes? What are the implications of efforts to redress displacement for peacebuilding? While largely outside the scope of this chapter, assessments of international standards on redress for refugees and IDPs must be cognizant of such questions.

A word on this chapter's approach: Before, during and after displacement, refugees and IDPs often experience rights violations requiring remedy, such as torture, rape, and other forms of violence. Being displaced can increase vulnerability to rights violations and hinder opportunities to participate in and benefit from redress processes. However, this chapter focuses primarily on redress for displacement *per se*, and for violations such as *refoulement* and the loss of homes and lands. Historically, restitution—the restoration of the *status quo ante*—has been seen as the most appropriate remedy in cases involving breaches of international legal obligations. However, this chapter follows the 2005 UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (UN Reparations Principles) in questioning the preference conventionally accorded to restitution. As the UN Reparations Principles indicate, the most appropriate remedy (or remedies) depends on context, with possibilities

[2] UN Commission on Human Rights, 'Guiding Principles on Internal Displacement', UN doc E/CN.4/1998/53/Add.2 (11 February 1998) (Guiding Principles).

[3] UN Commission on Human Rights, *Principles on Housing and Property Restitution for Refugees and Displaced Persons* UN doc E/CN.4/Sub.2/2005/17 (2005) (Pinheiro Principles).

[4] African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (adopted 23 October 2009, entered into force 6 December 2012) 49 ILM 86 (Kampala Convention).

[5] IASC, 'IASC Framework on Durable Solutions for Internally Displaced Persons' (The Brookings Institution–University of Bern Project on Internal Displacement April 2010).

including not only restitution, but also approaches such as compensation, apologies, trials and/or truth-telling. Some of these processes are closely associated with transitional justice.[6] While this discussion is not framed in terms of transitional justice, it acknowledges that efforts to redress forced migrants' losses, including through HLP restitution, may indeed be a critical dimension of transitional justice.[7]

2. The Rise of Restitution as the Primary Remedy for Displacement: Context and Dynamics

As survivors of human rights violations, refugees and IDPs are entitled to reparation—whether through restitution, compensation, or other mechanisms—under general principles of international human rights law, and may also claim reparations under mechanisms provided for in international criminal law, such as through Reparations Orders issued by the International Criminal Court.[8] Rulings such as that issued in 2013 by the Inter-American Court of Human Rights in the case of Leopoldo García Lucero confirm the right to reparation even when survivors have been exiled and are unable or unwilling to return.[9] Beyond the remedial rights of displaced individuals, standards such as the International Law Commission Articles on State Responsibility address reparation for internationally wrongful acts between States and could in theory be used, for example, by host States that have suffered harms linked to large influxes of refugees to seek remedies from the State(s) responsible.

Despite the broad legal foundations underpinning displaced persons' right to a wide range of reparations for the diverse losses they suffer, in practice attention has focused predominantly on the loss of HLP, and restitution as the primary remedy for these losses. This reflects the fact that HLP disputes are a defining feature of many conflicts involving massive displacement, and a predictable feature of almost every return and peacebuilding process. In voluntary repatriation intention surveys, refugees typically

[6] See Rhodri Williams, 'Protection in the Past Tense: Restitution at the Juncture of Humanitarian Response to Displacement and Transitional Justice' in Roger Duthie (ed), *Displacement and Transitional Justice* (SSRC 2012) 85.

[7] On transitional justice and displacement, see Megan Bradley (ed), *Forced Migration, Reconciliation and Justice* (McGill-Queen's University Press 2015); Roger Duthie, 'Transitional Justice and Displacement' (2011) 5 International Journal of Transitional Justice 241; Megan Bradley and Roger Duthie, 'Introduction to Special Issue on Accountability and Redress for the Injustices of Displacement' (2014) 27 Journal of Refugee Studies 161.

[8] See Dinah Shelton, *Remedies in International Human Rights Law* (OUP 2006).

[9] Leopoldo García Lucero suffered torture under the Pinochet regime in Chile, and was exiled to the United Kingdom. See *Case of García Lucero v Chile*, Inter-American Court of Human Rights Series C No 267 (28 August 2013).

rank HLP as the third or fourth barrier to return, after safety, livelihoods, and access to services, suggesting that resolving HLP claims is a critical concern for many.[10] Addressing displacement-related land grievances is particularly urgent given increased pressure on HLP resources associated with urbanization and the effects of climate change, which render some areas unsafe or uninhabitable.

Since the 1990s, major restitution processes involving displaced persons have been implemented in countries including Bosnia, Croatia, Kosovo, Georgia, South Africa, Mozambique, Rwanda, Iraq, and Colombia, with literature analysing experiences in these cases.[11] Formal, internationally supported restitution processes are more often launched in middle-income countries, where claims pertain primarily to properties owned by displaced individuals under statutory systems. Typically, these processes focus on the restitution of real property, particularly residences, rather than rented homes, moveable property or other assets. The literature broadly underscores the importance of administrative rather than judicial approaches to resolving claims as regular courts are typically out of reach and unable to handle significant numbers of HLP cases, leading to protracted disputes and congestion. It has often been vital to have empowered international actors working closely with domestic authorities to ensure the enforcement of decisions in favour of displaced claimants.[12]

While these are important insights, there is a need for more research on addressing HLP losses in customary or hybrid tenure systems which predominate across much of the Global South, where the vast majority of refugees and IDPs remain.[13] In sub-Saharan Africa, for example, an estimated 90 per cent of rural populations access land through customary or informal tenure systems; similarly, approximately 90 per cent of new urban communities in sub-Saharan Africa are slums or irregular settlements in which land is held informally.[14] In such contexts, informal or customary mechanisms often play critical roles in resolving claims and mediating disputes. These mechanisms do not necessarily adhere to international standards; in some instances their departure from these principles may be integral to their perceived credibility. They also may be difficult

[10] Niels Harild, Asger Christensen, and Roger Zetter, 'Sustainable Refugee Return: Triggers, Constraints and Lessons' (World Bank 2015) xi, xiii.

[11] On different national restitution experiences, see eg Derrick Fay and Deborah James (eds), *The Rights and Wrongs of Land Restitution* (Routledge 2009); Scott Leckie (ed), *Returning Home: Housing and Property Restitution Rights for Refugees and Displaced Persons* (Transnational Publishers 2003); Jon Unruh and Rhodri Williams (eds), *Land and Post-Conflict Peacebuilding* (Routledge 2013).

[12] Rhodri Williams, *The Contemporary Right to Property Restitution in the Context of Transitional Justice* (ICTJ 2007). For an alternative view, see Dan Stigall, 'Refugees and Legal Reform in Iraq: The Iraqi Civil Code, International Standards for the Treatment of Displaced Persons, and the Art of Attainable Solutions' in Unruh and Williams (n 11) 205–37.

[13] See eg Unruh and Williams (n 11); Scott Leckie and Chris Huggins, *Conflict and Housing, Land and Property Rights: A Handbook on Issues, Frameworks and Solutions* (CUP 2011); Liz Alden Wily, 'Tackling Land Tenure in the Emergency to Development Transition in Post-Conflict States: From Restitution to Reform' in Sara Pantuliano (ed), *Uncharted Territory: Land, Conflict and Humanitarian Action* (Practical Action 2009); Sandra Joireman and Laura Yoder, 'A Different Way Home: Post-Conflict Rural Property Restitution under Customary Law' (2016) 47 Development and Change 563.

[14] UN HABITAT, *Secure Land Rights for All* (2008) 14.

to access and navigate for refugees, IDPs, and returnees who have been absent for long periods, and disconnected from the norms and networks that shape these institutions' work.[15]

Whether formal or informal, restitution processes have had to grapple with challenges including competing claims, widespread damage and destruction of HLP, land grabbing, lack of documents and land records, or destruction of these materials, and coercive or 'bad faith' HLP transactions, sometimes followed by 'good faith' transactions.[16] Conflicts involving genocide or ethnic cleansing raise particularly severe hurdles, as the displacement of entire groups may be accompanied by deliberate efforts to prevent returns, such as through wholesale destruction of HLP and landmarks. In such instances, restitution and returns have been portrayed as essential to principled opposition to ethnic cleansing. From this perspective, remedies such as compensation may be rejected as 'blood money' that attempts to legitimize the dispossession of entire communities. And yet, given their experiences, some refugees and IDPs may prefer compensation over restitution and return, raising complex questions about how displaced persons' diverse perspectives and preferences should figure in the design and implementation of redress programmes. The development of international norms on redress for refugees and IDPs must be understood in relation to these dynamics.

3. Developing Norms on Redress for Refugees and IDPs: Focus on HLP Restitution

Opinions are divided on the state of the normative framework regarding HLP restitution for refugees and IDPs. Some suggest that existing international legal tools are 'robust', while others stress that minimum standards are difficult to precisely discern, as there is no explicit, binding provision in current international law on HLP restitution or other forms of redress for displaced persons.[17] Neither the Refugee Convention nor the OAU Convention directly address refugees' rights to remedies such as restitution. Rather, most general provisions on the subject are reflected in soft law. A wide

[15] See Conor Foley, 'Housing, Land and Property Restitution Rights in Afghanistan' in Scott Leckie (ed), *Housing, Land and Property Rights in Post-Conflict United Nations and Other Peace Operations: A Comprehensive Survey and Proposal for Reform* (CUP 2008).

[16] Jon Unruh, 'Evidencing the Restitution Landscape: Pre-Emptive and Advance Techniques for War-Torn Land and Property Rights Reacquisition' (2014) 38 Land Use Policy 111, 112. See also Sara Pantuliano (ed), *Uncharted Territory: Land, Conflict and Humanitarian Action* (Practical Action 2009); Smit (n 1); Williams (n 6); Unruh and Williams (n 11).

[17] Unruh (n 16) 111; Stigall (n 12); Catherine Phuong, *The International Protection of Internally Displaced Persons* (CUP 2004).

range of international resolutions and agreements, as well as national laws and policies, address restitution and other remedies for specific displaced groups, often emphasizing their link to enabling returns. By 2007, over 240 international, regional and national agreements, laws, and judicial decisions addressed HLP restitution for displaced persons; this number has kept growing, suggesting increased recognition of the general principle that refugees and IDPs have the right to have HLP assets restored, and the right to return to use them.[18] Reflecting this trend, the International Committee of the Red Cross (ICRC) has concluded that as a matter of customary International Humanitarian Law (IHL), '[d]isplaced persons have a right to voluntary return in safety and dignity to their homes or places of habitual residence as soon as the reasons for their displacement cease to exist', and that the 'property rights of displaced persons must be respected'.[19] The 'fact that violations of property rights may impede implementation of the right to return … further supports the customary nature of this rule'.[20]

a. UN Resolutions and Peace Agreements

The UN Secretary-General has called for negotiators to include 'the right to return and restitution of housing, land or property in all future peace agreements and all relevant [Security] Council resolutions'.[21] In addition, scores of UN General Assembly and Human Rights Council resolutions address the issue. Perhaps the earliest and certainly the most reaffirmed UN resolution related to refugees' remedial rights is UN General Assembly Resolution 194 (III) of 1948, which resolves that Palestinian

> refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those choosing not to return and for loss of or damage to property which, under principles of international law or in equity, should be made good by the Governments or authorities responsible.[22]

Resolution 194 has of course never been implemented, but its provisions have been echoed in many subsequent General Assembly resolutions, helping to cement the connection between the right of return and the reclamation of lost homes.[23]

[18] For a compilation of these standards, see Scott Leckie (ed), *Housing, Land and Property Restitution Rights of Refugees and Displaced Persons: Laws, Cases and Materials* (CUP 2007).

[19] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law: Rules*, vol I (CUP 2005) rules 132, 133.

[20] ibid 474.

[21] UNSC, *Report on the Protection of Civilians in Armed Conflict: Report of the Secretary-General*, UN doc S/2007/643 (7 May 2019) para 59.

[22] UNGA res 194(III) (11 December 1948).

[23] Gail Boling, 'Palestinian Refugees and the Right of Return: An International Law Analysis' (Information and Discussion Brief No 8, BADIL 2001).

The 1992 General Peace Agreement for Mozambique stands out as one of the first major post-Second World War treaties to explicitly acknowledge and detail plans to realize displaced persons' rights to return and restitution, indicating that 'Mozambican refugees and displaced persons shall be guaranteed restitution of property owned by them which is still in existence and the right to take legal action to secure the return of such property from individuals in possession of it'.[24] However, the 1995 General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Agreement) was a turning point in the promotion of restitution rights for refugees and IDPs, and by extension the right of return—understood as the right not only to re-enter one's country, but to reclaim and resume living in former residences. The Dayton Agreement surpassed previous treaties in its level of detail and international support for its implementation in an attempt to challenge the ethnic cleansing of Bosnia by insisting on the twin rights of return and restitution.[25] Annex VII of the agreement indicates that, '[a]ll refugees and displaced persons have the right freely to return to their homes of origin. They shall have the right to have restored to them property of which they were deprived in the course of hostilities since 1991 . . . .'[26]

Through a pivotal Property Law Implementation Plan, the process eventually resolved more than 215,000 claims, 92 per cent of which were enforced in favour of displaced claimants.[27] The restitution process did not translate into high levels of 'minority returns'; many refugees and IDPs who would have been in the ethnic minority if they returned to their pre-war homes, instead sold their properties and re-established themselves elsewhere in the country. However, building on this precedent, virtually every post-1995 peace agreement recognizes displaced persons' rights to return, restitution, or other forms of redress.[28] Handbooks and preparatory tools for peace negotiators now emphasize that all agreements aiming to resolve conflicts characterized by massive forced migration should address the right of return and the resolution of displaced persons' HLP claims.[29] Most recently, agreements to end the conflict in Colombia involve extensive, ongoing efforts to restore IDPs' lost homes

[24] UNSC, 'Letter Dated 6 October 1992 from the Representative of Mozambique to the United Nations Addressed to the Secretary-General,' UN doc S/24635 (8 October 1992) (General Peace Agreement for Mozambique) art IV(e). On customary authorities' roles in resolving property claims in post-war Mozambique, see Jon Unruh, 'Property Restitution Laws in a Post-War Context: The Case of Mozambique' (2005) 1 African Journal of Legal Studies 147.

[25] Gerard Toal and Carl Dahlman, *Bosnia Remade: Ethnic Cleansing and its Reversal* (OUP 2011) 7–8.

[26] 'General Framework Agreement for Peace in Bosnia and Herzegovina' in UNGA, *Letter dated 29 November 1995 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General* UN doc A/50/790; S/1995/999 (30 November 1995) (Dayton Agreement) annex VII, art 1(1).

[27] Rhodri Williams, 'Post-Conflict Property Restitution and Refugee Return in Bosnia and Herzegovina: Implications for International Standard-Setting and Practice' (2006) 37 New York University Journal of International Law and Politics 441, 443.

[28] See eg Catherine Phuong, *Forcible Displacement in Peace Agreements* (International Council on Human Rights Policy 2005) 12.

[29] See eg Gerard McHugh, *Integrating Internal Displacement in Peace Processes and Agreements* (Brookings-Bern Project on Internal Displacement and United States Institute of Peace 2010) 56.

and lands, alongside a range of other remedies for the displaced, including compensation and truth-telling.[30]

b. IDP Standards

The development of the normative framework on IDPs has played an important role in confirming, clarifying, and advancing displaced persons' rights to redress, including but not limited to HLP losses. While the Guiding Principles on Internal Displacement address remedies for IDPs only in terms of property losses, they buck the trend of focusing narrowly on return, also emphasizing the need to address the claims of resettled IDPs. Principle 29.2 states:

> Competent authorities have the duty and responsibility to assist returned and/or resettled internally displaced persons to recover, to the extent possible, their property and possessions which they left behind or were dispossessed of upon their displacement. When recovery of such property and possessions is not possible, competent authorities shall provide or assist these persons in obtaining appropriate compensation or another form of just reparation.[31]

The Guiding Principles thus reflect the view that restitution is generally the preferred approach to redressing displaced persons' property losses, but recognize the potential importance of other remedies. Significantly, Principle 29.2 addresses both real property and other possessions, although implementation efforts have focused primarily on HLP.

Comparing the 1995 Compilation and Analysis of Legal Norms informing the development of the Guiding Principles, and the revised 2008 Annotations to the Guiding Principles, underscores how rapidly norms on restitution developed in a relatively short period. The 1995 Compilation recognized that IDPs' return 'raises questions concerning the right to restitution for the property or compensation for its loss. There is a certain trend in general human rights instruments, along with the progressive development of international law, to answer these questions in the affirmative.'[32] However, the Compilation indicated that while regional bodies, such as the Inter-American Commission on Human Rights, had recommended remedies for IDPs' property losses,

[30] Roberto Vidal López, 'Truth-telling, Internal Displacement and the Peace Process in Colombia' in Megan Bradley (ed), *Forced Migration, Reconciliation and Justice* (McGill-Queen's University Press 2015); Julieta LeMaitre and Kristin Sandvik, 'From IDPs to Victims in Colombia: Reflections on Durable Solutions in the Postconflict Setting' in Megan Bradley, James Milner, and Blair Peruniak (eds), *Refugees' Roles in Resolving Displacement and Building Peace: Beyond Beneficiaries* (Georgetown University Press 2019) 187–210.

[31] Guiding Principle 29.2.

[32] UN Commission on Human Rights, 'Internally Displaced Persons, Report of the Representative of the Secretary-General, Francis Deng, submitted pursuant to Commission on Human Rights Resolution 1995/57: Compilation and Analysis of Legal Norms', UN doc E/CN.4/1996/52/Add.2 (5 December 1995) para 275.

'the right to restitution of property lost as a consequence of displacement or compensation for its loss is not fully recognized'.[33] In comparison, the 2008 edition of the Annotations indicates that while 'there is [still] no general rule in present human rights law that explicitly affirms the right of internally displaced persons to return to their original places of residence . . . such a right can be deduced from the right to the liberty of movement and the right to choose one's residence'.[34] The revised Annotations identify many new standards relevant to restitution and return, and elaborate on the expanding grounds underpinning IDPs' right to restitution or other remedies for their HLP losses, linking this to protection of the rights to property, freedom from arbitrary interference with one's home, and adequate housing.[35]

Building on the Guiding Principles and developed under the leadership of the Representative of the UN Secretary-General on the Human Rights of IDPs, the IASC Framework on Durable Solutions for IDPs distils rights-based criteria and processes related to the resolution of internal displacement. The Framework specifies that durable solutions have been achieved when IDPs 'no longer have any specific assistance and protection needs that are linked to their displacement and such persons can enjoy their human rights without discrimination resulting from their displacement'.[36] The Framework maps out eight criteria that can be used to discern the extent to which durable solutions have been achieved, including two directly pertinent to redress: 'restoration of housing, land and property' and 'access to effective remedies and justice'.[37] According to the Framework, 'IDPs who have achieved a durable solution have access to effective mechanisms for timely restitution of their housing, land and property, regardless of whether they return or opt to integrate locally or settle elsewhere in the country'.[38] Whereas the Guiding Principles focus on restitution of 'property and possessions', the IASC Framework follows the Pinheiro Principles in addressing not only real property independently owned under statutory law, but also the loss of housing and land held under tenancy or lease agreements, or under informal, customary, or collective arrangements.[39] Importantly, the Framework goes beyond a narrow focus on HLP, clarifying that

> IDPs who have been victims of violations of international human rights or humanitarian law, including arbitrary displacement, must have full and non-discriminatory access to effective remedies and access to justice, including, where appropriate, access to existing transitional justice mechanisms, reparations and information on the causes of violations.[40]

[33] ibid para 284, 416. See further Megan Bradley, 'Durable Solutions and the Right of Return for IDPs: Evolving Interpretations' (2018) 30 IJRL 218.

[34] Walter Kälin, *Guiding Principles on Internal Displacement: Annotations* (rev edn, American Society of International Law and Brookings–Bern Project on Internal Displacement 2008) 126.

[35] ibid 132–3. [36] IASC (n 5) 5. [37] ibid 27.

[38] ibid 35. [39] ibid 35–8. [40] ibid 42.

The Kampala Convention also takes an expansive approach to remedies for IDPs. Strikingly, the Convention does not directly mention restitution or explicitly recognize IDPs' right to have lost homes or lands restored to them, although article 11 does provide that 'States Parties shall establish appropriate mechanisms providing for simplified procedures where necessary, for resolving disputes relating to the property of internally displaced persons', and that 'States Parties shall take all appropriate measures, whenever possible, to restore the lands of communities with special dependency and attachment to such lands upon the communities' return, reintegration, and reinsertion'.[41] Rather, in article 12 on 'Compensation', the Convention indicates that States parties 'shall provide persons affected by displacement with effective remedies' and 'shall establish an effective legal framework to provide just and fair compensation and other forms of reparations, where appropriate, to internally displaced persons for damage incurred as a result of displacement, in accordance with international standards'.[42] In this way, the Convention recognizes the wide range of harms for which IDPs may seek redress, including but not limited to HLP losses. By specifying that effective remedies should be provided to those 'affected by displacement', the Convention dramatically expands the range of parties who could potentially seek redress, such as members of return and host communities who have been burdened or harmed by displacement. However, there is little evidence that these provisions have been leveraged to secure meaningful remedies for people 'affected by displacement' in signatory States.[43]

c. The UN Principles on Housing and Property Restitution for Refugees and Displaced Persons (Pinheiro Principles)

The Pinheiro Principles are the most prominent international standard focused on redressing forced migrants' HLP losses.[44] Named for Paulo Sérgio Pinheiro, the former Special Rapporteur on Housing and Property Restitution for Refugees and Internally Displaced Persons, the Principles were presented as the first 'consolidated and universal approach' to refugee and IDPs' HLP claims, rooted in existing international legal standards.[45]

[41] Kampala Convention (n 4) art 11(4), 11(5).

[42] ibid art 12(1), 12(2). In art 12(3), the Convention also articulates a particular obligation for States parties to redress IDPs 'for damage when such a State Party refrains from protecting and assisting internally displaced persons in the event of natural disasters'.

[43] Mike Asplet and Megan Bradley, 'Strengthened Protection for Internally Displaced Persons in Africa: The Kampala Convention Comes into Force' (2012) 16(36) ASIL Insights 1.

[44] Relevant regional standards include the International Conference on the Great Lakes Region, 'Protocol on the Property Rights of Returning Persons' (30 November 2006) <https://www.refworld.org/docid/595c92644.html> accessed 20 February 2020.

[45] Scott Leckie, 'An Introduction to the "Pinheiro Principles"' in *The Pinheiro Principles: United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons* (Centre on Housing Rights and Evictions 2005) 4.

The Pinheiro Principles provide that '[a]ll refugees and displaced persons have the right to have restored to them any housing, land and/or property of which they were arbitrarily or unlawfully deprived, or to be compensated for any housing, land and/or property that is factually impossible to restore', and insists that States should 'demonstrably prioritize the right to restitution as the preferred remedy for displacement and as a key element of restorative justice'.[46] While the Principles recognize that the 'right to restitution exists as a distinct right, and is prejudiced neither by the actual return nor non-return of refugees and displaced persons', they reflect the view that restitution and return are two sides of the same coin, and that return is the preferred solution to displacement. Section IV is devoted to 'The Right to Voluntary Return in Safety and Dignity', and return is addressed extensively throughout the document, which is otherwise almost silent on how restitution may support other durable solutions. Introducing the Principles, Pinheiro argued that the

> best solution to the plight of millions of refugees and displaced persons around the world is to ensure they attain the right to return freely to their countries and to have restored to them housing and property of which they were deprived during the course of displacement, or to be compensated for any property that cannot be restored to them. It is the most desired, sustainable, and dignified solution to displacement.[47]

In adopting this position, the Principles accord with many treaties, resolutions, and national laws and policies that prioritize return and restitution, but diverge from standards such as the Guiding Principles and the IASC Framework which instead emphasize the value of informed choice and the equal legitimacy of return, local integration, and relocation as avenues to resolving displacement.

In 2007, a collection of UN agencies and non-governmental organisations published a Handbook on Implementing the Pinheiro Principles, which was complemented by the release in 2016 of a legal commentary on the Principles.[48] The Principles have become widely referenced, informing court decisions and laws such as Colombia's influential Victims' Law.[49] However, they have also been forcefully critiqued by scholars, advocates, and practitioners concerned that, *inter alia*, the Principles overstate the implications of existing international law related to restitution, inappropriately privilege return over other durable solutions, and minimize the complexity of addressing the rights of

[46] Pinheiro Principles (n 3) Principle 2(1)–(2).

[47] Centre on Housing Rights and Evictions, 'UN to Adopt Pathbreaking New Global Standard Which Demands Return of Confiscated Refugee Land and Housing' (Media Release, 11 August 2005).

[48] UNHCR, Food and Agriculture Agency (FAO), Norwegian Refugee Council (NRC), Inter-Agency Internal Displacement Division (IDD), OHCHR, and UN-HABITAT, 'Handbook on Housing and Property Restitution for Refugees and Displaced Persons: Implementing the "Pinheiro Principles"' (2007); Khaled Hassine and Scott Leckie, *The United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons: A Commentary* (Brill 2015).

[49] Ley de Victimas, L 1448/11, junio 10, 2011, 40.096 DIARIO OFICIAL (DO) (Colombia).

secondary occupants, and that their rigid prioritization of restitution over other approaches may jeopardize fragile peace processes.[50]

4. Key Challenges

The international standards discussed above have been complemented by a raft of national laws and policies, some focused on particular displaced populations, or more broadly on responses to forced migration in the context of conflict, disasters, or development projects.[51] Despite these advances, major challenges remain for research, practice, and further normative developments.

a. Data Collection and Evidentiary Standards

Lack of clear documentation is a key challenge facing efforts to implement national and international standards on redress for refugees and IDPs, but important advances have been made in understanding how alternative evidentiary standards and tailored approaches to demonstrating ownership or occupancy may address this concern.[52] These techniques include gathering evidence on HLP claims during refugee and IDP registration processes and subsequent data collection efforts, community-based mapping and land registration efforts, forensic surveying, and recording customary practices that corroborate HLP claims, including testimony from owners, users, and community leaders.[53] Gathering evidence of claims and making these processes known even as conflict is ongoing may have a 'pre-emptive effect on some forms of dislocation', discouraging displacement and land grabbing by making clear that the ground has been laid for future restitution claims, and that it is therefore unlikely that occupied land can be legally retained.[54] However, deploying these techniques and advancing HLP restitution in the context of ongoing conflict may also present significant risks, particularly in the absence of effective institutions that can protect those who regain their homes and lands from coercive pressure to sell them at fire sale rates.

[50] See eg Smit (n 1); Megan Ballard, 'Post-Conflict Property Restitution: Flawed Legal and Theoretical Foundations' (2010) 28 Berkeley Journal of International Law 1; Paglione (n 1).

[51] See eg Michael Cernea and Hari Mathur (eds), *Can Compensation Prevent Impoverishment? Reforming Resettlement through Investments and Benefit-Sharing* (OUP 2008). The extent to which national laws and policies adhere to international, rights-based standards on durable solutions and redress for displacement varies dramatically. See Megan Bradley and Angela Sherwood, 'Addressing and Resolving Internal Displacement: Reflections on a Soft Law "Success Story"' in Thomas Gammeltoft-Hansen, Stephanie Lagoutte, and John Cerone (eds), *Tracing the Roles of Soft Law in Human Rights* (OUP 2016) 155–82.

[52] Unruh (n 16).

[53] ibid; Donald Wilson, *Forensic Procedures for Boundary and Title Investigation* (John Wiley 2008).

[54] Unruh (n 16) 111.

b. Balancing the Rights of 'Secondary Occupants' and People in Protracted Displacement

The increasingly protracted nature of refugee situations and internal displacement raises important questions regarding the rights of so-called 'secondary occupants' of forced migrants' homes and lands. 'Secondary occupants' is somewhat misleading as repeated displacements often mean that homes and lands may be occupied and abandoned multiple times; secondary occupants are often themselves displaced, and have had their own homes taken over by others. In the context of long-standing patterns of dispossession associated with colonialism and the ouster of indigenous populations, refugees or IDPs identified as the rightful claimants in post-conflict restitution processes based on statutory law may themselves be reasserting control over resources wrongfully taken from others in dispossessions deemed outside the remedial timeframe.

Evicting long-standing secondary occupants to make way for returnees, or to enable displaced claimants to repossess and sell their property, is itself a form of displacement, and in some cases arguably entails harms disproportionate to the value of the justice that would be achieved through restitution.[55] This is a particular concern in cases in which restitution would uproot people who had themselves been displaced or were deeply impoverished and homeless, and had been resident in good faith on lands left behind by others. Adverse possession laws may provide some legal grounding for secondary occupants' claims to remain, although these laws are rarely intended to apply in conflict situations and can raise serious challenges regarding respect for displaced persons' HLP rights.[56] It is often unclear if war-time occupation 'counts towards the time requirements for claiming land via adverse possession'.[57] Adverse possession laws may be used to undermine restitution, as took place for example in Guatemala in relation to restitution claims made by some indigenous displaced persons. In some cases, elite property owners may attempt to forcibly evict IDPs if they fear that war-time secondary occupation may be used to underpin adverse possession claims. As experiences in Liberia have demonstrated, this risk may be particularly pronounced as the end of the adverse possession period nears.[58]

[55] For an influential theoretical examination of this dilemma see Jeremy Waldron, 'Superseding Historic Injustice' (1992) 103 Ethics 4; Jeremy Waldron, 'Settlement, Return and the Supersession Thesis' (2004) 5 Theoretical Inquiries in Law 237. Extensive literature considers how compensation for Palestinian refugees may figure in an eventual peace agreement, and how this relates to refugees' rights to return and restitution. See eg Rex Brynen and Roula El-Rifai (eds), *Compensation to Palestinian Refugees and the Search for Palestinian–Israeli Peace* (Pluto Press 2013); IOM, *Property Restitution and Compensation: Practices and Experiences of Claims Programs* (2008).

[56] Adverse possession is 'a legal approach to acquisition of title by possession or occupation of land or property for a certain period of time under certain conditions'. (Unruh (n 16) 119). On the relationship between HLP restitution and adverse possession, see Smit (n 1).

[57] Unruh (n 16) 119.

[58] ibid. See also John Unruh, 'Land Rights in Postwar Liberia: The Volatile Part of the Peace Process' (2009) 26 Land Use Policy 425.

Existing international standards and scholarly literature provide limited guidance on addressing the complex challenges associated with balancing the rights and well-being of secondary occupants and displaced persons, particularly in protracted situations. The Pinheiro Principles do provide some protection for secondary occupants, but ultimately strongly favour granting refugee and IDPs' restitution claims. For example, principle 17.1 indicates that

> States should ensure that secondary occupants are protected against arbitrary or unlawful forced eviction. States shall ensure, in cases where evictions of such occupants are deemed justifiable and unavoidable for the purposes of housing, land and property restitution, that evictions are carried out in a manner that is compatible with international human rights law and standards, such that secondary occupants are afforded safeguards of due process, including an opportunity for genuine consultation, adequate and reasonable notice, and the provision of legal remedies, including opportunities for legal redress.[59]

The Principles also emphasize the need to protect evicted secondary occupants from homelessness,[60] but indicate that delays associated with upholding due process or securing alternative accommodation for secondary occupants should not 'prejudice the rights of legitimate owners, tenants and other rights holders to repossess the housing, land and property in question in a just and timely manner'.[61]

The complex series of rulings issued by the European Court of Human Rights in relation to displacement and restitution in Cyprus, stemming from the landmark 1996 ruling in *Loizidou v Turkey*, offer valuable insight into this legally and politically fraught question. The court's '*Loizidou* line of decisions' has often been interpreted as strongly favouring restitution and return, as promoted by Greek Cypriot negotiators. While the decisions clearly preclude earlier Turkish Cypriot proposals favouring a 'global exchange' of property and little to no return, in more recent judgments the court has accepted revamped Turkish compensation programmes as providing an 'effective domestic remedy' to dispossessed Greek Cypriots for the loss of use of their property, 'explicitly reject[ing] the Greek Cypriot position that remedies other than restitution should be limited to circumstances of "material impossibility" '.[62]

c. Mitigating Risks

HLP restitution efforts may inadvertently introduce risks to displaced persons' rights and well-being, which necessitate closer examination and mitigation. For example,

[59] Pinheiro Principles (n 3) Principle 17.1.
[60] ibid Principle 17.3. [61] ibid Principle 17.2.
[62] Rhodri Williams and Ayla Gürel, *The European Court of Human Rights and the Cyprus Property Issue: Charting a Way Forward* (PCC Paper 1/2011, PRIO Cyprus Papers 2011) 3–4.

while customary or informal tenure arrangements are predominant in much of the Global South, standards such as the Pinheiro Principles encourage the formalization of HLP rights with a view to limiting future conflict, and various restitution programmes have incorporated formalization efforts.[63] However, title formalization efforts are highly vulnerable to elite capture; that is, these processes are often manipulated by powerful economic actors, and entrench the marginalization of poorer populations, including displaced persons. In countries such as Colombia, restitution processes have been implemented in the context of ongoing violence. In the absence of institutions willing and able to protect against coercive transactions, displaced persons and communities who receive formal title through the restitution process have subsequently been pressured into selling their homes and lands to powerful actors connected to gangs, paramilitaries, and other armed groups, well below market rates. Such experiences underscore the need to ensure that the drive to resolve claims in a timely way does not exacerbate risks facing refugees and IDPs.[64]

These experiences also point to the risks associated with a disconnect between restitution programmes promoted by humanitarians focused on refugees and IDPs, and broader pro-poor tenure management efforts, typically led by development specialists. As Unruh stresses, 'land law reform usually always follows civil war . . . if approaches to HLP restitution which interact significantly with local populations are applied early, this can provide a valuable head start on this important phase, potentially . . . speeding up postwar HLP reform'.[65] Alternatively, approaches that treat displaced persons' HLP rights separately from those of the broader community may heighten resentment and confusion.[66]

d. The Influence of Gender, Class, and Other Power Structures on Redress

An increasing body of research considers how 'intersecting constellations of power relationships' associated with constructs such as gender, age, race, and class 'produce unequal material realities and distinctive social experiences for individuals and groups associated with them', including in contexts of conflict and displacement.[67] Some researchers have considered how factors such as gender and age influence restitution processes, bringing into focus how, for example, gendered distributions of HLP resources and legal systems that privilege older men can negatively affect the ability of

[63] Pinheiro Principles (n 3) Principle 15.1–15.2.

[64] Vidal López (n 30); David Cantor, *Returns of Internally Displaced Persons during Armed Conflict: International Law and its Application in Colombia* (Brill 2018).

[65] Unruh (n 16) 120.

[66] Alden Wily (n 13).

[67] Patricia Hill Collins and Valerie Chepp, 'Intersectionality' in Georgina Waylen, Karen Celis, Johanna Kantola, and Laurel Weldon (eds), *Oxford Handbook of Gender and Politics* (OUP 2013) 58–9.

women and young people to benefit from restitution.[68] To date, however, relatively little research has explored restitution and other approaches to redressing displacement from an intersectional perspective, although such approaches could helpfully bring into focus how 'individuals and groups can *simultaneously* experience privilege and disadvantage', including in contested efforts to resolve HLP claims and redress other aspects of forced migration.[69]

Gender-sensitive and intersectional perspectives reveal how restitution can function as a double-edged sword, restoring valuable resources that refugees and IDPs can use to rebuild their lives, while also reproducing inequality by seeking to restore the *status quo ante*, rather than recast power relations through redistribution. In particular, there is a stark need for research on restitution and other forms of redress to devote more attention to race, class, and the effects of national socio-economic contexts on decisions to promote restitution. Significant international investments in support of restitution and compensation are more common in the context of displacement in European and middle-income countries, where real property is more likely to be held under statutory laws. This disproportionately benefits middle-class and elite claimants who are more likely to own property, and erroneously suggests that losses are less important in deeply impoverished communities—whereas it is precisely in the context of severe resource scarcity that restitution or other material remedies may prove critical to forced migrants' ability to re-establish themselves. The tendency in research, law, policy, and practice to focus on restitution of real property also merits reconsideration to better account for the experiences and perspectives of indigenous communities who do not necessarily see land as property, and for whom the restoration of communal lands may carry broader spiritual or cultural significance.[70]

e. Remedies beyond HLP Restitution

The injustices of displacement go far beyond the loss of housing, land, and possessions. Although remedies for refugees and IDPs have focused primarily on HLP restitution, there is a need to consider the wider ranges of losses associated with forced migration—including refoulement and displacement as harms in their own right—and how these wrongs may be redressed. A limited but growing body of cases and literature provides insight into this issue, with the International Law Association's 1992 Cairo Declaration of Principles of International Law on Compensation to Refugees stressing that responsibility for redressing refugees rests first and foremost with State

[68] See eg Sharanya Mohan, 'The Battle after the War: Gender Discrimination in Property Rights and Post-Conflict Property Restitution' (2011) 36 Yale Journal of International Law 461; Sandra Joireman, 'Intergenerational Land Conflict in Northern Uganda: Children, Customary Law and Return Migration' (2018) 33 Africa 81.

[69] Collins and Chepp (n 67) 60.

[70] See eg LeMaitre and Sandvik (n 30) on experiences of indigenous communities in Colombia.

authorities involved in generating refugee flows.[71] This is typically the State of origin, but aggressor States in international armed conflicts may also incur obligations to compensate or otherwise provide redress to people displaced as a result of their actions. For example, the UN Compensation Commission (UNCC) was established in 1991 to redress harms against individuals, States, and companies stemming from Iraq's invasion of Kuwait, and compensated thousands of people forced to flee Kuwait and Iraq, with funds from Iraqi oil sales.[72] Reparations for *refoulement* remain rare, but in an exception to this trend, the settlement with Holocaust survivors negotiated and financed by the Swiss government and Swiss banks provided compensation to refugees who sought shelter in Switzerland and were turned away or subsequently *refouled*.[73] More recently, some refugees and asylum seekers who have been unlawfully harmed as they have sought protection have used class action lawsuits to secure some redress for their losses. For example, in 2018 the Australian courts awarded 1,700 former Manus Island detainees AUS$70 million in compensation for false imprisonment in the largest human rights class action settlement in Australian history.[74] While such efforts rely on domestic tort law rather than public international law, and are generally limited to defendant countries in the Global North, they represent a potentially important avenue for advancing refugees' remedial rights, and perhaps deterring some particularly flagrant violations of their rights.

The 2005 UN Reparations Principles suggest that enabling displaced persons to return to their homes may be a form of redress, while scholars such as Souter have suggested that the provision of asylum or support for alternative durable solutions such as resettlement or local integration may also, depending on the context, be framed as reparative measures.[75] Efforts to provide redress to IDPs in Colombia provide insight into how a range of remedies, including restitution, compensation, apologies, and support for durable solutions may be blended. At the same time, the process highlights the bureaucratic and political challenges associated with implementing such comparatively ambitious reparation efforts, and the risks that come with offering remedies with a view to closing the books on displacement.[76] In such cases, those who object to the forms of redress that are extended, or who continue to identify themselves as displaced despite the remedies offered, may be painted as recalcitrant

[71] Luke Lee, 'The Cairo Declaration of Principles of International Law on Compensation to Refugees' (1993) 87 AJIL 157; Hannah Garry, 'The Right to Compensation and Refugee Flows: A "Preventive Mechanism" in International Law?' (1998) 10 IJRL 97.

[72] Bradley (n 1). [73] ibid.

[74] 'Former Manus Island Detainees Paid $70 million in Compensation', *SBS* (6 June 2018) <https://www.sbs.com.au/news/former-manus-island-detainees-paid-70-million-in-compensation> accessed 12 February 2020.

[75] UNGA res 60/147 (21 March 2006) s IX, para 19. See also Bradley (n 1) on return as a form of redress. On asylum and durable solutions as remedies, see James Souter, 'Towards a Theory of Asylum as Reparation for Past Injustice' (2013) 62 Political Studies 326; James Souter, 'Durable Solutions as Reparations for the Unjust Harms of Displacement: Who Owes What to Refugees?' (2014) 27 JRS 171.

[76] Vidal López (n 30); LeMaitre and Sandvik (n 30).

spoilers out of step with the peace process, rather than legitimate victims with unresolved claims.[77]

International humanitarian law and international criminal law prohibits deportation or forcible population transfers in particular contexts, and in recent years an increasing number of international and *ad hoc* tribunals have attempted to prosecute these acts as war crimes or crimes against humanity.[78] For example, the Rome Statute of the International Criminal Court defines deportation or forcible transfer of population as 'forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law', and recognizes this as a crime against humanity when it is 'committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack'.[79] However, demonstrating that displacement meets these conditions has proven difficult, and it is unclear that criminal prosecution deters population displacement in war, or responds in a meaningful way to displaced persons' priorities and preferences in relation to redress. While prosecuting the architects of massive displacement or ethnic cleansing can send a powerful political signal, the local level perpetrators of such actions often go unpunished, with their presence in communities of origin undercutting the possibility of safe and sustainable returns.[80] In addition to efforts to redress deportations and forcible population transfers through prosecutions, some advocates are attempting to use international courts to uphold responsibility for policies that result in migrant deaths. For example, recent submissions to the International Criminal Court (ICC) encourage the prosecution of the European Union and key States including Italy, Germany, and France for deterrence efforts that have led to thousands of migrants dying while attempting to cross the Mediterranean.[81]

Beyond attempts to offer redress to displaced individuals, host States may also have significant claims for compensation in relation to the expenses and challenges associated with sheltering large numbers of refugees.[82] Does framing the act of extending asylum or sheltering displaced populations as a harm requiring redress actually encourage welcoming policies and advance rights protection overall? This is an open question.

[77] ibid.

[78] Federico Andreu-Guzmán, 'Criminal Justice and Forced Displacement: International and National Perspectives' in Roger Duthie (ed), *Displacement and Transitional Justice* (SSRC 2012) 233–78.

[79] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (Rome Statute), arts 7(2)(d), 7(1)(d). On displacement as a war crime under the Rome Statute, see arts 8(2)(a)(vii) and 8(2)(e)(viii).

[80] Paige Morrow and Jennifer Winstanley, 'The Challenge of Prosecuting Forced Displacement at the International Criminal Court: The Case of Kenya' in Megan Bradley (ed), *Forced Migration, Reconciliation and Justice* (McGill-Queen's University Press 2015).

[81] Owen Bowcott, 'ICC Submission Calls for Prosecution of EU Over Migrant Deaths', *The Guardian* (3 June 2019) <https://www.theguardian.com/law/2019/jun/03/icc-submission-calls-for-prosecution-of-eu-over-migrant-deaths> accessed 12 February 2020.

[82] Luke Lee, 'The Right to Compensation: Refugees and Countries of Asylum' (1986) 80 AJIL 532; Guy S Goodwin-Gill and Selim Can Sazak, 'Footing the Bill: Refugee-Creating States' Responsibility to Pay', *Foreign Affairs* (29 July 2015).

Elevating the pursuit of redress for wrongs can crowd out visions of political life based on other values such as solidarity and social justice—values that may ultimately be more conducive to welcoming, assisting and protecting the displaced.

5. Conclusion

The challenges discussed above are by no means exhaustive. Considerable progress has been made since the end of the Cold War in developing normative standards on redress for refugees and IDPs, and some important lessons have been gleaned on implementing these norms. Yet the extent to which these have translated into direct benefits for the displaced remain starkly limited. Moving forward, there is a need to look beyond the predominant, narrow focus on restitution of real property, to better consider the rights and well-being of those without land to repossess, and account for the broader range of harms suffered by forced migrants. While this discussion has focused on redress for refugees and IDPs in the context of violence and conflict, the rights and claims of those uprooted in disasters also demand more careful consideration.[83] Although there has, to date, been less attention devoted to remedies for displacement in disaster situations, this issue is becoming increasingly salient as the effects of climate change become more pronounced.[84]

[83] For an initial discussion, see Megan Bradley, 'More than Misfortune: Recognizing Natural Disasters as a Concern for Transitional Justice' (2017) 11 International Journal of Transitional Justice 400.

[84] For discussion of the contested approach to this issue laid out in the Peninsula Principles, see Scott Leckie and Chris Huggins (eds), *Repairing Domestic Climate Change Displacement: The Peninsula Principles* (Routledge 2017).

CHAPTER 63

THE RESPONSIBILITY OF ARMED GROUPS CONCERNING DISPLACEMENT

BEN SAUL

1. Introduction

Displacement frequently occurs in non-international armed conflicts (NIACs), whether as an incidental effect of actual or impending hostilities, a deliberate tactic of warfare, or as a preventive, protective measure to evacuate civilians at risk. In contrast to States parties to a NIAC, however, non-State armed groups (NSAGs) involved in conflict bear far fewer international obligations concerning protection from, during, and after displacement.

This chapter first charts how most of the relevant international law—refugee law, international human rights law (IHRL), international humanitarian law (IHL), and international criminal law (ICL)—imposes obligations principally on States. Under the law of State responsibility, a State is only responsible for a NSAG's conduct in a limited range of situations. Even where State responsibility formally exists, it will often be an ineffective means of accountability in practice (particularly where a NSAG exercises governmental authority over territory to the exclusion of the State authorities), and NSAGs themselves may not separately bear direct responsibility for their conduct.

A critical, second issue discussed in this chapter, therefore, is the extent to which international law directly binds NSAGs and holds them responsible for their breaches. By disaggregating the applicable specialized branches of law, the chapter shows that NSAGs are clearly bound by IHL *as groups*, while ICL imposes *individual* criminal liability on their members. Both of these branches of law contain norms concerning displacement, although IHL rules are far more limited in NIACs than in international armed conflicts (IACs), significantly limiting protection as regards refugees, persons who flee or are evacuated within a territory, and those who move voluntarily. Although it might be desirable for the rules in NIACs to align more closely with those of IACs, politically this seems unlikely to occur.

Whether, and to what extent, NSAGs are collectively bound by IHRL and international refugee law obligations remains more contested and uncertain. There is increasing consensus that at least some NSAGs (namely, *de facto* authorities controlling territory) are bound by IHRL to some degree (depending on their capacities). Formalism aside, in practice, NSAGs have occasionally committed to norms preventing displacement and/or have exercised protection functions during displacement and in relation to repatriation.

While it is clearly desirable for relevant aspects of refugee law and IHRL to apply to NSAGs, the political polarization on this issue inhibits both explicit reform and evolutionary interpretation, although the latter is a more likely pathway to change. Even if substantive obligations bind NSAGs, however, this chapter further shows that the modalities for invoking the collective responsibility of NSAGs remain underdeveloped. This renders it even more difficult to hold NSAGs accountable for violations than is the case with States. Reform of procedures and mechanisms must therefore go hand-in-hand with normative expansion.

2. International Refugee Law

a. State Responsibility for Persecution by NSAGs

In the interpretation and application of refugee law, NSAGs are encountered primarily as *sources of persecution* rather than as *providers of protection*. Under the law of State responsibility, a State is legally responsible for persecution by a non-State actor in a number of circumstances. Foremost is where a NSAG is the *de facto* (not *de jure*) State authority exercising control over the State's territory and population, and thereby constitutes a State organ.[1] An example is the Taliban controlling Afghanistan until late 2001.

The second set of circumstances grounding State responsibility is where the State authorities are closely connected to the group, namely where: the State empowers it to exercise elements of governmental authority (such as by delegating authority to an armed group over part of its territory or in relation to security or administrative functions); the group is acting under the State's instructions or direction or control (in relation to specific operations); or the State (*post facto*) acknowledges and adopts the group's conduct as its own.[2]

[1] International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' (2001) II(2) ILC Yearbook 26, art 4.

[2] ibid (see arts 5, 8, 11).

The third set of circumstances is where the group acts independently of the State authorities but its conduct is nonetheless formally imputed to the State: the group is exercising elements of governmental authority in the absence or default of the official authorities, in circumstances which call for such authority to be exercised (such as where State authority is partly, not fully, displaced by a NSAG in armed conflict); or an insurrectional movement succeeds in establishing itself as the new government or a new State and its prior acts become attributable.[3]

Where a NSAG's conduct is not attributable to a State, the State is not responsible for refugee law breaches by the NSAG. However, the NSAG may still be considered a source of persecution if the State is unable or unwilling to protect the person from such harm.[4] Article 1A(2) of the Refugee Convention does not limit the source of persecution to States,[5] although that was the original context for which it was envisaged. The view that non-State actors may be persecutors is consistent with the humanitarian object and purpose of the Convention, the practice of States, and the position of UNHCR.[6] Relatedly, a risk of persecution posed by NSAGs will be relevant in assessing whether an internal flight alternative exists within a country,[7] irrespective of whether the person is fleeing persecution by the State or a NSAG (in the absence of effective State protection).

In situations of mass influx into neighbouring States, the existence of a NIAC (of which a NSAG is a part) may provide the basis for *prima facie* determination of refugee status. This could occur, for example, where the NSAG targets a population (or part of it) on Refugee Convention grounds, or where civilians in general flee the conflict.

b. State Responsibility for Protection by NSAGs

The issue of the responsibility of NSAGs to *provide* protection has also arisen under refugee law. The Refugee Convention and Protocol do not explicitly mention non-State actors or impose obligations on NSAGs concerning *non-refoulement* or refugee rights. However, as outlined above, the State's refugee law obligations will be engaged (in principle) where it is legally responsible for the NSAG's conduct. The most pertinent situations are where the NSAG is the *de facto* State authority or is exercising elements of government authority in the absence/default of the State. While the legal principles

[3] ibid (see arts 9, 10).

[4] Andreas Zimmermann and Claudia Mahler, 'Article 1A, para 2' in Andreas Zimmermann (ed), *The 1951 Convention relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (OUP 2011) 367; UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/1P/4/ENG/REV.4 (1979, reissued 2019).

[5] Zimmermann and Mahler (n 4) 364.

[6] ibid 363–7; see also Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, OUP 2007) 98ff.

[7] UNHCR, 'Guidelines on International Protection: "Internal Flight or Relocation Alternative" within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees', HCR/GIP/03/04 (23 July 2003) paras 15–17.

seem clear, however, their application is difficult when the factual situation fluctuates during conflict. It may also be complex to assess whether a NSAG is providing protection that satisfies the preconditions for an internal flight alternative.[8]

Several consequences arise from State responsibility for NSAGs. Breaches of international refugee law resulting from the NSAG's acts or omissions are attributable to the State, including *refoulement* or violations of other Refugee Convention rights (whether through interference in those rights, or the failure to protect or provide them). Where the NSAG constitutes the *de facto* or *de jure* government of the State, attribution of responsibility is straightforward, since the NSAG now constitutes the State's organs. Furthermore, its control of the State's administrative machinery means that the NSAG is likely to possess the practical capacity to fulfil international obligations and make reparation for breaches.

In contrast, where a NSAG is exercising elements of governmental authority in the absence or default of the official authorities, in practice the State is unlikely to accept that it is responsible for the conduct of an adversary NSAG exercising rival authority in its territory.[9] The government will simply not be capable of ensuring that the NSAG meets the State's refugee law obligations, notwithstanding that the State is (artificially held) strictly responsible for breaches resulting from NSAG conduct. In such cases, the conventional analysis is that the NSAG itself cannot bear direct international responsibility (see Section 3).

3. Direct Obligations and Responsibility of NSAGs: Refugee Law and IHRL

The direct application of refugee law to NSAGs (including those exercising elements of governmental authority to the exclusion of the State authorities) is controversial and mirrors the wider debate about the direct application of IHRL obligations to NSAGs.[10]

[8] Chapter 38 in this volume.

[9] Where NSAGs do not exercise such authority, the State is not responsible for the conduct of insurrectional movements (unless they succeed), but only for failures to diligently suppress insurgent violence.

[10] See Nigel Rodley, 'Can Armed Opposition Groups Violate Human Rights Standards?' in Kathleen Mahoney and Paul Mahoney (eds), *Human Rights in the Twenty-First Century* (Martinus Nijhoff 1993) 297; Andrew Clapham, *Human Rights Obligations of Non-State Actors* (OUP 2010) chs 1, 7; Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (OUP 2012) 95–6; Noam Lubell, 'Challenges in Applying Human Rights Law to Armed Conflict' (2005) 87 International Review of the Red Cross 737; Andrew Clapham, 'Human Rights Obligations of Non-State Actors in Conflict Situations' (2006) 88 International Review of the Red Cross 491; Christian Tomuschat, 'The Applicability of Human Rights Law to Insurgent Movements' in Horst Fischer and others (eds), *Crisis Management and Humanitarian Protection* (Berliner Wissenschafts-Verlag 2004) 573; Andrew Clapham, 'Focusing on Armed Non-State Actors' in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (OUP 2014) 786.

As mentioned, NSAGs are not parties to refugee or IHRL treaties and such treaties do not explicitly impose obligations on them. Some States are also wary of legitimizing NSAGs[11] or regarding them as actors capable of providing protection.[12]

Particularly those NSAGs that are not exercising any form of governmental authority will seldom, if ever, be capable of providing effective, durable protection against *refoulement*, recognizing and guaranteeing refugee status, or securing the extensive suite of refugee and human rights under international law. They lack the institutional and administrative means, including territorial control and governmental authority, to do so.[13] Even NSAGs exercising governmental authority may only have a precarious hold over territory and not be well placed to provide protection.

In such situations, there is a gap in refugee law as conventionally understood. A NSAG is clearly capable of adversely affecting refugee rights, whether by generating refugee flows, *refouling* refugees, or interfering in their rights. Yet, neither the State nor the NSAG as a group can be held responsible. As discussed below, other areas of international law provide some, albeit imperfect, protection: IHL imposes obligations on NSAGs (as groups) not to unlawfully displace civilians, while ICL imposes individual criminal liability for breaches.

There is, however, growing support for the view that, under customary international law, at least some IHRL obligations apply to NSAGs in certain contexts, particularly where NSAGs are *de facto* State authorities with stable control over territory and a population.[14] UN bodies have increasingly called on NSAGs to respect IHRL since the 1990s,[15] as well as refugee law.[16]

The protection capacity of NSAGs has been legally recognized in limited contexts, for instance to deny protection in other States. The EU Qualification Directive provides that 'parties or organisations . . . controlling the State or a substantial part of the territory of the State' can confer protection against persecution, as long as they are 'willing and able to offer protection'.[17] Protection must be effective and non-temporary, and the non-State actor must operate an effective and accessible legal system to detect, prosecute, punish,

[11] Clapham 2014 (n 10) 786–7.

[12] Clapham 2006 (n 10) 498–9; Héloïse Ruaudel, *Armed Non-State Actors and Displacement in Armed Conflict* (Geneva Call 2013) 47.

[13] Markos Karavias, 'Non-State Actors in Control of Territory as "Actors of Protection" in International Refugee Law' (2014) XLVII Revue belge de droit international 487.

[14] OHCHR, *International Legal Protection of Human Rights in Armed Conflict* (2011) 25; Daragh Murray, *Human Rights Obligations of Non-State Armed Groups* (OUP 2016); Clapham 2014 (n 10) 766; Jean-Marie Henckaerts and Cornelius Wiesener, 'Human Rights Obligations of Non-State Armed Groups: An Assessment Based on Recent Practice' in Ezequiel Heffes, Marcos Kotlik, and Manuel Ventura (eds), *International Humanitarian Law and Non-State Actors* (Asser Press 2020) 222.

[15] OHCHR (n 14) 23–7, 92–116; Tomuschat (n 10) 586; Clapham 2014 (n 10) 709–802; Clapham 2010 (n 10) 281–4.

[16] UNSC Resolution 1894 (11 November 2009) para 1. See also UNSC Resolution 2417 (24 May 2018) preamble.

[17] EU Qualification Directive, art 7(1)(b). For a critique see Maria O'Sullivan, 'Acting the Part: Can Non-State Entities Provide Protection under International Refugee Law?' (2012) 24 International Journal of Refugee Law 85.

and prevent persecution.[18] In such cases, an individual will be ineligible for refugee status or subsidiary protection in the EU. EU law does not, however, impose protection obligations directly on NSAGs (nor attribute their conduct to a State—although such NSAGs would likely be exercising governmental authority in the absence or default of the State).

If it is accepted that some NSAGs are capable of bearing IHRL obligations in principle, which co-apply with IHL in armed conflict, numerous substantive obligations are relevant to displacement. These include: liberty of movement and freedom to choose one's residence; the freedom to leave any country, including one's own; the right not to be arbitrarily deprived of the right to enter one's own country; freedom from arbitrary or unlawful interference in one's privacy, family or home; and family rights.[19] Where displacement has a persecutory dimension, non-discrimination and cultural rights may be relevant.[20] The suite of economic, social, and cultural rights (under the ICESCR) is also relevant during displacement, while the UN Guiding Principles on Internal Displacement[21] (discussed in Section 5.a.*i*) elaborate upon and/or particularize their application in the displacement context.

Most of these rights are subject to necessary and proportionate limitations in pursuit of legitimate aims under IHRL (such as security).[22] However, such limitations must be interpreted in the light of the *lex specialis* in armed conflict: IHL. Specifically, IHRL cannot authorize greater restrictions on movement and residence than IHL allows (see Section 5 below).

Beyond the scope of this chapter, more difficult questions include whether NSAGs bear the same number and type of obligations as States, and whether the content of particular rights or obligations can be flexibly interpreted or tailored to the circumstances (especially in light of the different nature and/or level of control or jurisdiction exercised by NSAGs). Under IHRL (and arguably also refugee law), the orthodox tripartite typology of State obligations is a helpful starting point. In principle, a NSAG may have duties: (1) not to interfere in rights (such as by unlawfully displacing people, or *refouling* refugees); (2) to protect against (other) private interferences in rights (as by preventing other NSAGs from displacing people); and (3) to positively provide rights (such as food, water, health care, education, and shelter).

Even amid a conflict, NSAGs may be expected to refrain from returning people to harm. However, it may be too much to expect them to maintain a full asylum determination system granting permanent, effective protection—something many States do not even provide. Further, some acts of protection by NSAGs may have no practical effect—for example, issuing refugee identity or travel documents that States are unlikely to recognize. The next section considers particular areas in which NSAGs have engaged with protection.

[18] ibid art 7(2).

[19] ICCPR arts 12(1), 12(2), 12(4), 17(1), 23.

[20] ibid arts 2, 27.

[21] UN Commission on Human Rights, 'Guiding Principles on Internal Displacement', UN doc E/CN.4/1998/53/Add.2 (11 February 1998) (Guiding Principles).

[22] See eg ICCPR, art 12(3).

4. NSAGs as Providers of Refugee Protection

Quite apart from the normative questions of legal responsibility, an empirical question is whether NSAGs provide protection in practice. In some conflicts, NSAGs will not encounter refugees (unless they are already present in the territory). Refugee law is limited to cross-border displacement. NSAGs are typically engaged in NIACs, in which displacement is either internal or *to*—not *from*—other countries. The former Taliban regime in Afghanistan, Islamic State in Iraq and Syria (ISIS) in Syria or Iraq, Liberation Tigers of Tamil Eelam (LTTE) in Sri Lanka, or Revolutionary Armed Forces of Colombia (FARC) in Colombia were hardly destinations of choice (or even necessity) for refugees.

That said, some NSAGs in NIACs follow refugee populations into exile and remain closely connected to them. Examples include Hutu armed groups amongst Rwandan refugees in the Democratic Republic of Congo after the 1994 genocide;[23] Myanmarese armed elements amongst refugees in Thai border camps;[24] the Polisario Front (the Western Saharan liberation movement) organizing Sahrawi refugees in Algeria;[25] and armed factions administering Palestinian refugee camps in Lebanon.[26] Engagement by NSAGs varies, from coercive control (Hutus in Congo), to informal activities (Myanmarese in Thailand), to State-building (Polisario in Algeria).

One long-running example is the daily administration of Palestinian refugee camps in Lebanon by 'popular committees' drawn from the (armed) Palestinian factions (including the Palestine Liberation Organization (PLO)/Fatah, Hamas, and Islamic Jihad). The arrangement arose under the Cairo Agreement of 1969 between Lebanon and the PLO, which granted administrative autonomy to Palestinian refugees in place of Lebanese military control. The committees perform 'municipal functions such as providing water and electricity, collecting social contributions', manage law and order and disputes, and represent refugees to the Lebanese authorities and the UN Relief and Works Agency for Palestine Refugees in the Near East (UNRWA).[27] Challenges include factionalism, cronyism, skills and funding shortages, and armed violence. The Lebanon experience contrasts with suppression of Palestinian self-governance in Jordan.[28]

One of the more sophisticated and successful examples of cooperative State/non-State refugee protection involves refugees from Western Sahara in Algeria, after Morocco unlaw-

[23] UNSC, 'Report of the Secretary-General's Investigative Team Charged with Investigating Serious Violations of Human Rights and International Humanitarian Law in the Democratic Republic of Congo', UN doc S/1998/581 (29 June 1998) paras 35–6.

[24] Kirsten McConnachie, *Governing Refugees: Justice, Order and Legal Pluralism* (Routledge 2014) 72, 97–100.

[25] Randa Farah, 'Refugee Camps in the Palestinian and Sahrawi National Liberation Movements: A Comparative Perspective' (2009) 38(2) Journal of Palestine Studies 76.

[26] ibid.

[27] International Crisis Group, 'Nurturing Instability: Lebanon's Palestinian Refugee Camps' (Middle East Report No 84, 19 February 2009) 21.

[28] Farah (n 25) 86.

fully occupied Spanish Sahara in 1975. Algeria permits the Polisario government-in-exile of the Sahrawi Arab Democratic Republic (SADR) to self-govern up to 165,000 Sahrawi refugees in camps. SADR governance includes a constitution, parliament, government, administration, and security institutions. Popular committees administer education, health, food, handicraft work, and justice,[29] in concert with UN actors and non-governmental organizations. External security is provided by the Algerian military. SADR has also engaged in dialogue with, and monitoring by, Human Rights Watch on protection issues.[30]

In many situations, however, the presence of armed elements in refugee camps undermines protection. Fighters do not enjoy refugee status[31] and military activities are incompatible with the civilian and humanitarian character of asylum,[32] which host States must guarantee.[33] UNHCR recommends that States should identify, disarm, separate, and intern fighters as early as possible,[34] locate camps away from the border, exclude weapons, and prevent recruitment.[35]

There are other, less intensive ways that NSAGs may be involved in facilitating (if not directly providing) protection. For example, the political wing of Hezbollah has informally contributed humanitarian relief to Syrian refugees in Lebanon (who come under the protection of Lebanon, assisted by UNHCR) during the Syrian war since 2012.[36]

At the international level, actors have often been reluctant to engage with NSAGs on protection (although the International Committee of the Red Cross (ICRC) has routinely engaged them on IHL). This is partly due to legal uncertainties about the obligations of NSAGs and the actor's own mandate (including the need for State consent). Some States are also concerned about legitimizing NSAGs,[37] while NSAGs can be suspicious of outsiders, particularly in an era of counterterrorism.

In the field, UNHCR has often engaged informally with NSAGs. A review of engagement from 1982 to 2012 found that discussion of protection issues with NSAGs had often proved more difficult than engaging on security or access of humanitarian actors, or diplomacy for repatriation or peacebuilding.[38] There is also a tension in that raising protection concerns could prejudice humanitarian access.[39]

[29] ibid 82.

[30] See eg Human Rights Watch, 'Human Rights in Western Sahara and in the Tindouf Refugee Camps' (Report, 19 December 2008) <https://www.hrw.org/report/2008/12/19/human-rights-western-sahara-and-tindouf-refugee-camps> accessed 10 December 2019.

[31] UNHCR, 'Guidelines on the Application in Mass Influx Situations of the Exclusion Clauses of Article 1F of the 1951 Convention relating to the Status of Refugees' (2006) para 10.

[32] ibid.

[33] UNHCR Executive Committee, 'Conclusion on the Civilian and Humanitarian Character of Asylum No 94 (LIII) (2002)' in 'Report of the Fifty-Third Session of the Executive Committee of the High Commissioner's Programme', UN doc A/AC.96/973 (8 October 2002) para 23 (see sub-paras (a)–(b)).

[34] ibid sub-para (c). [35] ibid sub-paras (c), (e).

[36] Tamirace Fakhoury, 'Governance Strategies and Refugee Response: Lebanon in the Face of Syrian Displacement' (2017) 49 International Journal of Middle East Studies 681, 690.

[37] Clapham 2014 (n 10) 798; Sivakumaran (n 10) 546–9.

[38] Sean Keogh and Yvonne Ruijters, 'Dangerous Liaisons? A Historical Review of UNHCR's Engagement with Non-State Armed Actors', UNHCR Policy Developments and Evaluation Service, PDES/2012/03 (December 2012).

[39] Ashley Jackson, 'Talking to the Other Side: Humanitarian Engagement with Armed Non-State Actors' (Humanitarian Policy Group Brief 47, Overseas Development Institute, June 2012) 2.

There are numerous extra-legal reasons for adherence by NSAGs to protective norms on displacement. Protecting refugees may elicit the sympathy of, and mobilize support from, international actors, foreign States and publics, or diaspora communities. It may enhance the NSAG's political legitimacy and authority amongst refugee or internally displaced person (IDP) constituencies. Many NSAGs care about their reputation and providing protection may be consistent with their identity, moral convictions, religion, ideology, or politics.

5. International Humanitarian Law

All NSAGs in NIACs are bound by common article 3 of the 1949 Geneva Conventions, which requires each 'party' to a conflict to respect minimum humanitarian obligations, as well as customary IHL.[40] In addition, Additional Protocol II of 1977 (APII) may apply where NSAGs exercise territorial control.[41] However, the law applicable in NIACs remains less developed than in IACs, including as regards displacement. In IAC, States have extensive obligations with respect to refugees,[42] displacement and evacuations,[43] and voluntary internal or international movement.[44]

a. Displacement in NIAC

In contrast, in NIAC, common article 3 does not address refugees, displacement, or voluntary departure from the territory at all, while APII does not address refugees but provides important protections against displacement. Before discussing these issues, it should be emphasized that other, general IHL rules *are* indirectly relevant to preventing displacement. These include prohibitions on attacking civilians or civilian objects (including property and vital infrastructure), indiscriminate attacks, dispro-

[40] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 (GCI) art 3; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1951) 75 UNTS 85 (GCII), art 3; Geneva Convention relative to the Treatment of Prisoners of War (adopted August 12 1949, entered into force 21 October 1951) 75 UNTS 135 (GCIII), art 3; Geneva Convention relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1951) 75 UNTS 287 (GCIV), art 3. See Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol I (CUP 2005).

[41] Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (APII), art 1.

[42] GCIV (n 40) arts 44, 70; Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (API), art 73.

[43] GCIV (n 40) art 49(1)–(3). [44] ibid art 35(1).

portionate attacks, violence to life and person, use of prohibited weapons, and intentionally spreading terror amongst civilians. Respect for IHL at large, from the conduct of hostilities to humanitarian assistance, is one of the most effective means of preventing displacement.[45]

Nonetheless, IHL violations all too frequently both produce displacement and endanger displaced people. As the UN Secretary-General observed, refugees and IDPs 'were exposed [in 2016] to serious protection risks, including killings, sexual and gender-based violence, torture, forced recruitment, trafficking in persons, early and forced marriage and arbitrary arrest and detention'.[46] In that year, IDP camps were attacked in Iraq, Myanmar, Nigeria, South Sudan, and the Syrian Arab Republic.[47]

In extreme cases, NSAGs have destroyed whole settlements, as when the Alliance of Democratic Forces for the Liberation of the Congo disbanded five (partly militarized) Rwandan Hutu refugee camps in 1996 (with the support of the Rwandan army), displacing 722,000 people.[48] Attacks on refugees have also intersected with repressive border protection policies. For example, an airstrike by an armed faction in the Libyan civil war killed 40 people and wounded 80 at a refugee/migrant camp housing over 600 people in Tripoli in 2019—many of whom were detained after Libyan naval interdiction at the EU's behest.[49]

While some NSAGs perceive a military advantage in causing displacement, there are powerful countervailing advantages. Managing displacement imposes heavy costs on NSAGs,[50] including the diversion of limited resources and the disruption of business, employment, and livelihoods that would otherwise contribute to the NSAG's war economy. These are additional to the moral, legitimacy, and legal reasons for compliance mentioned above.

i. *Internal Displacement*

Concerning internal displacement, article 17(1) of APII largely reflects the position in IAC:[51]

> The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition.

[45] See generally ICRC, 'Displacement in Times of Armed Conflict' (2019).

[46] UNSC, 'Report of the Secretary-General on the Protection of Civilians in Armed Conflict', UN doc S/2017/414 (10 May 2017) para 65.

[47] ibid. [48] ibid paras 37–47.

[49] Rami Musa and Samy Magdy, 'Air Strike Kills Dozens of Migrants in Tripoli Detention Centre', *Sydney Morning Herald* (3 July 2019) <https://www.smh.com.au/world/middle-east/air-strike-kills-dozens-of-migrants-in-tripoli-detention-centre-20190703-p523sa.html> accessed 10 December 2019.

[50] ICRC (n 45) 63. [51] It is based on GCIV (n 40) art 49.

The rule reflects customary IHL.[52] It is understood not as being limited to 'ordering' displacement (as the text literally indicates), but encompasses the implementation of such orders or other practices of displacement (by whomsoever, even absent orders), and threats thereof.[53]

However, it does not extend to displacement that is *incidentally* caused by military hostilities[54] unless the pattern of violence is deliberately aimed at constructive expulsion. This is a gap under IHL, which does not require the parties to protect civilians who flee from the hostilities (unlike, for instance, the law of occupation in IAC). It is assumed (optimistically) that States parties will take care of their populations, but no obligations to do so are imposed on either States or NSAGs.

Given the risk of abuse, as in IAC, the thresholds for justifying (lawful) displacement under APII are high: it must be *necessary* for the security of civilians or *imperative* for military reasons. The first ground contemplates the evacuation of civilians from areas of military operations or the vicinity of a military objective (as required by IHL).[55] The second covers, for example, moving civilians whose presence would impede military operations.[56] Political motives,[57] speculative military advantage, or demographic engineering are not acceptable reasons, and an unjustifiable evacuation would include moving civilians to deprive a NSAG of its support base, to enable closer control of the population, or to obstruct the adversary's movements with 'human shields'.

In addition, the 'soft law' Guiding Principles on Internal Displacement recommend that (1) all feasible alternatives to displacement should be first explored, and (2) where there are no alternatives, displacement and its adverse effects should be minimized.[58] These import human rights-based necessity and proportionality conditions into the IHL rule.[59]

Since displacement is only justified for as long as civilian security or military imperatives so demand, article 17(1) of APII implicitly entails a right of civilians to return to home after such reasons no longer exist (as does customary IHL).[60] By further implication, NSAGs must not obstruct returns and should, depending on capacity, facilitate them, including through measures such as 'mine clearance, provision of basic needs, agricultural

[52] See Henckaerts and Doswald-Beck (n 40) rule 129(B); APII (n 41) art 17(1).

[53] ICRC, 'Commentary of 1987 to Protocol Additional to the Geneva Convention of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, Article 17 Prohibition of Forced Movement of Civilians', para 4862. See also Melanie Jacques, *Armed Conflict and Displacement: The Protection of Refugees and Displaced Persons under International Humanitarian Law* (CUP 2012) 58–62; Sivakumaran (n 10) 283.

[54] See eg Sivakumaran (n 10) 286.

[55] Henckaerts and Doswald-Beck (n 40) rule 24; Jacques (n 53) 52.

[56] ICRC, 'Commentary of 1958 to Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, Article 49(2)' 280–1 (containing similar grounds to APII (n 41) art 17(1)).

[57] ICRC (n 53).

[58] Guiding Principles (n 21) principle 7(1).

[59] Sivakumaran (n 10) 285.

[60] Henckaerts and Doswald-Beck (n 40) rule 132.

equipment, rehabilitation of schools, [and] skills training'.[61] Separately, article 4(3)(b) of APII guarantees that 'all appropriate steps shall be taken to facilitate the reunion of families temporarily separated', whether from lawful, unlawful, or incidental displacement.

Article 17(1) of APII does not restrict the right of civilians to move freely within the State[62] (subject to permissible restrictions under IHRL, such as security). However, unlike IHRL, IHL does not explicitly guarantee internal freedom of movement, which is necessary to enable civilians to flee conflict.[63] For this reason, the co-application of IHRL in NIAC is vital—but also problematic if the traditional legal view is taken that NSAGs do not bear IHRL obligations.

ii. *Cross-border (External or Internal) Displacement*

In relation to *cross-border* displacement, article 17(2) of APII is stricter than IHL in IACs in that it *absolutely* prohibits transboundary displacement. The provision applies to two situations: displacement across an international border, and displacement across the 'border' of the (internal) territory of the State controlled respectively by the State and a NSAG.[64] The latter is an important guarantee against displacing civilians for persecutory reasons or because of perceived association with the adversary. Such persons could be doubly victimized if the party to which they were displaced itself targeted them for those reasons.

On the one hand, the prohibition on *international* displacement in NIACs may be seen as more protective than IHL in IACs, in that it ensures civilians retain the protection of their presumptive State of nationality or residence. They therefore cannot be compelled to move to another State where the IHL protections in NIACs may not apply (since the other State is unlikely to be a party to the NIAC in the first State), the other State may be hostile to their presence, and their legal status under the law of the other State may be highly precarious.

On the other hand, the restrictive approach in article 17(2) of APII may undermine the security of civilians if temporary transboundary movement (such as because of geographical proximity or safer conditions across a border, including the presence of humanitarian actors) could provide the most expeditious and effective means of protecting them. Where such movement occurs with the consent of the foreign State, the adverse impacts of such movements on civilians may be minimized.

A lacuna could remain, however, because the State and NSAG parties to the conflict are likely to have no legal or practical means of exercising effective protective jurisdiction on the territory of the foreign State, including in respect of its treatment of those displaced. On balance, the strict approach of article 17(2) is normally justified. The provision, in any event, does not restrict the IHRL right to voluntarily leave one's

[61] Ruaudel (n 12) 21.

[62] ICRC (n 53) para 4851.

[63] Ruaudel (n 12) 30.

[64] ICRC (n 53) para 4859. The phrase 'their own territory' is used instead of, for instance, 'national territory' or the 'State party's territory'. See also Jacques (n 53) 63–4.

State[65] (including to seek protection), although again, IHL does not explicitly guarantee such right in NIACs.

b. *Non-refoulement* in NIAC

The justifications for displacement under APII and customary IHL assume that displaced civilians will remain under the control and protection of the party responsible for their displacement, elsewhere in its territory. The rules authorizing displacement do not, however, permit the transfer of a person to the territory or custody of other actors. International law in general does not positively authorize NSAGs to transfer persons. In practice, however, transfers of both nationals and foreigners occur, whether informally and summarily, or pursuant to more formal non-State equivalents of (the State processes of) extradition or deportation.

The question then arises whether NSAGs are bound by the international law principle of *non-refoulement* (under both refugee and human rights law).[66] The principle of *non-refoulement* applies to State transfers into the custody of both State and non-State actors, as well as to cross-border and internal transfers (as where different authorities exist within the same territory).

Since neither refugee law nor IHRL expressly binds NSAGs, the conventional answer is that NSAGs do not bear *non-refoulement* obligations. Again, the more progressive view is that at least *de facto* authorities controlling territory are bound. In respect of NSAGs, IHL arguably provides the most secure basis for this argument.

Common article 3 of the Geneva Conventions and APII are silent on *non-refoulement* in NIAC, in contrast to express protections in IAC.[67] However, the ICRC correctly takes the view that because common article 3 protects fundamental rights, it 'should be understood as also prohibiting Parties to the conflict from transferring persons in their power to another authority when those persons would be in danger of suffering a violation of those fundamental rights upon transfer'.[68] It thus prohibits transfers 'to violence to life and person, such as murder or torture and other forms of ill-treatment', as well as manifestly unfair trials.[69] Otherwise a party could circumvent its IHL obligations through

[65] ICRC (n 53) para 4851.

[66] Refugee Convention art 33(1). See further Chapter 36 in this volume.

[67] GCIII (n 40) art 12; GCIV (n 40) art 45(3)–(4).

[68] ICRC, 'Commentary of 2016 to Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva 12 August 1949, Article 3: Conflicts not of an International Character' para 708. See also ICRC, 'Note on Migration and the Principle of Non-Refoulement' (2017) 99 International Review of the Red Cross 345; Helen Obregon Gieseken, 'The Protection of Migrants under International Humanitarian Law' (2017) 99 International Review of the Red Cross 121, 162, 145; Cordula Droege, 'Transfers of Detainees: Legal Framework, *Non-Refoulement* and Contemporary Challenges' (2008) 90 International Review of the Red Cross 675.

[69] ICRC 2016 (n 68) para 710.

such transfers.[70] Given the fundamental rights protected by common article 3, no exceptions to the principle of *non-refoulement* can exist, in contrast to refugee law.[71]

Implied *non-refoulement* obligations under IHL thus extend to both States and non-States parties to a NIAC who transfer control over a person, cover transfers to State and non-State actors, and encompass internal[72] and transboundary movements.[73] They likely also extend to 'chain *refoulement*' (where the receiving authority transfers the person to a real risk of harm).[74] Procedurally, the transferring party 'must assess carefully and in good faith whether there are substantial grounds for believing' that a person would be at risk, and refrain from making a transfer unless measures are taken to effectively remove the risk (such as effective post-transfer monitoring).[75]

In practice, there is evidence that NSAGs have violated the principle of *non-refoulement*. In 2019, rebel Syrian Democratic Forces (SDF) transferred 300 ISIS detainees from Syria to the Iraqi authorities, despite known risks of torture of terrorism suspects,[76] the death penalty for terrorism offences,[77] and manifestly unfair trials.[78] Separately, the SDF transferred over 300 ISIS detainees to tribal justice in Syria,[79] raising risks of persecution, ill-treatment, irregular trials, and harsh penalties such as banishment or collective punishment of families.

6. Internally Displaced Persons

While there is no binding universal instrument on IDPs, the non-binding Guiding Principles on Internal Displacement particularize the application of relevant standards (particularly IHL and IHRL) to IDPs. They cover protection from displacement, assistance during it, and return, resettlement, and reintegration, and stipulate that the full

[70] ibid.

[71] Refugee Convention arts 1F, 32, and 33(2). Complementary protection regimes sometimes contain similar exceptions, but their purpose is to restrict legal status in the country of asylum; they do not permit *refoulement*: Jane McAdam, *Complementary Protection in International Refugee Law* (OUP 2007) 85.

[72] cf Ruaudel (n 12) 22. [73] ICRC 2016 (n 68) paras 713–14. [74] ICRC 2017 (n 68) 349.

[75] ICRC 2016 (n 68) para 715.

[76] 'Transfer of ISIS Suspects to Iraq Raises Torture Concerns: HRW', *Kurdistan 24* (5 March 2019) <https://www.kurdistan24.net/en/news/1b49cd0c-f6e1-4538-8a9b-e043f6c4ee3f> accessed 10 December 2019.

[77] Sangar Ali, 'Iraqi Court Sentences Four SDF-Delivered ISIS Fighters to Death', *Kurdistan 24* (21 April 2019) <https://www.kurdistan24.net/en/news/23197bc3-09ba-497f-82e3-183a64333bd4> accessed 10 December 2019.

[78] Human Rights Watch, 'US: Detainees Transferred from Syria to Iraq' (31 October 2018) <https://www.hrw.org/news/2018/10/31/us-detainees-transferred-syria-iraq> accessed 10 December 2019; UNAMI and OHCHR, 'Report on the Death Penalty in Iraq' (October 2014) 2, 13 <https://www.ohchr.org/Documents/Countries/IQ/UNAMI_HRO_DP_1Oct2014.pdf> accessed 10 December 2019; Human Rights Watch, *Flawed Justice: Accountability for ISIS Crimes in Iraq* (December 2017) 25, 31, 41–2 <https://www.hrw.org/report/2017/12/05/flawed-justice/accountability-isis-crimes-iraq> accessed 10 December 2019.

[79] Fight for Humanity and Geneva Academy of International Humanitarian Law and Human Rights, 'ISIS Members Detained in North East Syria: Legal and Security Challenges and Recommendations for their Judgment under International and National Law' (Expert Meeting Report, Geneva, 23 May 2019) 2.

spectrum of human rights applies to those displaced. Key principles include the prohibition on arbitrary displacement[80] (with displacement in conflict governed by the IHL standard);[81] the prohibition of all forms of violence against IDPs;[82] and the requirement to facilitate humanitarian relief.[83]

The Guiding Principles are addressed to 'all authorities, groups and persons irrespective of their legal status',[84] which includes NSAGs. Some NSAGs have been influenced by, or supportive of, the Guiding Principles, including the Sudan People's Liberation Movement and Army and the LTTE in Sri Lanka,[85] and the *de facto* authority in Abkhazia.[86] Some have also committed to facilitating voluntary returns, as in Sri Lanka, the Democratic Republic of Congo, and the former Yugoslavia.[87]

More broadly, NSAGs have sometimes assumed responsibility for IDPs. Geneva Call has identified 44 normative commitments made by NSAGs that address displacement.[88] Many refer to different phases of displacement, although few explicitly prohibit it or refer to the rights of the displaced or to norms, and most commitments deal with post-conflict return/reintegration. In practice, NSAGs have also sustained IDP populations. For example, the rebel SDF, which controlled over 30 per cent of Syria's territory by mid-2019,[89] housed (in closed camps) 80,000 persons who were displaced during or after ISIS's loss of its territory in Syria in 2019. The SDF administers the camps, assisted by humanitarian actors, although conditions (of safety and basic needs) do not meet international standards.[90]

Whereas it may not be onerous for NSAGs to refrain from causing displacement or interfering in IDP rights, it is far more difficult for them to fulfil positive obligations such as providing health care and education.[91] They therefore have a duty to accept international assistance where they are unable to meet humanitarian/protection needs.

7. Accountability

a. 'Group' Responsibility

Even though NSAGs bear obligations as groups under common article 3 of the Geneva Conventions, APII, and customary IHL, the mechanisms for holding NSAGs account-

80 Guiding Principles (n 21) principle 6(2).
81 ibid principle 6(2)(b). 82 ibid principle 10. 83 ibid principle 24–7.
84 ibid principle 2.
85 Roberta Cohen, 'The Guiding Principles on Internal Displacement: An Innovation in International Standard Setting' (2004) 10 Global Governance 459, 471.
86 Sivakumaran (n 10) 287. 87 ibid. 88 Ruaudel (n 12) 24–5.
89 Fight for Humanity and Geneva Academy of International Humanitarian Law and Human Rights (n 79) 2.
90 Human Rights Watch, 'Syria: Dire Conditions for ISIS Suspects' Families' (23 July 2019) <https://www.hrw.org/news/2019/07/23/syria-dire-conditions-isis-suspects-families> accessed 10 December 2019.
91 The Kampala Convention prohibits NSAGs from doing certain acts but does not impose positive obligations: Ruaudel (n 12) 23, referring to African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (adopted 23 October 2009, entered into force 6 December 2012) 49 ILM 86 (Kampala Convention).

able for violations concerning displacement are far less developed than for States. First, there is no general notion of 'group responsibility' akin to the responsibility of States or international organizations[92] (along with the associated rules for attributing conduct, invoking responsibility, and reparation). Whereas States have a duty under IHL to pay compensation for violations,[93] NSAGs do not.[94]

Secondly, NSAGs are not subject to the numerous permanent, institutionalized treaty-based reporting, monitoring, fact-finding, or verification mechanisms applicable to States.[95] Nor can legal claims be brought against NSAGs in the International Court of Justice, regional human rights courts, or the UN human rights treaty bodies.

Certainly some NSAGs (such as ISIS) have been investigated by *ad hoc* mechanisms, such as UN Human Rights Council commissions of inquiry[96] or investigative mechanisms of the General Assembly or Security Council.[97] Some NSAGs have also been subject to Security Council sanctions,[98] including to curb abuses of IHL, ICL, or IHRL, or even referrals by the Council to the International Criminal Court (as in the case of Darfur, Sudan, involving extensive displacement).[99]

However, while these processes often identify violations, they do not normally call for reparation by NSAGs, and only a few UN resolutions or inquiries have encouraged NSAGs provide it so.[100] Other obstacles to accountability include that NSAGs may lack the resources to make reparation; they may lack domestic legal personality; they may

[92] See Liesbeth Zegveld, *The Accountability of Armed Opposition Groups in International Law* (CUP 2002) ch 4.

[93] API (n 42) art 91; Henckaerts and Doswald-Beck (n 40) rule 150.

[94] Paloma Blázquez Rodríguez, 'Does an Armed Group Have an Obligation to Provide Reparations to Its Victims? Construing an Obligation to Provide Reparations for Violations of International Humanitarian Law' in James Summers and Alex Gough (eds), *Non-State Actors and International Obligations* (Brill 2018) 416.

[95] Pascal Bongard and Jonathan Somer, 'Monitoring Armed Non-State Actor Compliance with Humanitarian Norms: A Look at International Mechanisms and the Geneva Call Deed of Commitment' (2011) 93 International Review of the Red Cross 673, 676; Marco Sassoli, 'Engaging Non-State Actors: The New Frontier for International Humanitarian Law' in Geneva Call, 'Exploring Criteria and Conditions for Engaging Armed Non-State Actors to Respect Humanitarian Law and Human Rights Law' (Conference Report, Geneva 4–5 June 2007) 8, 15–16 <https://genevacall.org/wp-content/uploads/dlm_uploads/2013/11/20070605_criteria_conditions_engaging_ansa_to_hl.pdf> accessed 10 December 2019.

[96] Independent International Commission of Inquiry on the Syrian Arab Republic, established by UN Human Rights Council, 'Situation of Human Rights in the Syrian Arab Republic', UN doc A/HRC/RES/S-17/2 (22 August 2011).

[97] International, Impartial, and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011 (IIIM), established by UNGA res 71/248 (21 December 2016); UN Investigative Team to Promote Accountability for Crimes Committed by Da'esh/ISIL (UNITAD), established by UNSC Resolution 2379 (21 September 2017).

[98] See Francesco Guimelli, 'Understanding United Nations Targeted Sanctions: An Empirical Analysis' (2015) 91 International Affairs 1351, 1359 (25 per cent of UNSC sanctions between 1991–2013 targeted armed groups).

[99] UNSC Resolution 1593 (31 March 2005).

[100] Henckaerts and Doswald-Beck (n 40) Commentary to Rule 150 (Liberia and Afghanistan); Blázquez Rodríguez (n 94) 418 (Sudan and Sri Lanka).

dissolve after a conflict; and identifying perpetrators or superior responsibility may be difficult.[101]

In practice, the provision by NSAGs of compensation or reparation to victims is rare,[102] and has variously taken the form of commitments to provide it (as in the Philippines),[103] *ex gratia* payments, or post-conflict peace or transitional justice arrangements (as in Uganda and Colombia).[104] In the 2006 Darfur peace agreement in Sudan, restitution of, or compensation for, property was guaranteed to displaced persons.[105] After the 2016 peace agreement in Colombia, FARC surrendered US$330 million in assets to fund victim compensation, including for displacement,[106] in a conflict that displaced 7.5 million people. A few NSAGs have created mechanisms to allow civilians to complain of abuses by fighters, including the National Transitional Council of Libya,[107] the Taliban,[108] and ISIS.[109]

b. International Criminal Law

ICL imposes liability for international crimes directly on individual members of NSAGs, but it does not hold NSAGs criminally responsible *as groups*[110] (just as there is no notion of State criminality). The principle of command/superior responsibility, and the extended modes of criminal liability (such as ordering/soliciting/inducing, complicity, and conspiracy), may, however, capture many forms of criminal participation in terrorist organizations. It is a war crime to order the displacement of a civilian population for reasons related to an IAC (but not a NIAC) unless the security of civilians or imperative military reasons demand it.[111] However, it is a crime against humanity (by a State or

[101] Blázquez Rodríguez (n 94) 415.

[102] See Ron Dudai, 'Closing the Gap: Symbolic Reparations and Armed Groups' (2011) 93 International Review of the Red Cross 783.

[103] Henckaerts and Doswald-Beck (n 40) Commentary to Rule 150.

[104] See eg Blázquez Rodríguez (n 94) 420–2; Ezequiel Heffes and Brian Frenkel, 'The International Responsibility of Non-State Armed Groups: In Search of the Applicable Rules' (2017) 8 Göttingen Journal of International Law 39, 68.

[105] Heffes and Frenkel (n 104) citing the Darfur Peace Agreement (between the Government of Sudan, the Sudan Liberation Movement, and the Justice and Equality Movement, 2006) art 194 <https://peacemaker.un.org/sites/peacemaker.un.org/files/SD_050505_DarfurPeaceAgreement.pdf> accessed 11 December 2019.

[106] 'Colombia's FARC Rebels Say Assets Worth $324 Million', *Reuters* (26 August 2017) <https://www.reuters.com/article/us-colombia-peace-idUSKCN1B522G> accessed 10 December 2019.

[107] Sivakumaran (n 10) 108.

[108] Thomas Johnson and Matthew DuPee, 'Analysing the New Taliban Code of Conduct (*Layeha*): An Assessment of Changing Perspectives and Strategies of the Afghan Taliban' (2012) 31 Central Asian Survey 77, 78.

[109] Andrew March and Mara Revkin, 'Caliphate of Law: ISIS' Ground Rules', *Foreign Affairs* (15 April 2015) <https://www.foreignaffairs.com/articles/syria/2015-04-15/caliphate-law> accessed 10 December 2019.

[110] Sassoli (n 95) 18–19.

[111] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (Rome Statute), art 8(2)(a)(vii), 8(2)(b)(viii).

non-State actor, including in a NIAC) to deport or forcibly transfer a population (in peace or conflict), when committed as part of a widespread or systematic attack directed against a civilian population.[112]

A number of more specialized crimes may also be relevant to suppressing unlawful displacement by NSAGs. The crime of genocide includes, *inter alia*, forcibly transferring children of one group to another group, or deliberately inflicting on the group conditions of life calculated to physically destroy it[113] (which could include via displacement). Slavery, servitude, and forced labour are international crimes[114] (including war crimes in IAC and NIAC[115] and crimes against humanity[116]) and may cause displacement or target the displaced. For instance, the Security Council has condemned sexual slavery by Boko Haram in Nigeria[117] and by ISIS in Iraq and Syria,[118] and slavery practices by the Taliban, Nepalese Maoists, PKK, LTTE, and Al Shabaab.[119] Refugees and IDPs may also be vulnerable to the treaty-based offence of human trafficking.[120]

8. Conclusion: Developing Norms and Enhancing Compliance

As this chapter has discussed, NSAGs are not parties to treaties (and have played a negligible role in making international treaty or customary law),[121] and they may not be for-

[112] ibid art 7(1)(d).

[113] Convention for the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277, art II(e), (c).

[114] Convention to Suppress the Slave Trade and Slavery (adopted 25 September 1926, entered into force 7 March 1927) 60 LNTS 253, art 6; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (adopted 7 September 1956, entered into force 30 April 1957) 266 UNTS 4, arts 3, 5, 6.

[115] Including deportation to slave labour (Henckaerts and Doswald-Beck (n 40) rule 95), sexual slavery and enforced prostitution (Rome Statute (n 111) arts 8(2)(b)(xxii) (IAC), 8(2)(e)(iv) (NIAC)), and compelling a civilian, or a prisoner of war, to serve in the enemy's forces (GCIV (n 40) art 147 and GCIII (n 40) art 130).

[116] Including enslavement, and sexual slavery and enforced prostitution: Rome Statute (n 111) art 7(1)(c)), 7(1)(g). Note also ICCPR, art 8.

[117] UNSC, 'Presidential Statement', UN doc S/PRST/2015/4 (19 January 2015).

[118] UNSC Resolution 2388 (21 November 2017) paras 1 and 10.

[119] UNSC, 'Presidential Statement', UN doc S/PRST/2015/25 (16 December 2015).

[120] See eg Human Rights Council, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic', UN doc A/HRC/30/48 (13 August 2015) para 87. Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (adopted 15 November 2000, entered into force 25 December 2003) 2237 UNTS 319. On trafficking, see further Chapter 30 in this volume.

[121] See Sophie Rondeau, 'Participation of Armed Groups in the Development of the Law Applicable to Armed Conflicts' (2011) 93 International Review of the Red Cross 649; Anthea Roberts and Sandesh Sivakumaran, 'Hybrid Sources of Law: Armed Groups and the Creation of International Humanitarian Law' (2011) 37 Yale Journal of International Law 108.

mally bound by IHRL or refugee law (by contrast to IHL or ICL). Even where a State is formally responsible for NSAG conduct, reparation may be unenforceable in practice against the State, and the NSAG itself will not separately bear the primary international obligations.

However, while the applicable norms are limited, they are not insignificant. NSAGs must not: (1) displace civilians, except for the security of such civilians or imperative military reasons, and then only under satisfactory conditions; (2) compel civilians to leave their own territory; (3) violate the principle of *non-refoulement* in any internal or cross-border transfers; and (4) impede impartial humanitarian relief to displaced persons.

From a protection standpoint, however, there remains room for normative improvement, even if it is politically unlikely. First, the more extensive IHL norms on displacement in IAC could guide the evolution of norms in NIAC (even if wholesale convergence may not necessarily be desirable), particularly as regards the more explicit protection of refugees and norms on displacement, cross-border evacuations for protection reasons, and voluntary internal or international movements. Secondly, some tailored norms from international refugee law and IHRL should be recognized as formally applicable to suitable NSAGs. Thirdly, there needs to be greater recognition of—and lessons learned from—any existing good protection practices by NSAGs.

Whatever the applicable norms, securing NSAGs' compliance with them will always be challenging, given the conflict-fuelled pressures that induce violations and the limited existing mechanisms for externally influencing NSAG behaviour. There is clearly scope for expanding international procedures for monitoring NSAG compliance and engaging NSAGs directly, particularly if, as suggested above, aspects of refugee law and IHRL are recognized as binding on certain NSAGs. State sovereignty objections must give way to enhancing protection against, during, and after displacement. Recognizing the applicability of the primary rules of IHRL and refugee law to NSAGs also opens up the foundations and possible modalities of 'group responsibility' and associated prospects for seeking reparation.

CHAPTER 64

THE ACCOUNTABILITY OF INTERNATIONAL ORGANIZATIONS IN REFUGEE AND MIGRATION LAW

JAN KLABBERS

1. Introduction

The accountability of international organizations is a topic of bewildering complexity, legally, morally, and politically. Scandals and incidents associated with international organizations abound, ranging from the UN's inaction in the face of the Rwandan genocide to the World Bank's projects leading to mass displacements; from the UN's role in bringing cholera to Haiti to the possibly premature promulgation of health pandemics by the World Health Organization (WHO). Faced with these scenarios, things seem rather obvious: of course the UN should be held responsible if its agents act in ways that are clearly harmful. However, cracks quickly emerge in the moral certitude. While there is no excuse for some forms of wrongdoing, such as peacekeepers sexually abusing minors, other issues are more morally ambiguous. The WHO's decision-makers may have sincerely thought that a pandemic had broken out, based on analysing all the relevant information available at the time.[1] And what if the World Bank's project is intended to improve the fate of the entire nation, and may even actually do so, albeit at the expense of the displaced individuals? In such a scenario, a cost–benefit analysis might even support the World Bank's position.

[1] Much decision-making takes place in difficult circumstances, including time-pressure and incomplete information. See eg Friedrich Kratochwil, *Praxis: On Acting and Knowing* (CUP 2018).

Further moral ambiguities emerge when we consider that bad acts may be the result of good intentions; bad acts may be the result of sincere and rigorous, if thoughtless, rule-following.[2] Or such acts may be part of a larger context, knowledge of which helps to put things in perspective. For example, on its face, NATO dropping bombs on Belgrade in 1999 was an act of aggression. Nonetheless, many thought it was undertaken for lofty reasons, namely to help stop the ethnic cleansing going on in Kosovo.[3] For better or worse, international law—and international lawyers—are markedly ambivalent when it comes to holding international organizations responsible. Obviously, bad behaviour ought not to be tolerated, but equally obviously, international organizations are generally seen as forces for good, whose existence and activities ought to be facilitated. Unlike States (which are highly unlikely to become insolvent), international organizations have no steady source of income and are often pressured by their Member States to work on the cheap, sometimes leading to sub-quality performances or even to the sort of incident that provokes outcries concerning responsibility. It is possible, for example, to connect the UN's procurement of the services of a cheap local waste management company in Haiti, to the subsequent outbreak of cholera.[4] Morally speaking, too, things are not always self-evident: the ethical appraisal of an international organization's acts or omissions strongly depends on one's general ethical outlook. This helps explain why the lawyers in the World Bank struggle to convince the economists to take human rights into account: human rights are hard to fit into any cost–benefit calculation.[5]

This chapter sets out the general responsibility regime as it applies to international organizations with special reference to refugee protection. Several international organizations are pertinent: most prominently UNHCR and the International Organization for Migration (IOM), but also the EU through its European Agency for the Management of Operational Cooperation at the External Borders (Frontex), and the UN Office of the High Commissioner for Human Rights (OHCHR). Refugee protection also involves several different settings, from the running of refugee camps and the guarding of borders to the handling of individual asylum applications. In general, this chapter demonstrates that responsibility is highly elusive.

In addition to responsibility itself being complicated, the surrounding regime does not help much. The attribution problem has ontological origins: it is never quite clear where the Member States end and the international organization begins, or *vice versa*—it is not even clear which is the correct way of putting it.[6] Organizations generally enjoy a wide scope of privileges and immunities, including immunity from legal proceedings,[7]

[2] Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Penguin 1963).

[3] See eg Bruno Simma, 'NATO, the UN, and the Use of Force: Legal Aspects' (1999) 10 European Journal of International Law 1.

[4] Brian Concannon and Beatrice Lindstrom, 'Cheaper, Better, Longer-Lasting: A Rights-Based Approach to Disaster Response in Haiti' (2011) 25 Emory International Law Review 1145, 1170.

[5] Galit A Sarfaty, *Values in Translation: Human Rights and the Culture of the World Bank* (Stanford University Press 2012).

[6] Seminal is Catherine M Brölmann, *The Institutional Veil in Public International Law* (Hart 2007).

[7] Officials of international organizations may not always be able to claim that immunity also covers their private acts. See already *Essayan v Jouve*, Tribunal de Grande Instance de la Seine [1962] UNJY 290 (France) (concerning the private residence of UNHCR's delegate in France).

which means that domestic courts have lacked opportunities to clarify or develop the law on the responsibility of international organizations. And international tribunals, including the International Court of Justice (ICJ), do not provide international organizations with *locus standi*, likewise resulting in a dearth of authoritative legal opinion on responsibility.[8] It is hardly a coincidence that the first lengthy studies on the responsibility of international organizations quickly turned to Member State responsibility: normatively, the idea that organizations could do wrong was anathema, and practically, no materials were available which said otherwise.[9]

2. Responsibility and International Organizations: The Bird's-Eye View

When first created in the latter half of the nineteenth century, international organizations were envisaged as merely doing things for, on behalf of, and limited to, their Member States.[10] Even if quite a few organizations owed their existence in part to private initiatives (think of novelist Victor Hugo campaigning for an International Copyright Union), they were formally set up by States, and supposed only to affect those States. This was always a chimera: who else was to benefit from the International Copyright Union but the individual novelist or poet? Even so, it was an influential chimera, helping to frame the way we look at international organizations and strongly influencing our legal perceptions and ideas. This particular way of framing organizations developed into a theoretical approach, already authoritatively formulated more than a century ago, according to which international organizations exercise delegated powers in the pursuit of a particular function. They do so on behalf of their Member States and eventually this will benefit humanity at large. Thus, the theory of functionalism was born but, for all its merits, it came with an important limitation: it applied only, and could apply only, to relations between the organization and its Member States. There was no external world envisaged, neither in terms of the nationals of those Member States (the individual novelists or poets), nor in terms of States other than those Member States. An important corollary was that issues of responsibility could hardly arise: if the organization were to do something to displease one of its Member States, the Member States could hold it to account. But if it did something to affect another State, a company somewhere, or an individual somewhere, the law had no resources. And it had no resources because the underlying theory could not even

[8] There have been several arbitral awards involving complaints against the EU, but these are not public.

[9] Clyde Eagleton, 'International Organizations and the Law of Responsibility' (1950) 76 Recueil des Cours 319; Konrad Ginther, *Die völkerrechtliche Verantwortlichkeit internationaler Organisationen gegenüber Drittstaaten* (Springer 1969).

[10] Jan Klabbers, 'The European Union in the Law of International Organizations: Misfit or Model?' in Ramses Wessel and Jed Odermatt (eds), *Research Handbook on the European Union and International Organizations* (Edward Elgar 2019).

begin to envisage the legal relationship involving the organization and third parties: the 'operating system' of international organizations law could not handle the unfamiliar 'software'.

This became painfully clear in the 1980s. First, in 1980, the ICJ found it impossible for the WHO unilaterally to terminate its headquarters agreement with Egypt, *nota bene* a Member State.[11] Secondly, several years later the International Tin Council (ITC) became insolvent, leaving several of its creditors empty-handed.[12] It turned out that organizations could affect third parties, and it turned out that the law, always revolving around the relationship between the organization and its members, excluding the external world, lacked the resources to do something about it.

Consequently, since the 1980s the responsibility of international organizations came to be problematized. In the literature, the idea of holding international organizations responsible in their own right and for their own conduct was still considered difficult: the first studies that appeared following the collapse of the ITC were premised on the assumption that organizations were controlled by Member States, and thus the position of the Member States was worth focusing on. Findings typically suggested either that Member States cannot be responsible for the acts of their organizations, or that such responsibility can only arise indirectly or secondarily.[13]

Doing so, however, largely missed the point, and around the turn of the century attention shifted to the responsibility of the organization in its own right. This required a shared set of assumptions. Holding organizations responsible assumes, first, that they can act independently from their Member States, and while that was long accepted as a sociological matter, giving it a legal formulation proved difficult. In the end, most observers agree that international organizations can only meaningfully be held responsible if they have international legal personality. This makes eminent sense in the abstract, but many classic organizations have never been explicitly endowed with such personality—including the UN and the EU.[14] The upshot then is that international legal personality either does not attach to many international organizations (which seems an untenable proposition), or is so common as to be almost meaningless. Moreover, much cooperation between States takes place in informal entities, either self-proclaimed extra-legal, such as the Organization for Security and Co-operation in Europe (OSCE), or more or less explicitly given a loose institutional structure, such as the Conferences (or Meetings, or Assemblies) of the Parties

[11] See *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (Advisory Opinion) [1980] ICJ Re 73; for discussion see Jan Klabbers, 'The EJIL Foreword: The Transformation of International Organizations Law' (2015) 26 European Journal of International Law 9.

[12] Seminal is Romana Sadurska and Christine Chinkin, 'The Collapse of the International Tin Council: A Case of State Responsibility?' (1990) 30 Virginia Journal of International Law 845.

[13] Matthias Hartwig, *Die Haftung der Mitgliedstaaten für International Organisationen* (Springer 1993); Moshe Hirsch, *The Responsibility of International Organizations toward Third Parties: Some Basic Principles* (Martinus Nijhoff 1995).

[14] In both cases, courts had to decide the issue, and did so without much by way of compelling argument. See for the UN, *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174; for the EU, see Case 22/70, *Commission v Council (ERTA)* [1971] ECR 263.

set up under environmental agreements but also informing the Framework Convention on Tobacco Control or the International Criminal Court. Functionally it makes sense to think of these as having international legal personality, but their Member States might object, in particular if they either erroneously or tendentiously equated the grant of legal personality as synonymous with a loss of sovereignty. As it is, under the authoritative International Law Commission (ILC) Articles on the Responsibility of International Organizations (ARIO), only those entities that possess international legal personality can even engage in internationally wrongful acts to begin with.[15] As a result, the acts of 'coalitions of the willing' may well be excluded, as may acts of Meetings of Parties, or Assemblies of States Parties or such 'soft organizations' as may exist.[16]

Secondly, it is assumed that international organizations are actually bound to respect international law. Obvious as this sounds, it is actually unclear how far this obligation extends. The ICJ, in the aforementioned WHO/Egypt opinion, opined that organizations are bound by the treaties to which they are parties, by their internal rules,[17] and by the 'general rules of international law'. Furthermore, the mandate of the organization can itself also generate tangible obligations.[18] If the references to treaties and internal rules are relatively clear, the reference to 'general rules of international law' is not. It is often taken as a reference to the corpus of customary international law, but doing so begs various questions. If the ICJ wanted to refer to customary international law, it could have done so explicitly. And can customary international law become binding on organizations without them having had a chance to influence their contents or engage in any relevant practice? Do the practices of organizations themselves qualify as 'practice' for purposes of the formation of customary international law? The more modest view suggests that organizations are bound by what Hart referred to as the secondary rules of international law, that is, those relating to how the system works, more so than to the primary rules operating within the system.[19] Thus, organizations cannot single-handedly modify or ignore

[15] International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' (2001) II(2) ILC Yearbook 26.

[16] Jan Klabbers, 'Institutional Ambivalence by Design: Soft Organizations in International Law' (2001) 70 Nordic Journal of International Law 403. The OSCE may have changed its mind: see Mateja Steinbrück Platise, Carolyn Moser, and Anne Peters (eds), *The Legal Framework of the OSCE* (CUP 2019).

[17] The 'internal rules' at the very least comprise constitutional instruments, but may also cover all sorts of internal guidelines, instructions, regulations, codes of conduct, and the like, as well as 'external provisions' taken over or incorporated by the organizations concerned. The ICJ never clarified its position on this issue. For a fine discussion of some of the underlying theoretical problems, see Lorenzo Gasbarri, 'The Dual Legality of the Rules of International Organizations' (2017) 14 International Organizations Law Review 87.

[18] Jan Klabbers, 'Reflections on Role Responsibility: The Responsibility of International Organizations for Failing to Act' (2017) 28 European Journal of International Law 1133.

[19] Jan Klabbers, 'The Sources of International Organizations' Law: Reflections on Accountability' in Samantha Besson and Jean d'Aspremont (eds), *The Oxford Handbook of the Sources of International Law* (OUP 2017). The reference is to HLA Hart, *The Concept of Law* (Clarendon 1961).

the law of treaties or, indeed, basic principles of responsibility, but if the above is plausible then it follows that organizations cannot, without some further intellectual activity, be considered bound by customary rules on, say, innocent passage, or even, it seems, basic human rights.[20]

There might be one exception, and that is the category of *jus cogens* norms. Their binding force on international organizations stems from the concept of *jus cogens* itself. By its nature, *jus cogens* is binding on each and every one of us, 'even without any conventional obligation'.[21] If international organizations violate *jus cogens* norms, such as the prohibitions of torture or *refoulement*, [22] that would trigger the responsibility of the organization concerned. Even if international organizations do not directly torture or *refoule*, there is general agreement that *jus cogens* prohibitions also encompass closely related acts. To illustrate, handing over an individual in the near-certainty that this person will be tortured may not constitute torture in and of itself, but does form part of a constellation of surrounding acts that should trigger responsibility.[23] Whether this will have significant practical implications remains to be seen. However, the ICJ has held that States may claim immunities from jurisdiction even with respect to *jus cogens* violations, and there is little reason to expect a different treatment of international organizations on this point.[24]

The ILC and its Special Rapporteur, Professor (now Judge) Giorgio Gaja, openly acknowledged struggling with these fundamental jurisprudential questions. While the ILC was drafting its ARIO, others also presented models of coming to terms with misbehaviour by international organizations. The International Law Association adopted in 2004 a set of recommended rules and practices, which intentionally circumvented the question of whether and why international law would bind international organizations. Utilizing the broader concept of accountability, its work posited the existence of rules and practices, and expressed the hope that organizations might abide by them.[25] Likewise, scholars unified under the heading of 'global administrative law' posited a number of sensible, largely Western, administrative law principles as relevant to the activities of international organizations, but again did so by ignoring the

[20] This is subject to considerable controversy, with many holding that organizations are at a minimum under an international legal obligation to respect human rights. A thoughtful contribution is Kristina Daugirdas, 'How and Why International Law Binds International Organizations' (2016) 57 Harvard International Law Journal 325.

[21] In the early conceptualization of the ICJ in *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep 15, 23.

[22] See Cathryn Costello and Michelle Foster, '*Non-refoulement* as Custom and *Jus Cogens*? Putting the Prohibition to the Test' (2015) 46 Netherlands Yearbook of International Law 273.

[23] For discussion of torture constituting a collective practice, see Rebecca Gordon, *Mainstreaming Torture: Ethical Approaches in the Post-9/11 United States* (OUP 2014).

[24] *Jurisdictional Immunities of the State (Germany v Italy, Greece intervening)* [2012] ICJ Rep 99. The ICJ held that *jus cogens* refers to substantive norms which may continue to apply and remain unaffected even if they cannot be enforced in a concrete case due to procedural devices, such as (*dixit* the ICJ) the rules on immunities.

[25] For text and discussion, see International Law Association, *Report of the Seventy-First Conference: Berlin 2004* (ILA 2004) 164–241.

question of legal obligation, and provoking debate on the representativeness of such notions.[26] A different research project carried out at the Heidelberg Max Planck Institute went a step further and proposed a novel legal nomenclature to address the exercise of public authority by international organizations.[27]

It is this latter aspect relating to the exercise of public authority that is absent from the ARIO. The ARIO have been criticized for a variety of reasons,[28] in particular that they are limited by their two threshold conditions: only organizations with international legal personality can commit an internationally wrongful act for purposes of the ARIO (and thus eventually be held responsible), and such an act must comprise a violation of an international legal obligation incumbent on the organization in question. A further significant, yet less widely recognized, problem relates to invocability. The invocability problem is that for all practical purposes, the ARIO can only be invoked by States or by other international organizations.[29] In everyday language: should the IOM violate a treaty commitment towards Norway, then Norway can invoke the ARIO in order to hold the IOM to account. Should however the IOM violate the same commitment vis-à-vis someone who just happens to be in Norway, then that individual has little opportunity to hold the IOM to account. Under the ARIO, she is not entitled to do so herself. This need not be a huge practical problem if she is a Norwegian national: she might be able to ask Norway to exercise diplomatic protection on her behalf. But if she is an Australian academic or a Syrian refugee temporarily residing in Norway, the ARIO offer little solace. Neither Australia nor Syria would, in such a scenario, have much of a right to invoke IOM's responsibility unless it concerns an *erga omnes* obligation,[30] let alone whether they would have much of an incentive.

Admittedly, the ARIO itself provides an escape, or a safety valve, when claiming that it is without prejudice to any other basis an individual or other entity may have to invoke the responsibility of the organization concerned.[31] But those instances are few and far between, with the obvious and unpleasant conclusion being that precisely when most needed (ie when organizations exercise public power over individuals), it becomes extremely difficult to hold them to account.

[26] See eg BS Chimni, 'Co-optation and Resistance: Two Faces of Global Administrative Law' (2005) 37 New York University Journal of International Law and Politics 799.

[27] Armin von Bogdandy, Rüdiger Wolfrum, Jochen Bernstorff, Philipp Dann, and Matthias Goldmann (eds), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Springer 2010); Matthias Goldmann, *Internationale öffentliche Gewalt* (Springer 2015).

[28] See eg Maurizio Ragazzi (ed), *Responsibility of International Organizations* (Martinus Nijhoff 2013).

[29] See also Armin von Bogdandy and Mateja Steinbrück Platise, 'ARIO and Human Rights: Leaving the Individual in the Cold' (2012) 9 International Organizations Law Review 67.

[30] See ARIO, art 49. *Erga omnes* obligations are usually cast as the procedural complements to *jus cogens* norms, the idea being that everyone has a legal interest in seeing such a norm enforced. The concept was launched by the ICJ in *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* [1970] ICJ Rep 3 and is to some extent, and in varying forms, recognized in positive law. For instance, while the term is absent, art 48 of the ILC's Articles on State Responsibility and art 49 of the ARIO can be read this way.

[31] ARIO, art 50. See also art 57 on countermeasures.

3. An Overview of the ARIO

Notwithstanding the above, the most authoritative international legal provisions are precisely those contained in the ARIO. The regime as a whole is thus well worth having a closer look at, on the understanding that invocation by victimized individuals, including refugees and migrants, is not encouraged. At the core of the ARIO is a deceptively simple proposition: international organizations having international legal personality can be held responsible for their internationally wrongful acts, and those acts must meet with two requirements: they must be attributable to the organization concerned, and must entail a violation of an international legal obligation incumbent on that organization.[32] This clarifies two things. First, international organizations are not responsible for behaviour that is not theirs, in particular that of their Member States. Secondly, as with State responsibility, international organizations cannot be held legally responsible for doing morally wrong (without also violating a legal obligation); they cannot be held responsible for violating obligations resting upon their Member States but not on them.[33] And their responsibility is 'objective': neither *culpa* nor damage is required.

The above presupposes a degree of analytical precision rarely met in the messy circumstances of international governance, so it is no surprise that the ARIO address situations where international organizations act through others, or may have collaborated with others.[34] Organizations are generally responsible for behaviour of their officials and organs,[35] and even that of their Member States when these implement an organizational directive.[36] Responsibility can be shared, as accepted, for example, by the Dutch Supreme Court;[37] the more limited view that responsibility exclusively rests upon either an organization or its Member States, endorsed by the European Court of Human Rights (ECtHR) in 2007, is often seen as mistaken.[38] Organizations are free to decide on issues of responsibility or liability in advance.[39] This applies, for example, to accidents taking place during NATO training exercises: it is agreed that liability rests with the State of nationality of the 'culprit'.[40] The bottom line can be summarized as follows: international organizations may, under the ARIO, incur responsibility for their own acts and omissions, including those of their organs and officials, as well as those of their Member States when these act in implementation of an organiza-

[32] ARIO, art 4. The personality requirement derives from art 2.

[33] Member States may remain responsible for their voting within organizations: Ana Sofia Barros, *Governance as Responsibility: Member States as Human Rights Protectors in International Financial Institutions* (CUP 2019).

[34] See in particular ARIO, arts 14–16. [35] ibid art 6. [36] ibid art 17.

[37] *The Netherlands v Mothers of Srebrenica and others*, Judgment of 19 July 2019, ECLI:NL:HR:2019:1284 (Supreme Court of the Netherlands).

[38] See *Behrami v France* and *Saramati v France, Germany and Norway* (2007) 45 EHRR SE10. See eg Guglielmo Verdirame, *The UN and Human Rights: Who Guards the Guardians?* (CUP 2011) 112.

[39] Article 64 ARIO allows for *lex specialis* regimes.

[40] See generally Kirsten Schmalenbach, *Die Haftung internationaler Organisationen* (Peter Lang 2004).

tional decision. Where the Member State has discretion, either because the decision is non-binding or because its wording leaves discretion, responsibility is more likely to rest with the Member State.

Given that the ARIO's invocability is limited to States and other international organizations, the ARIO is most likely to be invoked when an organization violates some sort of consensual arrangement concluded with either a State or another international organization. In particular, the latter is a rapidly growing category, for fairly obvious functionalist reasons. An organization such as UNHCR has been given a specific function, and should not act outside its competences (*ultra vires*). The same applies to other organizations. As a result, in crisis situations, a multitude of organizations are usually active, each with its own mandates and competences. They need to agree on how to cooperate and divide tasks. UNHCR's partners often include the WHO, the United Nations Development Program (UNDP), the UN Children's Fund (UNICEF), and in particular the World Food Programme (WFP).[41] The resulting inter-organizational agreements often take the form of Memoranda of Understanding (MoUs), whose legal nature is debated. If such MoUs are legally binding, then their violation amounts to an internationally wrongful act, entailing legal responsibility on the part of the organization in question.[42]

4. Triggering Responsibility

A serious intellectual problem concerns the awkward circumstance that the acts (and omissions) of international organizations almost by definition have distributive consequences, even when organizations act within their mandate and competences. Those distributive consequences can be serious, but often the organization may rely on its general mandate, or even specific instructions, to justify its behaviour. This would suggest that as a general rule, it will be difficult to hold organizations to account for the consequences of their actions (incidental or otherwise), yet this is precisely the focus of many critiques. In turn, this reveals that some critiques are politically motivated, in the sense that organizations are often criticized not so much for what they actually do, but for what they represent. Yet, as long as they stay within their mandate, the law remains fairly toothless. At best, in such a situation, organizations can be held to account, in public debate if not necessarily in court, for failing to exercise due diligence, for failing to recognize that a chosen and, in itself, perfectly lawful policy or plan may come with

41 Intensive cooperation may also generate problems of attribution: the problem of the 'many hands'. See Mark Bovens, *The Quest for Responsibility* (CUP 1998).

42 Anthony Aust, *Modern Treaty Law and Practice* (2nd edn, CUP 2007), arguing that MoUs are usually not intended to have legal effect, cf Jan Klabbers, *The Concept of Treaty in International Law* (Kluwer 1996), arguing that there are good grounds (theoretical and empirical) to suggest that MoUs, regardless of subjective intent, are to be seen as binding treaties. Note that often international organizations lack explicit treaty-making powers (which makes it difficult formally to conclude treaties), but conclude MoUs as a functional substitute.

nefarious side effects. This move has a 'clutching at straws' quality, as the legal basis of the obligation to exercise 'due diligence' is not entirely clear.[43] It seems premature to posit a general legal obligation to the effect that in the proper exercise of their powers, organizations should make sure not to cause adverse consequences, desirable as such may be from an ethical point of view.[44]

Generally speaking, moreover, organizations often find themselves in policy dilemmas of the 'damned if you do, damned if you don't' variety. Such dilemmas apply in particular to organizations involved in crisis management, including those engaged with refugees and migration.[45] UNHCR's practices around 'returns' reflect such dilemmas, often entailing practices that put the voluntariness of returns in doubt, and risk *refoulement*. For example, in the 1990s UNHCR was confronted with large refugee flows from Cambodia, so much so that temporary camps threatened to become semi-permanent settlements of far larger size than the neighbouring countries claimed to be able to handle. This prompted UNHCR to arrange with Cambodia for the more or less voluntary return of many of the refugees, skirting the boundaries of individual consent and possibly amounting to *refoulement*. The policy dilemma was clear, and is well-nigh perennial: either send back people, even if they are reluctant to return, or run the risk of establishing semi-permanent settlements threatening to undermine the very basis of refugee protection—the worry is that large-scale semi-permanent settlements become unsustainable in the long run, solidifying a situation many deem undesirable to begin with: putting people in camps is not particularly human rights-friendly. UNHCR's leadership in Southeast Asia chose the first option, mindful that either choice would be questionable.[46] In the event, many would deem UNHCR's choice acceptable. This general problem persists. Hosting large numbers of refugees often stretches the capacities of host States, and without greater international efforts in terms of both funding and resettlement, the pressure to push for premature 'returns' may be immense. The current plight of the Rohingya in Bangladesh is one of many illustrations.

There are a number of activities for which organizations operating in the refugee domain could possibly incur responsibility. Setting up refugee camps is in itself an activity of doubtful legality: the Refugee Convention does not offer camps as a solution, and generally, camps are considered to be in tension with the protection of basic individual rights.[47] Yet, sometimes there is little choice but to operate a camp: when

[43] For a positive appraisal of the due diligence principle, while warning against its juridification, see Neil McDonald, 'The Role of Due Diligence in International Law' (2019) 68 ICLQ 1041.

[44] See eg Jan Klabbers, 'The Virtues of Expertise' in Monika Ambrus, Karin Arts, Ellen Hey, and Helena Raulus (eds), *The Role of 'Experts' in International and European Decision-Making Processes: Advisors, Decision-Makers, or Irrelevant Actors?* (CUP 2014).

[45] By comparison, organizations such as the World Meteorological Organization or the Universal Postal Union rarely need to handle urgent crises.

[46] See Samantha Power, *Chasing the Flame: Sergio Vieira de Mello and the Fight to Save the World* (Penguin 2008) 85–91, and generally Marjoleine Zieck, *UNHCR and Voluntary Repatriation of Refugees* (Martinus Nijhoff 1997).

[47] UNHCR itself views camps as a measure of last resort, which ought to be temporary by definition: see UNHCR, 'UNHCR Emergency Handbook' <https://emergency.unhcr.org/entry/42974/camp-coordination-camp-management-cccm#5,1569408927745> accessed 25 September 2019.

people flee their country in large numbers, the only feasible option might be to centralize aid and support. Provided, indeed, that the search for other solutions continues, the bigger problem would be the way camps are run. Thus, a management decision to withhold food to promote orderly behaviour seems highly suspect, neither easy to reconcile with general human rights concerns nor with the humanitarian mission of UNHCR.[48] Such a decision most likely meets the twin standards of the ARIO: it is attributable to the organization,[49] and entails a violation of an international legal obligation resting upon UNHCR. Even if UNHCR is not a party to human rights treaties, and even if customary international human rights law cannot with great ease be applied, as discussed above, UNHCR is bound to act in accordance with its own mandate.[50]

UNHCR engages in refugee status determination (RSD), and its determinations, so the ECtHR has indicated, must be given 'due weight' by States.[51] UNHCR's RSD practices have been born out of practice and necessity. An express mandate is absent from the Refugee Convention and its Protocol as well as from the Statute establishing UNHCR.[52] There exist several possible internal oversight mechanisms ('appeal mechanism' is too strong a term here) within UNHCR, but these tend to be mostly general oversight bodies, investigating various kinds of misconduct by staff. The oversight bodies are not specialized in RSD. And to the limited extent that they are open to individual complaints by directly affected individuals, the rate at which they are used is 'astonishingly low'.[53]

Where nefarious conduct is done by individuals in the conduct of their office, the organization too may possibly be held responsible. Surely, an argument can be made that UNHCR employees working in the field should not sexually or otherwise abuse those within their protection. Even if a direct legal obligation not to engage in sexual abuse may be hard to find, an organization such as UNHCR applies the standards of the Humanitarian Accountability Project (HAP), dating back to 2010 and specifically including a duty of care both for the crisis-affected people and for the staff in camps.[54]

[48] The example is derived from Verdirame (n 38) 2.

[49] Here it might be argued that since UNHCR is a programme of the UN, UNHCR's actions are attributable to the UN.

[50] Support for this proposition can draw on the *Effect of Awards of Compensation Made by the UN Administrative Tribunal* (Advisory Opinion) [1954] ICJ Rep 47 (holding that the creation of an administrative tribunal within the UN to provide staff members with access to justice was justifiable in light of the UN's general task in achieving justice, even in the absence of an express power to set up an administrative tribunal). See also n 17.

[51] See *Jabari v Turkey*, App No 40035/98 (ECtHR, 11 July 2000) para 41. The same term 'due weight' is used in *Abdolkhani and Karimnia v Turkey*, App No 30471/08 (ECtHR, 22 September 2009) para 82.

[52] See Maja Smrkolj, 'International Institutions and Individualized Decision-Making: An Example of UNHCR's Refugee Status Determination' in von Bogdandy, Wolfrum, Bernstorff, Dann, and Goldmann (n 27).

[53] ibid 189. See also Mark Pallis, 'The Operation of UNHCR's Accountability Mechanisms' (2005) 37 New York University Journal of International Law and Politics 869.

[54] Humanitarian Accountability Project, *The 2010 HAP Standard in Accountability and Quality Management* (HAP International 2010).

Indeed, more generally, the operations of international organizations are embedded in legal frameworks, typically consisting of arrangements with host States, agreements with other international organizations, and sets of general principles or guidelines by which the organization declares itself to be bound,[55] complemented by general obligations resting on UNHCR by virtue of being part of the UN.[56] Even if organizations are parties to few general treaties and customary international law may not immediately apply, they do not operate in a legal vacuum. Where UNHCR itself accepts a duty of care, whether in the form of HAP standards or otherwise, it can be held responsible when performing under par. Things are less clear with respect to the IOM, which appears to pay much attention to evaluation of the effectiveness of its activities and preventing individual cases of fraud and corruption (its website even has a ready-made form to report such things),[57] but is decidedly less forthcoming on its possible accountability for wrongdoing.

If the establishment of refugee camps may accompany an urgent and serious political crisis, this is less obviously the case with migration processing centres such as the offshore camps operated by IOM at the behest of Australia.[58] These usually spring from the desire on the part of the destination State to preclude access to their territory. When a State keeps its doors closed, many may be knocking at the same time, creating a need to somehow manage the group of people thus assembled. In this, IOM sometimes plays an important role: it lends its services and expertise to those of its Member States willing to pay for it. IOM is financially constrained, so often agrees to contain would-be migrants and refugees for revenue. It is dependent on voluntary contributions and the sale of its services for the lion's share of its budget.[59] Here accountability may depend on the precise terms of the agreement between IOM and the destination State—and examples of such agreements are hard to come by as they are rarely in the public domain. That said, IOM too, having become a UN-related organization in 2016, should be held to the minimum standard to which the UN is held, if only because the UN–IOM agreement specifies as much. It holds that IOM recognizes the purposes and principles of the UN and related agencies, and undertakes to work in accordance with the purposes and principles of the UN and the policies the UN has adopted to further its purposes and principles.[60]

[55] These can be very detailed: UNHCR, 'Guidelines on Assessing and Determining the Best Interests of the Child' (November 2018) comprises over 120 pages.

[56] This is, admittedly, a vague source of law, but one might suggest that with being part of the UN family comes a general obligation to act decently. Put differently, it would make sense to suggest even on positivist premises that parts of the UN family are bound to act in ways more conducive to humanitarian concerns than applies to an interest organization such as the Organization of Petroleum Exporting Countries (OPEC) or the Organization of Islamic Countries (OIC).

[57] IOM, 'Confidential Reporting Form' <https://weareallin.iom.int/> accessed 27 January 2020.

[58] Tania Penovic and Azadeh Dastyari, 'Boatloads of Incongruity: The Evolution of Australia's Offshore Processing Regime' (2007) 13 Australian Journal of Human Rights 33.

[59] Jan Klabbers, 'Notes on the Ideology of International Organizations Law: The International Organization for Migration, State-making, and the Market for Migration' (2019) 32 Leiden Journal of International Law 383.

[60] Agreement concerning the Relationship between the United Nations and the International Organization for Migration, UN doc A/70/976 (8 July 2016) art 2, paras 4–5.

A relative newcomer is Frontex, the border control agency of the European Union, and generally thought to be an operational arm of the EU rather than an entity with its own personality under international law.[61] Its general mandate suggests that Frontex is occupied with the regulation of migration into the EU and has a 'preoccupation with security'.[62] However, as EU Member States separately have all sorts of human rights obligations, Frontex cannot, effectively, ignore this. While Frontex is not legally bound by obligations resting on EU Member States, being an EU agency entails that should Frontex do wrong, its wrongdoings are, legally speaking, likely to be attributed to the EU, rather than to Frontex in its own right.[63] Accordingly, Frontex stands in an accountability relationship to the EU. It is unlikely to be held responsible under international law, but can be held accountable by the other institutions of the EU and EU Member States, possibly (if not likely) also for actions violating international law, to the extent that international law is binding on the EU.[64]

International organizations may incur responsibility not merely for their operational activities (running a refugee camp or migration processing centre) but, in principle, *also for their standard-setting activities*. Should UNHCR's Emergency Handbook allow for torture in specified circumstances (the example is hypothetical) then surely UNHCR should be held to account. Domestic courts have sometimes relied on the authoritative (even if not legally binding) nature of handbooks produced by UNHCR,[65] in particular the Handbook on Procedures and Criteria for Determining Refugee Status.[66] Courts may depart from it, but are unlikely to cast it aside as irrelevant;[67] as a result, such handbooks qualify as exercises of public authority (epistemic authority),[68] and may therefore trigger accountability concerns. Likewise, should IOM incite to racial hatred, it may be held responsible should the prohibition of incitement to racial hatred have passed into customary international law or been accepted by the IOM as applicable to it. Much the same, and on the same assumption, could apply to Frontex, if it were to call on the EU and its Member States to exclude women from rescue missions.

Responsibility may also be incurred for *not giving effect to the organization's mandate*, at least in situations where the organization may legitimately be expected to act. This is an

[61] See eg Florin Coman-Kund, 'European Union Agencies as Global Actors' (PhD thesis, University of Maastricht 2015) 251–329, now published as Florin Coman-Kund, *European Union Agencies as Global Actors: A Legal Study of the European Aviation Safety Agency, Frontex and Europol* (Routledge 2018).

[62] Roberta Mungianu, *Frontex and Non-Refoulement: The International Responsibility of the EU* (CUP 2016) 2.

[63] The conclusion is shared by Mungianu (n 62) and Coman-Kund (n 61).

[64] For an early discussion, see Madalina Busuoic, 'Accountability, Control and Independence: The Case of European Agencies' (2009) 15 European Law Journal 599.

[65] See eg *R v Secretary of State for the Home Department, ex parte Adan and Aitseguer* [2001] 2 AC 477 (HL); *INS v Cardoza-Fonseca* 480 US 421, 107 S Ct 1207 (1987).

[66] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/1P/4/ENG/REV.4 (1979, reissued 2019).

[67] See eg *R v Secretary of State for the Home Department, ex parte Bugdaycay* [1987] AC 514 (HL).

[68] Jan Klabbers, 'The Normative Gap in International Organizations Law: The Case of the WHO' (2019) 16 International Organizations Law Review 272.

underdeveloped area of the law on responsibility, but an example may help. It seems clear that the UN wilfully ignored its mandate during the Rwandan genocide: having the general task to maintain and restore peace and security, it singularly failed to prevent the slaughter of some 800,000 people, despite having a military and political presence on the spot.[69] This is to be distinguished from the situation of UNHCR which, when all is said and done, is often accused of having prioritized immediate protection and *non-refoulement* over the development of more permanent solutions, for instance in the form of asylum policies.[70] This may owe something to the urgency of crises in conjunction with scarce financial resources—a prioritization that is difficult to criticize, given these circumstances.

More difficult, but perhaps not entirely impossible, is holding international organizations to account *for not living up to their own promises*. Should an organization adopt a decision to engage in a certain activity and then fail to engage in that activity, or do it badly, it is not impossible that it might be held to account, provided a few hurdles are overcome. For legal responsibility to arise, it would seem to be necessary for the decision in question to be legally binding. As international organizations typically depend on Member States for implementation, if the wrongdoing stems from a lack of implementation on the part of these Member States, then the problem of attribution manifests itself. Wrongdoing by Member States cannot, as a general rule, be attributed to an international organization, except if those Member States are seen as organs of the organization concerned. In a variation on this theme, it is not entirely excluded that various parts of the same organization give each other assignments that may have legal consequences. This is not lightly to be presumed, but one could, for example, think of the UN Human Rights Council (HRC) assigning a task to OHCHR, and OHCHR being not particularly diligent in performing that task.[71]

5. Mechanisms

Since UNHCR, being part of the UN system, is generally immune from prosecution before national courts, it will be difficult, perhaps impossible, to appeal UNHCR-mandated RSD decisions before domestic courts. Immunity from legal proceedings and other legal considerations may prevent access to national courts.[72] At best, UNHCR

[69] Romeo Dallaire, *Shake Hands with the Devil* (Carroll and Graf 2004).

[70] See eg Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (OUP 2012). For this dual mandate, see Statute of the United Nations High Commissioner for Refugees (adopted 14 December 1950) UNGA res 428(V) art 1.

[71] A possible (if not very strong) example is how the HRC 'requests' OHCHR to produce a database on companies engaged in business relations with the Israel occupied territories: HRC, 'Israeli Settlements in the Occupied Palestinian Territory, including East Jerusalem, and in the Occupied Syrian Golan', UN doc A/HRC/RES/31/36 (20 April 2016) para 17.

[72] The Belgian Conseil d'État held in 1978 that a decision by UNHCR's Belgian representative did not form part of Belgium's administrative system, and could therefore not be appealed under Belgian administrative law: see *Lusnjani v Belgium and Belgian Representative of the United Nations High Commissioner for Refugees* (1988) 77 International Law Reports 417.

activities may be raised in incidental manner in domestic proceedings, introduced as evidence concerning domestic legal issues such as whether the individual ought to be recognized as a refugee by the competent domestic authorities, or whether the country to which he or she may be sent back can be considered a safe country.[73] Courts will naturally be inclined to treat UNHCR opinions as authoritative, so one can only hope UNHCR gets it right more often than not. To some extent, the acts of UNHCR are scrutinized by the ECtHR, albeit indirectly perhaps, as UNHCR is not itself a party to the ECHR. Not only has the court indicated that 'due weight' be given to decisions of UNHCR, as noted above, but it also exercises some indirect judicial review, noting for instance in *D and Others* that UNHCR had rejected a demand for asylum 'with little reason'.[74]

Theoretically, as observed above, international organizations law forms a closed circle: organizations are established by Member States to perform tasks for their Member States. The Member States remain in full control (on paper, that is), and this entails that they are also in a position to hold their organizations to account. The Member States remain *Herren der Verträge* ('masters of the treaties'), and can and should intervene when their organization does something wrong. The wrong can be an act outside its proper powers (*ultra vires*) or can be a violation of an international legal obligation. In both cases, so functionalist theory prescribes, the Member States are in a position to tell the organization to cease and desist.

In practice, things do not always work out this neatly, due to several factors. An obvious problem is that not all Member States may agree that the organization does wrong; if some dissent, it will not be held to account. The Member States may even find that, though legally wrong, the action may be desirable. A possible example of this scenario is NATO's 1999 humanitarian intervention in Kosovo. Some organizations may be dominated by a single Member State or small group, effectively depriving the others of a voice.[75] And in most organizations, the Secretariat will play an important role, performing all sorts of activities that cannot directly be traced back to the collective will of the Member States,[76] and thus often escape Member State control.

In part as a result, many organizations have created their own accountability mechanisms, whether relating to financial accountability (auditing boards) or to testing the propriety of the organization's actions. In many organizations, compliance offices, integrity offices, or inspection panels have been established.[77] The UN's General Office

[73] An example is *Ceskovic v Minister for Immigration and Ethnic Affairs* (1979) 27 ALR 423.

[74] *D and others v Turkey*, App No 24245/03 (ECtHR, 22 June 2006) para 21. The Contracting Parties to the ECHR cannot delegate their human rights obligations to entities such as UNHCR, as the ECtHR suggested in *Muslim v Turkey,* App No 53566/99 (ECtHR, 1 October 2002) (holding in part B2 that the fact that UNHCR was better informed in the case at hand was not 'un point déterminant').

[75] The international financial institutions tend to listen more carefully to the US Treasury Department than to other Member States: see Randall Stone, *Controlling Institutions* (CUP 2011).

[76] John Mathiason, *Invisible Governance* (Kumarian Press 2007); Michael Barnett and Martha Finnemore, *Rules for the World: International Organizations in Global Politics* (Cornell University Press 2004).

[77] Jan Klabbers, 'Self-Control: International Organizations and the Quest for Accountability' in Malcolm Evans and Panos Koutrakos (eds), *The International Legal Responsibility of the European Union* (Hart 2013) 75.

of Internal Oversight Services[78] may scrutinize UNHCR generally, while UNHCR's Policy Department and Evaluation Service evaluates and assesses policies and programmes, and the Inspector General's Office can receive individual complaints.[79] The IOM likewise has an Office of the Inspector General, largely for financial issues, and an Ethics and Conduct Office, which can receive complaints about misconduct, harassment, and discrimination, amongst others.[80]

Overall, accountability via public opinion may be most powerful, if challenging to ensure. International organizations compete with each other for scarce resources, including funding and the more elusive resources of political legitimacy and a decent reputation.[81] Scandals may hit them hard, and public outrage may prove an effective technique for bringing them into line. Non-governmental organizations (NGOs) active in the field may condemn organizations, and engage in 'naming and shaming'. If done cleverly, such advocacy may be presented as 'speaking truth to power', and may induce the organization concerned to exercise greater care in the future or even change its policies altogether. However, the capacity for NGOs to call international organizations to account varies. In the refugee regime, many NGOs do regular business and are heavily financially dependent on UNHCR in particular, and may accordingly be unlikely to bite the hand that feeds them. Moreover, the general institutional drawback is obvious: if the NGOs act as guardians, then who guards *them*?

6. Concluding Remarks

Accountability is the Achilles' heel of international organizations. With the exception of accountability towards its Member States (rarely achieved at any rate), the law, epistemologically premised as it is on a view of organizations as relating solely to their Member States, simply lacks the resources properly to address other possible accountability relationships, whether of the organization towards individuals, towards the private sector, towards third States, or towards other international organizations. The ARIO help with the latter two categories, where legal relationships can possibly be said to rest on a consensual basis. With individuals and the private sector this is far harder to maintain: here, organizations often exercise public power, and that does not fit the functionalist model on which international organizations law is based.

What holds true for international organizations generally also holds true for organizations in the domain of refugee and migration movement. The law does not

[78] It remains unclear whether this now also applies to IOM; the UN–IOM agreement of 2016 does not explicitly mention such a construction.

[79] Smrkolj (n 52) 188–9.

[80] See IOM, 'Office of the Director General' <https://www.iom.int/office-director-general#ECO> accessed 26 September 2019.

[81] Kristina Daugirdas, 'Reputation and the Responsibility of International Organizations' (2014) 25 European Journal of International Law 991.

distinguish between organizations, and does not treat those working with vulnerable people differently from those working with powerful private conglomerates or the financial sector. Yet, it is usually precisely when organizations deal with vulnerable people that they are engaged in the exercise of public power, and thus accountability towards those in the organization's care becomes imperative. It seems more than likely though that accountability can only be achieved (if at all) following theoretical renewal of international organizations law. As long as the discipline does not allow for the possibility of organizations exercising public power in much the same way as public authorities everywhere, accountability will remain elusive.

CHAPTER 65

BORDER CRIMES AS CRIMES AGAINST HUMANITY

ITAMAR MANN*

1. Introduction

During the 2020 Democratic Party campaign for the United States Presidential nomination, former Attorney General of California, Kamala Harris, repeatedly described President Trump's treatment of asylum seekers as a 'crime against humanity'.[1] The fervour around violent border enforcement policies was comparable to the mood about George W Bush's torture policies at the cusp of the Obama era.[2] Obama chose not to prosecute officials from the former's administration. Irrespective of whether Americans give Donald J Trump another term in office, the campaign to criminalize extreme border violence will not abate. It is a campaign that has been directed, for the last few years, against violence in many parts of the world. These include European and Australian practices and policies (this chapter's focus), as well as atrocities in many developing

* This chapter stems amongst other things from my own experience as a legal adviser for the Global Legal Action Network (GLAN). In the latter capacity I co-authored a complaint to the International Criminal Court concerning practices of offshore detention and other forms of ill-treatment, commissioned *inter alia* by Australian agents. Many thanks to the editors of this volume for their invaluable comments. Any errors are of course mine alone.

1 Susan Jones, 'Kamala Harris: Immigration Raids Are "A Crime against Humanity"' *CNS News* (12 July 2019) <https://www.cnsnews.com/news/article/susan-jones/kamala-harris-immigration-raids-are-crime-against-humanity> accessed 21 May 2020; John Bowden, 'Kamala Harris: Trump's Treatment of Migrants is "A Crime against Humanity"' *The Hill* (22 June 2018) <https://thehill.com/homenews/senate/393742-kamala-harris-trump-treatment-of-migrants-is-a-crime-against-humanity> accessed 21 May 2020.

2 Will Bunch, 'Obama Would Ask His AG to "Immediately Review" Potential of Crimes in Bush White House' *The Philadelphia Inquirer* (14 April 2008) <https://www.inquirer.com/philly/blogs/attytood/Barack_on_torture.html> accessed 21 May 2020.

countries.[3] Once social movements put them on the table, such agendas do not evaporate quickly.[4]

As States escalate border violence, commentators have appealed to crimes against humanity to describe the underlying practices and policies. How have some of us come to think of violations of refugee rights as fitting into this legal category?[5] While part of the work needed to explain this is doctrinal, positive law is not the entire story. Choosing between legal interpretations is also an exercise in moral and political theory. Below, I begin from a doctrinal outline of the legal bases for such charges. I then elucidate three theories buttressing the claims that crimes against refugees have (sometimes) become crimes against humanity.

At the very core of international criminal law, the crimes of forcible transfer of populations[6] and displacement[7] proscribe the coerced movement of people.[8] But of course, not all forms of violence commissioned in the context of human mobility are criminal. 'Border violence', meaning the violent means States use to enforce their own border controls, is often acceptable under international law. Yet the charge that some such border violence may amount to crimes against humanity is not unusual. Note a few of its recent invocations. In 2016, legal scholar Vincent Chetail argued that deportation could amount to crimes against humanity. In his words: 'Is there blood on my hands?' This is a question shared by an increasing number of people who observe or carry out migration control in the Global North and the rest of the world'.[9] Agnes Callamard, Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, has argued in 2017 that '[s]hould the jurisdictional requirements of the International Criminal Court be met, investigations into crimes against refugees and migrants by State officials and non-State actors should be opened'.[10] Ben Ferencz, the last surviving prosecutor at the Nuremberg trials, opined that Trump committed a crime against humanity with his practices of deliberate family separation and detention.[11]

[3] For an overview see Itamar Mann, 'The New Impunity: Border Violence as Crime' (2020) 42 The University of Pennsylvania Journal of International Law (forthcoming) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3548181> accessed 21 May 2020.

[4] See generally, Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions are Changing World Politics* (WW Norton & Company 2011).

[5] See also Ioannis Kalpouzos, 'International Law and the Violence against Migrants' (2020) 21 German Law Journal 571.

[6] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (Rome Statute) art 7(1)(d).

[7] ibid art 8(2)(e)(viii) (war crime).

[8] See investigation in the Situation of Bangladesh/Republic of the Union of Myanmar ICC-01/19. But this was not always so. For a historicization of this assertion, see Umut Özsu, *Formalizing Displacement: International Law and Population Transfers* (OUP 2015).

[9] Vincent Chetail, 'Is There Any Blood on My Hands? Deportation as a Crime of International Law' (2016) 29 Leiden Journal of International Law 917, 917.

[10] UNGA, 'Unlawful Death of Refugees and Migrants—Report of the Special Rapporteur of the Human Rights Council on Extrajudicial, Summary or Arbitrary Execution', UN doc A/72/335 (15 August 2017) para 55 (Unlawful Death of Refugees and Migrants Report).

[11] Mythili Sampathkumar, 'Last Surviving Prosecutor at Nuremberg Trials Says Trump's Family Separation Policy is 'Crime against Humanity' *Independent* (9 August 2018) <https://www.independent.co.uk/news/world/americas/trump-border-crisis-nazis-nuremberg-trial-ben-ferencz-family-separation-migrants-un-a8485606.html> accessed 21 May 2020.

In order to assess such claims, one first must understand what they mean; or rather, what we as advocates mean when we make them.[12] Section 2 below briefly explains what it takes to interpret the phrase 'crimes against humanity', as it appears in article 7 of the Rome Statute, in light of rules of interpretation articulated in the Vienna Convention on the Law of Treaties. Three theories of crimes against humanity follow, shedding further light on such accusations. Section 3 introduces the first, following a basic tenet of Kantian ethics: the charge of crimes against humanity denounces the transformation of humans from ends in themselves to means of governing, or even of eliminating, the lives of others. A second option, described in Section 4, posits that the key aspect of claims concerning crimes against humanity directed at refugees is that they exert a kind of structural violence: certain kinds of border violence establish a system that extinguishes legal protections for humans, while making such results appear natural. Unlike other cases in which structural violence is rendered transparent to criminal law, contemporary border violence against asylum seekers and refugees *can* be effectively captured within a criminal law framework. A third interpretive theory, advanced in Section 5, suggests that border violence is deleterious towards our social lives, as it separates us into hermetic units and prevents interaction and mobility between groups. Proponents of this view may proceed to argue that sealing borders and eliminating the right to asylum is part of a larger plan for solidifying global racial and economic hierarchies: a 'global apartheid'.[13]

The purpose of this chapter is to introduce each of the theories and assess their respective merits. I conclude in Section 6 by discussing which of the three theories is most compelling as the moral and political framework we need in order to understand the law.[14] I examine their overlaps and mutual tensions, with hope of contributing an understanding of the wider turn to criminal law in the protection of refugees.[15] While each of the interpretive approaches is valuable, the third one is the most crucial, as it outlines a positive vision for the role of prosecutions. The doctrinal basis of international law is rightly silent on the political vision motivating it. This does not mean that from a situated advocate's perspective, such silence is advisable. Ultimately, this chapter also raises a question of philosophical and practical importance for lawyers working for social change: what is the relationship, indeed what should be the relationship, between advancing a doctrinally rigorous interpretation, and articulating the vision for social transformation resting behind it?

[12] I write this essay not only as a scholar, but also as an advocate involved in some of the efforts described below.

[13] See Philip Alston in Damian Carrington, '"Climate Apartheid": UN Expert Says Human Rights May Not Survive' *The Guardian* (25 June 2019) <https://www.theguardian.com/environment/2019/jun/25/climate-apartheid-united-nations-expert-says-human-rights-may-not-survive-crisis> accessed 21 May 2020.

[14] See eg Barrie Sander, 'The Expressive Turn of International Criminal Justice: A Field in Search of Meaning' (2019) Leiden Journal of International Law 1.

[15] Mann, 'The New Impunity' (n 3).

2. Interpreting 'Crimes against Humanity'

Like any law, international criminal law allows for multiple incongruent interpretations.[16] Choosing between them demands a more general account of the political and moral aims and purposes the law should seek to serve.[17]

The prohibition of crimes against humanity has a rich history, and multiple legal sources. As the authors of the entry on 'Crimes against Humanity' in the Max Planck Encyclopaedia of Public International Law tell us, the expression apparently emerged in 1915, when France, Great Britain, and Russia stated with regard to 'the massacre of Armenians' that 'they would hold personally responsible all persons implicated in these "new crimes of Turkey against humanity and civilization" '.[18] At least since the framing of the Charter of the International Military Tribunal at Nuremberg (1945), it has been enshrined in customary international law.[19] It has since appeared in numerous international legal instruments and has been codified in the domestic laws of multiple countries. Today, the most universally accepted international legal instrument is the Rome Statute, which established the International Criminal Court (ICC). It is for this reason that, in discussing the interpretive theories below, I will refer to the Rome Statute. However, the theories elucidated here are equally useful in interpreting other instruments, including domestic ones. Within the context of the Statute, crimes against humanity are one category amongst several, including war crimes and the crime of genocide.

International criminal law aims to hold accountable and punish the perpetrators of the most heinous crimes. A lively debate has been going on for at least a decade, on whether the institutions of international criminal law, specifically the ICC, can ever be expected to accomplish this aim. Evidently, there are major concerns about the efficacy of the ICC as an institution to hold the perpetrators of the most heinous crimes to account. This chapter does not assume that institution's efficacy, but rather outlines how the concept of crimes against humanity ought to be understood, leaving open the possibility that this concept could be operationalized either before the ICC or before domestic courts. The structure of the Rome Statute is thus important. Its preamble

[16] See generally Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (CUP 2006).

[17] See generally Aharon Barak, *Purposive Interpretation in Law* (2nd edn, Princeton University Publishing 2007).

[18] For background, see Guido Acquaviva and Fausto Pocar 'Crimes against Humanity', *Max Planck Encyclopaedia of International Law* (2008) <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e768> accessed 21 May 2020.

[19] On the problems in regarding crimes against humanity as customary international law during the time of Nuremberg, see Judith N Shklar, *Legalism: Law, Morals, and Political Trials* (Harvard University Publishing 1986) 165.

emphasizes that the role of the ICC is to try 'the most serious crimes, of concern to the international community as a whole',[20] and the jurisdiction of the court is limited to such crimes.[21]

According to the Statute, whether an international crime within the ICC's jurisdiction, has been committed, is not limited to questions about the criminal act (*actus reus*) or criminal intent (*mens rea*), but also includes a threshold of seriousness. Unlike war crimes, crimes against humanity do not have to be committed in the context of armed conflict, but rather in the context of 'a widespread or systematic attack directed against any civilian population'.[22] After this so-called *chapeau* requirement, the Statute proceeds to a list of prohibited acts and policies: murder (article 7(1)(a)); extermination (article 7(1)(b)); enslavement (article 7(1)(c)); deportation or forcible transfer (article 7(1)(d)); imprisonment in violation of fundamental rules of international law (article 7(1)(e)); torture (article 7(1)(f)); rape and other kinds of sexual violence (article 7(1)(g)); persecution against identifiable groups (article 7(1)(h)); enforced disappearances (article 7(1)(i)); apartheid (article 7(1)(j)); and 'other inhumane acts' (article 7(1)(k)). In the migration context, advocates have based allegations of crimes against humanity on many or all of these categories. Chetail, for example, has emphasized the crime of deportation.[23] The crime of deportation has further become central to the legal discussion surrounding refugees recently, as it has triggered the ICC's jurisdiction with respect to the protection of members of the Rohingya minority.[24] Others have organized their claims around imprisonment, torture, persecution, enslavement, or murder. Recently, commentators have drawn powerful analogies between violations in the migration context and enforced disappearances.[25] Alston has even warned of a kind of global apartheid regime, as States may respond harshly to those displaced by climate change.[26]

Whether one ultimately agrees with all or any of such doctrinal accounts, it likely does not depend exclusively on the Rome Statute (or any other positive source, for that matter). The language of the treaty has an 'open texture'.[27] Any interpretation makes assumptions about what it is in human life that merits protection.[28] Different assumptions on the role of international law in such protection lead to different interpretations of international crimes. Article 7(1) specifies what is often referred to as 'the contextual elements': as indicated above acts must be 'committed as part of a widespread or system-

[20] Rome Statute (n 6) preamble. [21] ibid art 5. [22] ibid art 7. [23] Chetail (n 9).

[24] See investigation in the Situation of Bangladesh/Republic of the Union of Myanmar ICC-01/19.

[25] See eg Alonso Gurmedi, 'On Calling Things What They Are: Family Separation and Enforced Disappearance of Children' *Opinio Juris* (24 June 2019) <http://opiniojuris.org/2019/06/24/on-calling-things-what-they-are-family-separation-and-enforced-disappearance-of-children/> accessed 21 May 2020; Daniel Wilkinson, 'Mexico: Forced Disappearance, an Ongoing Crime' *El Universal* (26 November 2018) <https://www.hrw.org/news/2018/11/26/mexico-forced-disappearance-ongoing-crime> accessed 21 May 2020.

[26] UN Human Rights Council, 'Report of the Special Rapporteur on Extreme Poverty and Human Rights', UN doc A/HRC/41/39 (25 June 2019).

[27] HLA Hart, *The Concept of Law* (3rd edn, OUP 2012) 124.

[28] In legal parlance, this is often referred to as 'the principle of humanity'. See Theodor Meron, 'The Martens Clause, Principles of Humanity, and Dictates of Public Conscience' (2000) 94 AJIL 78.

atic attack directed against any civilian population, with knowledge of the attack'. When do instances of certain criminal behaviour towards asylum seekers and refugees become an 'attack', be it 'widespread' or 'systematic'? That question too, depends on the purpose of the prohibition of crimes against humanity, as explored in the three interpretive theories explored below.

3. Against Weaponizing Humans

The first interpretative theory reaches back to a cornerstone of enlightenment moral theory, namely Immanuel Kant's 'categorical imperative'. The so-called 'humanity formulation' of Kant's categorical imperative states that we should never act in such a way that we treat humanity, whether in ourselves or in others, as a means only but always as an end in itself.[29] Rulers in many parts of the world have historically decapitated or impaled captured enemy soldiers, exposing their bodies along the outer city walls as warning signs.[30] Such displays of corpses or suffering human bodies treat humans as a very specific kind of means: they become weapons in an ongoing war. The laws of war now prohibit such policies, and human rights law too rejects them.[31] Yet violent borders often impose a similar instrumentalization of human lives, outside of armed conflict. This is not merely hyperbole. As Trump's instructions to 'build an alligator moat' at the US–Mexican border reveal, some policy discussions have revived medieval techniques.[32] Though ridiculous, the discourse reveals a return to deep impulses that have survived millennia, namely meting out harsh and inhumane treatment in order to deter others or demonstrate power.[33]

The manifest suffering of asylum seekers has become an essential border enforcement tool, especially for Western democracies. 'Host countries' extend detention periods only to communicate the news amongst audiences in 'countries of origin'. In 'No Friend but the Mountains', author and Iranian refugee Behrouz Boochani describes how this works in the infamous Australian Manus Island facility: 'The deal is that we have to be a

[29] See generally Immanuel Kant, *The Metaphysics of Morals* (2nd edn, CUP 1996); Thomas E Hill Jr, 'Humanity as an End in Itself' (1980) 91 Ethics 84.

[30] Author Ala Helehel has described this practice colourfully in his novel, Ala Helehel, *Au Revoir Acre* (Am Oved 2017).

[31] See eg International Committee of the Red Cross, 'Practice Relating to Rule 113. Treatment of the Dead' (*IHL Database*) <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_cou_us_rule113> accessed 21 May 2020 (including reference to 'display'); International Committee of the Red Cross, 'Practice Relating to Rule 115. Disposal of the Dead' (*IHL Database*) <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule115> accessed 21 May 2020.

[32] Michael D Shear and Julie Hirschfeld Davis, 'Shoot Migrants' Legs, Build Alligator Moat: Behind Trump's Ideas for Border' *The New York Times* (1 October 2019) <https://www.nytimes.com/2019/10/01/us/politics/trump-border-wars.html> accessed 21 May 2020.

[33] Compare also to the rule against collective punishments, International Committee of the Red Cross, 'Rule 103. Collective Punishments' (*IHL Database*) <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule103> accessed 21 May 2020.

warning, a lesson for people who want to seek protection in Australia.'[34] According to this first interpretive theory, the distinct flavour of evil in crimes against humanity directed at refugees is that they systematically pit human beings in a fight against other humans who may seek protection.

Hathaway has identified the turn to deterrence as early as 1992.[35] More recently, Gammeltoft-Hansen has characterized 'the deterrence paradigm' in a series of articles authored with Hathaway and with Tan.[36] While they define the term in a slightly broader way, this chapter treats deterrence straightforwardly to encapsulate any policy intentionally inflicting pain and suffering upon asylum seekers and refugees, in order to warn other would-be asylum seekers and migrants that if they attempt entry—they too will suffer.[37] If we follow Kant, such deterrence is immoral *per se*. Yet it is far from clear that all its instances are also illegal. François Crépeau, Special Rapporteur on the human rights of migrants, has said that '[i]t is a fundamental principle of human rights law that one person cannot be punished only for the reason of deterring another'.[38] Yet, as Gammeltoft-Hansen and Tan have explained, 'the deterrence paradigm is not premised on the rejection of international law as such'.[39] Be that as it may, in some instances, the extent of suffering and harm intentionally inflicted as a warning is so high that it does meet the definition of 'crime against humanity' as enumerated in article 7 of the Rome Statute. Where border violence entails torture, inhumane imprisonment, deportation, persecution, and according to some advocates, murder, it may entail 'crimes against humanity'. The contextual elements of the crimes, their link with 'systemic attacks', lie in the systemic nature of deterrence practices, which also allows us to see their heinousness clearly. 'Deterrence' may very well have a pride of place in a particular 'concept of evil'.[40]

Several of the scholarly and activist attempts to treat border violence as a crime against humanity emphasize the deterrence turn. For example, concerning the crime of

[34] Behrouz Boochani, *No Friend but the Mountains: Writing from Manus Prison* (Picador Australia 2018) 92.

[35] James C Hathaway, 'The Conundrum of Refugee Protection in Canada: From Control to Compliance to Collective Deterrence' (1992) 4 Journal of Policy History 71.

[36] Thomas Gammeltoft-Hansen and James C Hathaway, 'Non-Refoulement in a World of Cooperative Deterrence' (2015) 53 Columbia Journal of Transnational Law 235; Thomas Gammeltoft-Hansen and Nikolas Feith Tan, 'Beyond the Difference Paradigm in Global Refugee Policy' (2016) 39 Suffolk Transnational Law Review 637; Thomas Gammeltoft-Hansen and Nikolas Feith Tan, 'The End of the Deterrence Paradigm? Future Directions for Global Refugee Policy' (2018) 5 Journal on Migration and Human Security 28. See also John Washington, *The Dispossessed: A Story of Asylum and the US–Mexican Border and Beyond* (Verso 2020) 98–100.

[37] But see Jonathan Kent, Kelsey P Norman, and Katherine H Tennis, 'Changing Motivations or Capabilities? Migration Deterrence in the Global Context' (2019) International Studies Review 1.

[38] François Crépeau, Special Rapporteur on the Human Rights of Migrants in Human Rights Council Office of the High Commissioner, 'Australia's Human Rights Record Blemished by Punitive Approach to Migrants' (Press Release, Office of the High Commissioner for Human Rights, 18 November 2016) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20889&LangID=E#sthash.VRd3ikds.dp%20uf> accessed 21 May 2020.

[39] Gammeltoft-Hansen and Tan, 'The End of the Deterrence Paradigm?' (n 36) 32.

[40] Todd Calder, 'The Concept of Evil', *Stanford Encyclopedia of Philosophy* <https://plato.stanford.edu/entries/concept-evil/> accessed 21 May 2020.

murder under article 7(1)(a), Branco and Shatz have argued that this crime is perpetrated in Europe's failure to render assistance to migrants crossing the Mediterranean. According to their explanation, European government agents have committed the crime in causing the death of thousands, by way of omission to render a legal duty of rescue.[41] Deterrence is crucial here, because it adds the necessary component of criminal intent, or *mens rea*. As they write: 'Increased death at sea is not an unintended consequence, but part and parcel of strategies that hinge on deterrence to curb migration'.[42] Following important work by Heller and Pezzani, they provide evidence that European border officials have purposefully or knowingly designed a policy that would increase migrant drownings—to send a message.[43] Human rights activist and Burmese refugee in Australia, U Ne Oo, argues that his adopted country's offshore detention policies amount to the crime of enslavement under article 7(1)(c).[44] His accusation relies on an interpretation of the provision, according to which Australia has 'lent' asylum seekers to for-profit private contractors, who maintain them in custody in Manus Island or Nauru. It has therefore allowed the companies, Broadspectrum and Ferrovial, to exploit asylum seekers in conditions tantamount to enslavement.[45] Observe that deterrence plays a pivotal interpretive role in this argument: 'The Labor government's initial purpose of deterrent measures…appeared to have evolved into the enslavement of asylum-seekers'.[46] While these interpretations of both murder and enslavement may be somewhat unorthodox, the relevance of deterrence in the argumentation is noteworthy.

Turning to the crimes of deportation (article 7(1)(d)), imprisonment (article 7(1)(d)), and torture (article 7(1)(f)), compelling interpretations also focus on deterrence. Van Schaack, for example, has argued that Trump's child separation policy amounts to

[41] Omer Shatz and Juan Branco, 'EU Migration Policies in Central Mediterranean and Libya (2014–2019)' (Communication to the Office of Prosecutor of the International Criminal Court Pursuant to the Article 15 of the Rome Statute) 135 <https://www.statewatch.org/news/2019/jun/eu-icc-case-EU-Migration-Policies.pdf> accessed 21 May 2020.

[42] ibid 62.

[43] Charles Heller and Lorenzo Pezzani have since 2011 produced a series of groundbreaking reports and films in which the theme of 'deterrence' is cast as evidence of an intent to cause the death of migrants and refugees. See especially Charles Heller and Lorenzo Pezzani, 'Death by Rescue: The Lethal Effects of the EU's Policies of Non-Assistance' <https://deathbyrescue.org/> accessed 21 May 2020, as well as a video op-ed we produced together: Charles Heller, Lorenzo Pezzani, Itamar Mann, Violeta Moreno-Lax, and Eyal Weizman, '"It's an Act of Murder": How Europe Outsources Suffering as Migrants Drown' *The New York Times* (26 December 2018) <https://www.nytimes.com/interactive/2018/12/26/opinion/europe-migrant-crisis-mediterranean-libya.html> accessed 21 May 2020. See also Rome Statute (n 6) art 30 (on the equivalence of knowledge and intention).

[44] U Ne Oo, 'Enslavement in Manus Island and Nauru, Summary of Allegations' (Communication to the Office of the Prosecutor of International Criminal Court under Article 15 of Rome Statute) <http://www.netipr.org/saorg/docs/enclosure_icc-reply-n-comm.pdf> accessed 21 May 2020.

[45] This is part of a larger emergence of private actors in migration control. See eg Thomas Gammeltoft-Hansen, *Access to Asylum International Refugee Law and the Globalisation of Migration Control* (CUP 2011); Daria Davitti, 'The Rise of Private Military and Security Companies in European Union Migration Policies: Implications under the UNGPs' (2019) 4 Business and Human Rights Journal 33.

[46] U Ne Oo (n 44) 4.

torture.[47] She uses the administration's statements that the policy is meant as a deterrent to reveal the 'coercion' of would-be migrants, part of the US domestic definition of torture. Whether such torture reaches the level of a crime against humanity depends on whether one deems child separation part of a 'widespread or systematic attack directed against any civilian population, with knowledge of the attack'. That child separation is specifically designed to send a threatening message to other parents that may consider entry sheds light on its systematic and assaultive nature.

Similarly, the Global Legal Action Network and the Stanford Law School Human Rights Clinic highlighted deterrence measures in their Communication to the ICC prosecutor concerning Australia's offshore detention practices.[48] The Communication focuses on the offences of imprisonment,[49] torture,[50] 'other inhumane acts',[51] deportation,[52] and persecution.[53] The Communication quotes Liz Thompson, a former Australian migration agent, who had characterized the offshore camps as 'an experiment in the ultimate logic of deterrence, designed to frustrate the hell out of people and terrify them so that they go home'.[54] The discussion of deterrence in the submission exposes the systematic character of the inhuman and degrading practices in Australia's offshore facilities, and how they have entrenched practices of torture.

On 12 February 2020, the ICC rejected the Communication without preliminary investigation with a reasoned letter,[55] accepting that 'some of the conduct' constituted the underlying acts for the crimes of imprisonment and cruel, inhuman, or degrading treatment, and that 'the gravity of the alleged conduct thus appears to have been such that it was in violation of fundamental rules of international law'. Nonetheless, it concluded that the allegations did 'not appear to satisfy the contextual elements of crimes against humanity under article 7 of the Statute'.[56] This is because the underlying policy was not 'deliberately aimed at encouraging an "attack", within the meaning of article 7'. The letter acknowledged that offshore detention was 'initiated to pursue, among other things, a policy of immigration deterrence', but nonetheless concluded that 'the information available at this stage does not support a finding that cruel, inhuman, or degrading treatment was a deliberate, or purposefully designed, aspect of the policy'. In other words, the rejection turned on a finding that it is not enough for practices to be

[47] Beth Van Schaack, 'The Torture of Forcibly Separating Children from Their Parents' *Just Security* (18 October 2018) <https://www.justsecurity.org/61138/torture-forcibly-separating-children-parents/> accessed 21 May 2020.

[48] Global Legal Action Network and the Stanford Law School Human Rights Clinic, guided by Diala Shamas, 'The Situation in Nauru and Manus Island: Liability for Crimes against Humanity in the Detention of Refugees and Asylum Seekers' (Communication to the Office of the Prosecutor of the International Criminal Court under Article 15 of the Rome Statute) <https://www.glanlaw.org/single-post/2017/02/13/Communication-made-to-International-Criminal-Court-requesting-investigation-of-Australia-and-corporate-contractors> accessed 21 May 2020.

[49] Rome Statute (n 6) art 7(1)(e). [50] ibid art 7(1)(f). [51] ibid art 7(1)(k).

[52] ibid art 7(1)(d). [53] ibid art 7(1)(g).

[54] Communication, 'The Situation in Nauru and Manus Island' (n 48) 15.

[55] Letter Ref OTP-CR-65/17, 12 February 2020, Phakiso Mochochoko, Director of the Jurisdiction, Complementarity and Cooperation Division, on file with the author.

[56] Letter Ref OTP-CR-65/17, 12 February 2020, on file with the author.

intentional (indeed the deterrent rationale was accepted), but rather required that the cruelty, inhumanity or degradation must itself be *deliberate* or 'purposefully designed'. The legal cogency of this finding may be questioned.[57]

Even if Australia only intended to apply pain and suffering *below* the level of cruel, inhuman or degrading treatment for deterrence purposes, but ended up exceeding that threshold, it has commissioned a systematic attack against a civilian population. Applying pain and suffering on persons for deterrence purposes—which it is not disputed that Australia did—is inherently attack-like. Deterrence is based upon the presumption that human behaviour is simply the result of carrot and stick incentives, which migration scholars often call 'push' and 'pull' factors. By manipulating such incentives it is possible to manage refugee flows, while ignoring the underlying claims and grievances refugees seek to express and closing paths to asylum. In 2012, the architect of offshore detention and head of the Expert Panel on Asylum Seekers, Air Chief Marshall Angus Houston, stated that Australia must 'shift the balance of risk and incentive in favour of regular migration pathways and established international protections and against high-risk maritime migration'.[58] In practice, this meant rationing the suffering exerted on detainees in the offshore facilities so that it is worse than the suffering that asylum seekers would otherwise experience.

These examples illustrate the moral repugnancy of the deterrence model. Only some practices that rest on this model reach the level of criminality, let alone constitute a 'crime against humanity'. Deterrence practices may invariably be a violation of the Kantian imperative, but that in itself is not sufficient to make them illegal. However, advocates focus on deterrence in this context because it reveals the systematic and assaultive character of the crimes in question: suffering is meted out in a carefully calibrated way, using human beings as spectacle in a power play.

4. Against Structural Violence

The first account of crimes against humanity, rooted in Kantian ethics, may seem mere moralism, detached from a wider account of politics. Following Marks, we might fault an account of crimes against humanity, even when motivated by an intention to deter as failing to offer 'analytically substantive accounts of the forces of injustice or injury'; instead, they might be perceived to merely 'condemn the manifestation of these forces in particular . . . events'.[59] This second account aims to put front and centre the social

[57] cf Kevin Jon Heller, 'The OTP Lets Australia off the Hook' *Opinio Juris* (2 February 2020) <http://opiniojuris.org/2020/02/17/the-otp-lets-australia-off-the-hook/> accessed 21 May 2020.

[58] Angus Houston, Paris Aristotle, and Michael L'Estrange, 'Report of the Expert Panel on Asylums Seekers' (Australian Government, August 2012) 8 <http://www.kaldorcentre.unsw.edu.au/sites/default/files/expert-panel-report.pdf> accessed 21 May 2020.

[59] See eg Susan Marks' discussion of moralism (relying on Wendy Brown), in Susan Marks, 'Four Human Rights Myths' (2012) Law Society Economy, Working Papers 10/2012, 11 <https://iow.eui.eu/wp-content/uploads/sites/28/2018/05/Session-2-COMPLEMENTARY-7-Marks.pdf> accessed 21 May 2020.

contexts in interpreting crimes against humanity, by locating the wrongfulness of crimes against humanity directed at refugees precisely in their social context; or rather, in their *lack* of social context, best exemplified by the very fact that they are still often not recognized as international crimes.[60] This may seem like a paradoxical proposal: 'they are crimes against humanity precisely because we normally do not think of them as such!' Agnes Callamard, Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, has explained the idea. In her 2017 report on unlawful migrant deaths, she expresses concern at 'an international crime whose very banality in the eyes of many makes its tragedy particularly grave and disturbing'.[61] As emphasized above, the Rome Statute requires an assessment of whether crimes are 'of concern to the international community as a whole'. International criminal law is widely associated with *direct violence*, such as killing or maiming bodies, paradigmatically during times of war.[62] This view is reflected in the institution of the International Military Tribunal, and other iconic examples, such as the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda. The image of an international crime brings to mind countless civilian bodies attacked by an armed group, in violation of fundamental rules of *jus in bello*.

Sociologist Johan Galtung has also called such acts 'personal violence', distinguishing it from 'structural violence'. The latter category refers to the slower and less visible, but no less lethal, processes in which people become victims of structural forces such as poverty and inequality, for example through food shortages, or lack of access to water or to adequate health or education services.[63] As Galtung emphasizes, structural violence is often not even seen as violence. Terrible as personal violence is, we are overly focused exclusively upon it. This is not only because personal violence is transmitted more easily on the media—on television in Galtung's time, and online in our own. It is also because of a certain metaphysics of evil, in which individual agents and bad intentions are held as essential for the possibility of moral reprimand. The ICC rejection discussed above is one apposite example of this focus on deliberate acts. More specifically, a harmful motivation is held by some theorists as necessary for an act to be evil or atrocious.[64] While Kant was our hero with the first theory proposed above, here Kant figures at the source of a problem; for there is perhaps no one who better embodies the primacy of intention and the autonomy of the individual than Kant.[65] His views on subjectivity may

[60] For a philosophical background on wrongs that are characterized precisely by not being recognized as such, see Jean François Lyotard, *The Differend: Phrases in Dispute* (Minnesota University Publishing 1989).

[61] Unlawful Death of Refugees and Migrants Report (n 10) 4. She draws on Ioannis Kalpouzos and Itamar Mann, 'Banal Crimes Against Humanity: The Case of Asylum Seekers in Greece' (2015) 16 Melbourne Journal of International Law 1.

[62] On the distinction between direct and indirect violence, see Johan Galtung, 'Violence, Peace, and Peace Research' (1969) 6 Journal of Peace Research 167.

[63] ibid.

[64] Roy W Perrett, 'Evil and Human Nature' (2002) 85 The Monist 304; Hillel Steiner, 'Calibrating Evil' (2002) 85 The Monist 183; Terry Eagleton, 'On Evil' (2010) 139 The New Statesman 43.

[65] See eg Michel Foucault, 'What is Enlightenment?' in Paul Rabinow, *The Foucault Reader* (Pantheon Books 1984).

indeed lead us to think that moral reprimand is just about personal decisions. This may further distract us from our historical situatedness, as well as structural conditions in which social wrongs can endure. Flowing from the enlightenment view, personal violence and not structural violence thus comprises the 'bread and butter' of criminal law (international criminal law included). Structural violence remains far removed from criminal accountability. Critics working in a Marxist tradition may even regard criminal law as a way of legitimizing structural violence by distracting us from it.

Against this backdrop, crimes against asylum seekers and migrants may be an exceptional category; one that sheds light on what it means to commit an atrocity, and that thus merits specific concern from the 'international community'. Crimes against asylum seekers and migrants may reveal a kind of intermediate space between Galtung's two kinds of violence, revealing the difficulty of clearly distinguishing them. On the one hand, they should be thought of as instances of structural violence. At least in democracies, they do not *normally* involve instances of direct intentional violence by State agents. Inasmuch as prolonged or indefinite detention for deterrence purposes is concerned, such measures are often disregarded as unfortunate but ultimately legitimate outcomes of global disparities of wealth: rich countries have a right to protect their borders. On the other hand, unlike other instances of 'structural violence' in which poverty leads to indirect results such as reduced life expectancy, disease, or drug abuse, border violence still involves *some* direct violence. In other words, we find that structural violence is traceable to its embodiment in direct violence. This is true not only when border enforcement personnel shoot at asylum seekers, whether to intimidate, disable, or kill them. It is also true in any instance in which detention and deportation are involved. To put it plainly, this is the use of force required to keep some of the world's poorest people from opportunities and resources (which in turn could also generate structural political transformation).

This use of force may characterize the still-inchoate category of international crimes against asylum seekers. If investigated and prosecuted, they may enable international criminal law to respond somehow to heinous wrongs that are normally considered beyond its reach. The popular imagination of international criminal law may thereby be recast: no longer a form of sanction against political and military leaders who have lost touch with the imperative of being 'civilized'.[66] The discipline may, rather, emerge as enforcing the rights of those whose de-humanization is often deemed an acceptable outcome of the fact that the world is divided by borders.

Such 'banal' international crimes are those whose gravity emanates precisely from the fact they normally cannot be seen from the perspective of their victims.[67] They are grave because the current world order conceals their adverse consequences on the populations they target.[68] This egregiousness of crimes against asylum seekers militates towards

[66] This is the imagination Makau Mutua ascribes to the human rights movement more generally. See Makau Mutua, 'Savages, Victims, and Saviors: The Metaphor of Human Rights' (2001) 42 Harvard International Law Journal 201.

[67] Kalpouzos and Mann (n 61); Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Penguin Classics 2006).

[68] Kalpouzos and Mann (n 61) 4.

their interpretation as crimes against humanity, as it may help fulfil the chapeau requirement and reveal that seemingly discrete instances of violence at borders are in fact 'systematic' or 'widespread'. The insight is supported by how often they are disregarded as the unfortunate but legitimate outcome of global inequality. Crimes against asylum seekers and other unauthorized migrants are where personal violence visibly meets structural violence, delineating an overlap between the two.

5. 'Cosmopolitics'

The third theory draws on the interpretation of crimes against humanity offered by Luban,[69] although modifying it significantly. Luban's account addresses the perennial question of what it means to commit a crime 'against humanity'. Rather than engage in a metaphysical debate about human nature, he turns to the law itself. As he puts it 'it seems likely that *any* metaphysical theory of humanness will prove far more debatable than the intuitions it is supposed to anchor. . . . [W]e should seek the idea in the same set of intuitions that informs the law of crimes against humanity. That is, we should seek the image of humanness reflected in the law.'[70] However, Luban ultimately does rely on philosophical sources that illuminate the essence of what is valuable in human life, drawing on the work of Hannah Arendt. For Luban, crimes against humanity are crimes against the political nature of humans.[71] As he explains, '[c]rimes against humanity are not just horrible crimes; they are horrible *political* crimes, crimes of *politics gone cancerous*. The legal category of "crimes against humanity" recognizes the special danger that governments, which are supposed to protect the people who live in their territory, will instead murder them, enslave them, and persecute them, transforming their homeland from a haven into a killing field'.[72] With these words, Luban alludes to article 7. The categories he mentions—murder, enslavement, and persecution—are all within the Rome Statute enumeration of crimes against humanity. The distinctiveness of 'crimes against humanity', for Luban, is that they are particularly abusive towards our ability to live in groups. For him, these are crimes where the institutions that are supposed to enable our life in political communities are turned against their purposes. Luban's theory illuminates the distinction between crimes against humanity and war crimes. Whereas the latter are about atrocious acts within an armed conflict between two or more groups, the former are about the nature of government. The underlying imagination (one which also animates Arendt's thinking), is one of totalitarianism. Apart from Nazi Germany and the Soviet Union, apposite examples include Augusto Pinochet's treatment of Chileans during the 1970s and 1980s; Bashar Al-Assad's crushing of an initially peaceful uprising against him, starting from 2011; Omar Al-Bashir's extermination of Darfurians and mistreatment of other Sudanese groups until he was

[69] David Luban, 'A Theory of Crimes Against Humanity' (2004) 29 Yale Journal of International Law 85.
[70] ibid 109. [71] ibid 110. [72] ibid 117 (emphasis added).

ousted in 2019; and many comparable others. These are all crimes against humanity not *only* because torture, extermination, or apartheid are systematically or widely inflicted upon civilians (which is what the law says). Such criteria are advanced purposively, to prevent the State, our vehicle for leading meaningful political lives, from being instrumentalized against us.

Admittedly, Luban's reference to 'governments who are supposed to protect the people *who live in their territory*'[73] may sound like an awkward basis for a theory of 'crimes against refugees as crimes against humanity'. When governments commit crimes of border violence, they commit crimes precisely against those who seek a haven in their territory but may not have established it (yet). If crimes against humanity are to be interpreted by reference to human sociability and our nature as 'political animals', what about people who are neither part of our society nor of our polity? Beyond the mere fact of inhabiting a territory, part of the force of Luban's account lies in his emphasis on a special relationship between a government and its citizens. The emphasis on territory and citizenship in Luban's account reflects a traditional conception of the scope of government responsibilities in liberal political theory.[74] Crimes against humanity thus emerge when that conception itself becomes the source of danger. The crime of apartheid, for example, transformed the link of South African citizenship to an instrument of domination.

The crimes of border violence are crimes against non-citizens, often extraterritorial. Those who commit crimes against refugees often invoke the rhetoric of *protecting* the cohesiveness of society and polity to justify their heinous acts. Think, once again, of the separation of children from their families at the US–Mexican border, a policy that has been described as torture. Imagining such policies as crimes of governments against their people misconstrues them. Their heinousness stems precisely from *hierarchical* relationships in which the victims are vulnerable because they are foreigners.

To allow for an understanding of examples where refugees are exposed to widespread or systematic egregious violence as crimes against humanity, we need to adapt Luban's theory. The rationale for the prohibition of crimes against humanity should be understood not (only) in national terms, but rather as a sort of social protection, in which the relatively porous borders between our societies is acknowledged as intrinsically valuable and necessary for our political lives. This cosmopolitan reading highlights the ongoing interactions that constitute both national and transnational political community.

A wide variety of authors have advanced political theories that demand borders be porous to some degree.[75] These include liberal nationalists as well as cosmopolitans.

[73] ibid (emphasis added).

[74] See eg ICCPR, art 2 (defining jurisdiction).

[75] Of the cosmopolitan camp I focus on here, especially salient are eg Seyla Benhabib, *The Rights of Others: Aliens, Residents, and Citizens* (CUP 2012); Seyla Benhabib, *Another Cosmopolitanism: Hospitality, Sovereignty, and Democratic Iterations* (OUP 2006); Kwame Anthony Appiah, *Cosmopolitanism: Ethics in a World of Strangers* (reprint edn, WW Norton & Company 2007); Bonnie Honig, *Democracy and the Foreigner* (Princeton University Press 2003); Homi K Bhabha, *Our Neighbours, Ourselves* (De Gruyer 2011).

Neither argue for hermetically closed borders. Thomas quotes Édouard Glissant, who has introduced a particularly apposite brand of cosmopolitanism, championing 'the encounter, the interference, the shock, the harmonies and disharmonies among cultures'.[76] As Thomas explains, Bonnie Honig proposed the label of 'cosmopolitics'.[77] Honig's theoretical move intended to signal a turn away from the Kantian notion of cosmopolitanism as incremental progress towards global perpetual peace. Glissant's 'encounter' and 'interference'—and indeed a broader programme for porous borders—are worthwhile not only for the sake of an aspirational future, but also for what they bring to us *today*.

Such cosmopolitan views typically highlight that our most vibrant communities are never composed exclusively of compatriots.[78] They are nearly always homes for migrants and refugees; and members of such groups contribute to the regeneration of the 'demos'.[79] We live together politically not only in our own pre-existing communities. Essential to any conception of humans as 'political animals' is defending their rights to go beyond their communities and request asylum elsewhere. Equally important as a basis for political life is the duty to heed the call of those who need such safety, and to display solidarity with them. Ultimately, political participation, too, goes beyond national borders and the strict definition of citizenship. Starting from Luban's idea of crimes against humanity as crimes against our political nature, we thus arrive at the idea of crimes against humanity as crimes against our cosmopolitan political life. There is a conceptual gap here. Luban is concerned about a lack of societal agreement about metaphysical understandings of the value of human lives. And indeed, the position I articulate here departs, to some degree, from any identifiable political consensus. After all, we are not all cosmopolitans in our basic political convictions—far from it.

As I have acknowledged elsewhere, in some instances, a theory of crimes against humanity resting entirely/predominantly on a controversial political theory may not be a good basis for prosecution. In extremis, it may lead to criminal proceedings that violate the principle of legality, or that are directed against defendants who lack culpability in the sense of understanding their own wrongdoing.[80] Yet inasmuch as prosecutions can avoid such pitfalls, prosecutions based on such accounts may be worthwhile. They invite law to be interpreted with a distinct vision of political ends in mind. Crimes against humanity, in this view, are not simply about eliminating torture, extermination, or mass rape. They are about generating a world in which societies evolve from inter-social and intercultural relations, and from opportunities to encounter each other. Whoever utilizes politics and the State in order to prevent such encounters

[76] Chantal Thomas, 'What Does the Emerging International Law of Migration Mean for Sovereignty?' (2013) 14 Melbourne Journal of International Law 392, 446.

[77] ibid 445.

[78] See eg Saskia Sassen, *The Global City: New York, London, Tokyo* (2nd edn, Princeton University Press 2001).

[79] See generally Benhabib, *The Rights of Others* (n 75).

[80] Itamar Mann, 'Eichmann's Mistake: The Problem of Thoughtlessness in International Criminal Law' (2020) 33 Canadian Journal of Law and Jurisprudence 145.

through systematically violent measures, amounting to the subheadings of article 7, should be held accountable under international criminal law. The crime's basic elements, the *actus reus* and *mens rea*, remain; yet their understanding is laden with a specific political vision. International criminal law is granted positive ends, not only negative ones. It is no longer simply about imposing accountability for the worst of crimes. It is also about advancing and promoting an understanding of what it means to live in a good (global) society.

Admittedly, such a vision cannot rely on international criminal law alone, but rather must be embedded in a much wider political project that reimagines and reinterprets international law. In this tradition, public international law as a whole protects a 'cosmopolitan right' concerning 'the relations of Right between persons and foreign states'.[81] These abstract principles require a historical corrective, a rejection of the traditions that allow such rights to be denied *in reality*. After all, the need for asylum and protection from grave human rights abuses is not equally distributed on the face of the planet; nor is the rate in which societies choose to close their doors.[82] Achiume's work is informative in this context. Achiume has contributed to upending the xenophobia hard-wired into a dominant understanding of international law.[83] She has then gone further to argue that migration from former colonies to States that have participated in their colonization is a form of emancipatory action.[84] An international criminal prohibition informed by a need to protect refugees should be understood, in this view, as one small component of a reorientation of international law towards dismantling global racial hierarchies.

The global regime of violent borders is sometimes characterized as apartheid.[85] Alston mentioned a global apartheid in which borders are closed to prevent the movement of poor migrants seeking protection from the risks of climate change. Economic historian Quinn Slobodian has shown how early in the twentieth century, the racism of apartheid germinated not only into global economic policy but also into the governance of multiple national borders.[86] Political theorist Achille Mbembe has gone further, and has advanced an analysis of contemporary world politics based on what he calls 'the logic of enclosure': a comparison between apartheid and border violence.[87] Complementary to the positive vision of cosmopolitanism or cosmopolitics, the negative vision attached to crimes of humanity against refugees may best be framed as one of a global apartheid. Apartheid occupies a separate subheading in the Rome Statute definition of crimes against humanity—article 7(1)(j). It reminds us that systems of

[81] Benhabib, *Another Cosmopolitanism* (n 75) 148.

[82] It is currently still the case that most refugees find protection in the Global South.

[83] E Tendayi Achiume, 'Governing Xenophobia' (2018) 51 Vanderbilt Journal of Transnational Law 333.

[84] E Tendayi Achiume, 'Migration as Decolonization' (2019) 71 Stanford Law Review 1509.

[85] Etienne Balibar, *We, the People of Europe? Reflections on Transnational Citizenship* (Princeton University Press 2004) 113, 121.

[86] See Quinn Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (Harvard University Press 2018) ch 5.

[87] Achille Mbembe, *Critique of Black Reason* (Duke University Press Books 2017) 35.

racialized hierarchy and exclusion have earned a distinctive form of global legal condemnation. This section suggests that that reasoning may have wider application, to serve as an interpretative frame for crimes against humanity generally.

6. Conclusion

The three interpretive theories discussed above aim to support the claim that border violence sometimes entails crimes against humanity. Connecting the three interpretations, the argument moves along two axes, from morality to politics, and from a negative to a positive vision.

The 'deterrence paradigm' emphasized the *moral* injury in instrumentalizing human life. It was animated by a negative vision of wrongdoing, although that vision may generate a society where no such instrumentalization would occur, a 'kingdom of ends', to use Kant's term. 'Cosmopolitics', in contrast, aimed to provide a programmatic agenda. Its antithesis is global apartheid, but it also provides a sketch of the kind of society we should strive for: a multicultural and multiracial society with porous borders. Some readers may respond that precisely such societies generated considerable backlash in many parts of the world, with Brexit and Trumpism being just two examples. Such backlash does not mean that the positive vision should be abandoned.

Between these two categories, lies the idea of criminalizing structural violence. The idea of 'banal international crimes' has a moral valence, namely, reprimanding conditions in which certain humans can simply be rendered rightless. While it did not outline a positive political theory, the notion of structural violence generates a larger political programme. At the very least, background conditions of global inequality are highlighted as both part of what makes crimes against some people seem 'natural', yet also warranting global legal opprobrium.

Where do we, as advocates, want to stand on this continuum? In the larger context of a fiery public debate, simply adopting a 'culture of formalism' may neither be possible, nor advisable.[88] A programme to reorient international criminal law towards prioritizing condemnation of border violence, and holding accountable those responsible for it, does not rest on doctrinal grounds alone. It requires a purposive account of crimes against humanity that inevitably rests both on ethics and politics. This chapter aims to join a conversation that must include not only amongst scholars, but also activists, politicians, refugees and citizens of 'host countries'. Prosecution, even prosecution at an international criminal tribunal, is ultimately a political act. International criminal law is only relevant to curtailing border violence as part of a larger shared vision of justice.

[88] Koskenniemi (n 16) 571; Jan Klabbers, 'Towards a Culture of Formalism? Martti Koskenniemi and the Virtues' (2013) 27 Temple International Comparative Law Journal 417.

Index

For the benefit of digital users, indexed terms that span two pages (eg, 52–53) may, on occasion, appear on only one of those pages.

A

accountability *see also* accountability of international organizations
- camps 1158, 1166–8
- data protection 1012, 1014–15
- discrimination 513
- domestic courts, role of 515
- European Union 514–15
- genocide 438–9, 1169–70
- human rights 514–16
- international organizations 17, 1157–73
  - ILC Articles on State Responsibility 1160–7, 1172
- non-State armed groups (NSAGs) 1138, 1152–5
- resettlement 1092, 1095
- responsibility/burden-sharing 515–16
- UNHCR 18–19, 1157–73

Africa 11–12, 279–95 *see also* African Charter on Human and Peoples' Rights (ACHPR); African Commission on Human and Peoples' Rights (ACHPR); Comprehensive Refugee Response Framework (CRRF); OAU Convention
- African Committee of Experts on the Rights and Welfare of the Child (ACERWC) 289, 291
- African Court on Human and Peoples' Rights (AFCHPR) 289–91, 515–16, 880, 883
- African Economic Community, Free Movement Protocol to Treaty establishing 291–2
- African Humanitarian Agency, creation of 291
- African Union (AU) 280–1, 289–93, 338, 852–3
- Asian–African Legal Consultative Organization 390
- asylum, right to seek and obtain 288
- AU Commission Department of Political Affairs 291–2
- camps 293
- children 281, 287–8, 291, 605, 749, 990–1, 994, 1002–3
- civil society 293
- climate change and disasters 294–5
- complementary protection 288
- contemporary achievements and challenges 293–5
- European Union 101, 294–5
- freedom of movement 293–5
- housing, land, and property rights 1122–3
- human rights 281, 287–8
- humanitarian affairs 292
- humanitarian organizations 293
- institutional framework 289–93
- nationality 291
- naturalization and integration 1056–7, 1061–2
- newly independent States 197–8
- procedural standards 597–9, 605
- progressive development of the law 293
- Refugee Convention 281, 293–4, 1056
- refugee status determination (RSD) 108, 293–5
- regional economic communities (RECs) 280

Africa (*cont.*)
sexual orientation and gender identity (SOGI) claimants 80
sub-regions 280–1
treaty framework 281–8
UNHCR 197–8, 280–1
African Charter on Human and Peoples' Rights (ACHPR) 281, 287–93, 723–4
asylum 254–5, 288, 878, 880, 882
education, right to 974
family reunification, right to 990
gender-based violence, Maputo Protocol on 565–6
legal assistance and representation, access to 601
nationality 159–60
non-refoulement, principle of 288, 882
OAU Convention 286, 595
Protocol to the African Charter on the Rights of Women in Africa 281, 287–9
work, right to 652–3
African Commission on Human and Peoples' Rights (ACHPR) 289–93, 880
international humanitarian law 211
legal assistance and representation, access to 601
Special Rapporteur on Refugee, Asylum Seekers, Internally Displaced Persons and Migrants in Africa 290, 295
aggression, crime of 227, 635, 641, 716, 830–1, 1134–5
aiding and abetting 720–1
algorithms 619–22, 1008–9, 1095–6
American Convention on Human Rights (ACHR) 297–8
asylum, right to 254–5, 324, 878–9, 912
work, right to 654
family reunification, right to 990–1
Latin America 323–4, 326–9
non-refoulement, principle of 208–9, 324, 900, 902–3, 912
procedural standards 598–9, 601–2
San Salvador Protocol 654
translators or interpreters, access to 601–2
American Declaration of the Rights and Duties of Man 297–8, 326–7, 663–4, 902, 910–12
apartheid 56–7, 1176, 1178, 1189–90
Arendt, Hannah 122–4, 1186–7
armed conflicts *see also* conflict refugees; international armed conflicts (IACs); international humanitarian law; non-international armed conflicts (NIACs); non-State armed groups (NSAGs), responsibility of; war crimes
Armenian refugees 25, 33–4
Asia *see also* Central Asia; East Asia; Southeast Asia
ASEAN 423–40
citizenship 1057
human trafficking 557–8
naturalization and integration 1057, 1061
Refugee Convention, ratification of 103–4
sexual orientation and gender identity (SOGI) claimants 80
asylum, right to 15, 867–82 *see also* Common European Asylum System (CEAS); national constitutions and right to asylum
access to asylum 515, 599–600, 926
Asylum Cooperative Agreements 531–3
Asylum Procedures Directive (EU) 354, 358, 523
asylum, right to seek 242–3, 254–6, 873–7
asylum shopping 704–5
customary international law 242–3, 253–6, 933
European Union 870–1, 878, 880–1
general principles of international law 255, 868–9
Global Compact on Refugees 867–70
historical perspective 867–9
human rights 253–5, 868, 870–1, 873–4, 876, 878–9, 933
international protection, use of term 867, 870–2, 882
national constitutions 260, 262–3, 868–9, 881–2

non-refoulement, principle of 244, 253–5, 874–7
onward migration 1103–9, 1115
procedure 598–9, 877
receive asylum, right to 242–3, 253–6
refugee status and asylum, relationship between 867–70
Refugee Convention 253–4, 870–2, 874–5, 877
regional instruments 878–82
resettlement 1080–3, 1090–1, 1098
State practice 255–6, 867
subsidiary protection 870–1
Australia 448–52 *see also* Nauru; Papua New Guinea (PNG)
Bali Process 448–52
border crimes 1183
Cambodia 399, 425
cessation 1037, 1041
climate change and disasters 457–8
complementary protection 670–1, 673–4
constitutional law 267–8, 272–6
crimes against humanity 1174–5, 1179–83
criminalization of people smuggling and human trafficking 449–50
detention 272–3, 445, 448–51
deterrence 445, 449–51, 526
disabilities, refugees with 788, 794–6
East Timorese refugees 447–8
family reunification 1001
gender 70, 76
human rights 272–4, 444–5, 451, 527–9
human trafficking 448–52
Indonesia 504
international organizations, accountability of 1168
interdiction at sea 272–3, 445, 495–7, 500, 908–11
liberty, right to 268, 272–6
Malaysia 273–4, 504, 528–9
Manus Island (PNG) 267–8, 273–6, 511, 514–15, 1134–5, 1179–80
Ministers, unconstrained power of 273–5
non-refoulement, principle of 272–3, 496–7, 509–10, 906, 908–12
offshore detention and processing 91–2, 448–51, 504, 514, 908, 1180–2
Operation Relex 496
Operation Sovereign Borders 496, 908, 911
Pacific Island States 273–4, 442, 448, 451–2, 458
race 55–6, 272
regional processing centres (RPCs) 525, 528–9
resettlement 73–4, 1081–2, 1085–6, 1089–92
safe third country (STC) law and practice 518–19, 525–9, 534
securitization of refugees 449
settlement 450–1
sexual orientation and gender identity (SOGI) 763–4, 768, 773
Tampa incident of 2001 495
temporary protection 681–4, 686
torture 444, 1182
White Australia policy 272

B

Bali Process 89–90, 340–1, 390, 429–30
Bangladesh 407, 413, 420–1, 438–9
Andaman Sea crisis 908
camps 420
Chakma refugees 199
detention 434
India 417
Rohingya refugees 412, 420–1
secession 417, 419
Bangkok Principles on Status and Treatment of Refugees 251–2, 335–6, 340, 390, 414, 428–9, 439–40, 1055
Bhutan 407, 412, 421–2
biometrics 1007–8, 1016–18, 1110
boat migrants *see* interdiction powers of State at sea; search and rescue (SAR) obligations at sea
border control
crimes against humanity 17, 1174–90
detention 933, 938–9, 945, 950, 1175, 1179–83
deterrence 1180–5, 1190
European Union 353, 1158, 1169
extraterritoriality 13, 502, 907, 913
family separation 1175, 1181–2
human trafficking 557–60

border control (*cont.*)
international criminal law 1175, 1177–8, 1183–6, 1189–90
politics 97–101
procedure 596
smuggling of migrants and refugees 535, 546–7, 551
walls 907
Bosnia and Herzegovina 662–3, 1122, 1125–6
Brazil 319–20, 325–6, 331–2, 1112–13
CONARE (National Committee for Refugees) 577
humanitarian visas 1112
onward migration 1101
refugee status determination (RSD) 577
resettlement 1083–4
burden-sharing *see* responsibility/burden-sharing
Burma *see* Myanmar; Rohingya refugees from Myanmar

C

Cambodia 68–9, 305, 399, 426, 1057, 1072, 1166
peace process 425
Refugee Convention and Protocol 426, 430
refugee status determination (RSD) 577
repatriation 425, 1073
Canada 12, 296–303, 311, 313–14
asylum, right to 531
borders 302–3, 311
Central America 299–302, 313
Charter of Rights and Freedoms 300–1, 530–1
children 751–2, 755
complementary protection 670–1, 673–5
deportation 300
extraterritoriality 530–1
fair hearing, right to a 531
gender-based claims 76, 296, 301, 530, 741
human rights 296–7, 299–301, 328
internal protection alternative (IPA) 706, 736–7
judges, assignment of 618–19
Nansen Medal 106, 299, 302
non-refoulement, principle of 297, 530–1
permanent residence 1058
precarious migrants, concept 142–3
protectionism 299, 301–3, 313
race 50–2, 58, 307–8
recognition rates 107–8, 618–19
Refugee Convention 297, 299, 530–1
refugee status determination (RSD) 299, 302, 576–7, 582, 618–19, 777
repatriation 143–4
resettlement 73–4, 106, 1083–4, 1091–2, 1095, 1097
safe third country (STC) law and practice 518–19, 530–1
denial of claims from 302, 312–14
United States, agreement with 71, 302, 312–14, 530–1
sexual orientation and gender identity (SOGI) claimants 94–5, 762–3, 772–3
subsidiary protection 670–1, 673–5
United States 296, 298–301, 304–5, 313–14
Safe Third Country (STC) Agreement 302, 312–14, 530–1
women 301, 731
Caribbean, US interdiction programme in the 493–5, 500
carrier liability/sanctions 104–5, 311, 503–4, 509, 542, 556, 581, 917
Cartagena Declaration on Refugees 297–8
see also refugee definition in Cartagena Declaration
accountability 515–16
asylum, right to 890–1
climate change and disasters 837–8
complementary protection 662
conflict refugees 828–31
family reunification, right to 994
internal protection alternative (IPA) 700–1
international humanitarian law 227, 239
Mexico 298, 309
MIRPS (Comprehensive Regional Protection and Solutions Framework) 478–9
naturalization and integration 1055
non-refoulement, principle of 900, 903
policy instruments, list of 323
soft law procedural standards 594
refugee, definition of 322–4, 331–3
temporary protection 251–2
Venezuelan refugee crisis 270

Central America
Canada 299–302, 313
Cartagena Declaration on Refugees 128
deportations 119–20, 300
International Conference on Central American Refugees (CIREFCA) 468, 634–5
MIRPs (Comprehensive Regional Protection and Solutions Framework) 477–9
United States 299–300, 304, 531–3
Central Asia 12, 370–88
cessation of refugee status 16, 205, 1029–45
assessments 1037–42
ceased circumstances 1030–1, 1034–42, 1044–5
durable solutions 1040, 1064
exemption from 1042–4
internal protection alternative (IPA) 710
nationality, loss of 1044–5
naturalization and integration 1030, 1047, 1053
non-State parties, protection provided by 1041–2
presence of effective protection 1037–9
repatriation 1032–4, 1039–40, 1068–70, 1072–5, 1078–9
returns to country of origin 1030, 1032–4, 1040
significant and non-temporary nature 1041–3
Charter of Fundamental Rights of the EU 254–5, 878, 880–1
Article 18 355–6, 706, 880–1
Common European Asylum System (CEAS) 355–6
Dublin system 525
family reunification, right to 990
non-refoulement, principle of 208–9
smuggling of migrants 549
children 15, 745–60 *see also* Convention on the Rights of the Child (CRC); education, right to; unaccompanied children
Africa 749, 990–1, 994, 1002–3
age of criminal responsibility 752
age of majority 1005
asylum, right to 898
best interests principle 672–3, 751, 1004
child labour 817–19, 953–4
conflict refugees 817–19
Dublin system 522
European Convention on Human Rights (ECHR) 604–5
family reunification, right to 988–91, 1002–5
gang violence 817–19
human trafficking 557
military recruitment 817–19
nationality 164–5, 749
persecution 749–52
procedural standards 604–5
stateless refugees 164–5
Chimni, BS 4–5, 8–9, 56–9, 413, 939
China 391–6 *see also* Hong Kong SAR; Macau; Taiwan
asylum, right to 881
children 437
citizenship 1057
Constitution 391–2
domestic law 392–4
Kachins and Kokangs from Myanmar 393–4, 396
Kazakhstan 385–7
North Koreans 393–4, 396, 406
Refugee Convention 388, 390, 391–393, 404–5
refugee status determination (RSD) 392, 396, 405
Shanghai Convention 2001 with Central Asia 375, 383–4
citizenship 123, 154–5, 1042
civil citizenship 1060
climate change 457
economically self-reliant refugees 1048
human rights/citizenship conundrum 1050–1
naturalization and integration 1047–8
onward migration 1111
plural citizenship 1054
political citizenship 1060
race 53
stateless refugees 154–5
virtual citizenship 802–3
xenophobia 46–7

civil and political rights 746–7, 808 *see also* International Covenant on Civil and Political Rights (ICCPR)
climate change and disasters 15, 442, 453–9, 832–47
  Cartagena Declaration on Refugees 635–6, 639–40, 837–8
  climate justice theory 457
  conflict refugees 819, 826
  disabilities, people with 781–2, 784, 794–5
  discrimination 836–7, 840–1, 847
  education, right to 976–7
  human rights 457, 832, 837–41, 847
  humanitarian protection mechanisms 846
  internal displacement 832–3, 848, 850
  internally displaced persons (IDPs) 834–5, 846
  Kainaki II Declaration 458
  knowledge gaps 456
  Nansen Initiative on Disaster-Induced Cross-Border Displacement 844–6
  OAU Convention 284–5, 631–2, 639–40, 837–8
  Paris Agreement 2015 844–5
  Platform on Disaster Displacement 844–5
  policy-making 844–6
  precautionary principle 842
  pre-emptive strategies 847
  Protection Agenda (Nansen Initiative) 845–6
  Refugee Convention 294, 454, 629, 637, 835–8, 847
  refugee, definition of 639–40
  relocation of entire populations 457–8
  remain, development of legal and policy frameworks to assist people to 834, 847
  Sendai Framework 844–5
  slow-onset impacts 453–4, 833, 842
  small island States 453–4, 843
  statelessness 832, 843–4
  sudden-onset disasters 832–3
  UN Framework Convention on Climate Change (UNFCCC) 844–5
  voluntary/forced migration binary 139
  well-founded fear of persecution 836–7, 842–3
colonialism
  border crimes 1189
  boundaries, imposition of 701
  climate change and disasters 455, 457
  decolonization 129, 281–4
  empires, breaking down 1083–4
  freedom fighters 253, 283–4, 630
  neo-colonialism 44–5, 102, 128–9, 455
  OAU Convention 283–4, 630–1
  Ottoman and Austro–Hungarian empires, collapse of 25
  Pacific Island States 442, 455, 642
  Partition of India 1947 407–8, 410–11
  politics 100–2
  post-colonialism 9, 57, 67–8, 98–9, 115, 127–9
  race 44–5, 55–8
  refugee, definition of 630–1
  resettlement 1083–4
  settler societies 1083, 1091–2
Common European Asylum System (CEAS) 354–62, 725
  cooperation, practical 361–2, 369
  Dublin system 356–7, 359–60, 521, 525, 1106–7
  European Asylum Support Office (EASO) 361, 577
  harmonization 356, 583
  human rights 361–2, 606
  implementation 356–7, 369
  Qualification Directive (EU) 92, 355–6, 583
  Reception Directive (EU) 92
  sexual orientation and gender identity (SOGI) claimants 79, 88–9, 92
  subsidiary protection 355–6, 359, 369
  vulnerable persons 92
communism, refugees fleeing 100, 303, 305, 576
Comprehensive Regional Protection and Solutions Framework *see* MIRPS (Comprehensive Regional Protection and Solutions Framework)
complementary protection *see also* subsidiary protection 14, 661–79, 903
  asylum, right to 870–1
  conflict refugees 815–16, 829
  family reunification, right to 1000

human rights 202–4, 209–12, 216, 218
Human Rights Committee 666–9, 674–5
procedure 588–9, 593
humanitarian admission programmes 144–5
humanitarian visas/humanitarian corridors 144–5
internal protection alternative (IPA) 700
migrant/refugee binary 144–5
onward migration 1102–3, 1113
procedure 588–90
resettlement 1090–7
soft law procedural standards 593
Comprehensive Refugee Response Framework (CRRF) 474–7
Global Compact on Refugees 144–5, 474–7
migrant/refugee binary 144–5
conflict refugees 15, 815–31
climate change and disasters 819, 826
complementary protection 671–2, 815–16, 829
education, right to 972, 976–7
historical context 820–2
human rights 825, 827
humanitarian aid 827–8
international humanitarian law 815, 823, 825, 828, 830–1
nationality 822, 826–7
occupation 830–1
persecution 822, 825–7, 831
political opinion 822, 826–7
race 822, 826–7
refugee, definition of 815–16, 823, 828–31
religion 822, 826–7
sexual and gender-based violence 817, 819–20
situational events 829–31
social group, membership of a particular 822, 826–7
conflicts *see* conflict refugees; international armed conflicts (IACs); international humanitarian law; non-international armed conflicts (NIACs); non-State armed groups (NSAGs), responsibility of; war crimes
constitutions *see* national constitutions
consular authorities *see* diplomatic and consular authorities
containment *see* detention/containment; liberty, right to
Convention on the Rights of the Child (CRC)
age assessments 748–9
appropriate protection 756–8
Charter of Arab Child's Rights 343
benefit of the doubt 748–9, 752–3
'best interests' principle 747–8, 753–5, 757–60
child soldiers 817–19
climate change and disasters 838–9
Committee on the Rights of the Child (UNCRC) 604–5, 746, 751, 755–6
complementary protection 666–9, 672–3
family reunification, right to 993, 996, 1003–6
non-refoulement, principle of 900–1, 906
discrimination 756–7
drafting 746–7
durable solutions 758–60
education, right to 147–8, 757–8, 972, 974, 978–80
complaints 985
enforcement 984
Individual Education Plans 756
monitoring 984–5
quality 987
reservations 978–9
family reunification, right to 759, 989–91, 993, 996, 1002–6
health, standard of 757–8
humanitarian assistance 746–7, 756–8
individual complaints mechanism 755–6, 760
life, survival, and development, right to 757–8
non-refoulement, principle of 753–6
persecution threshold 750, 753
ratification 746–7
refugee status determination (RSD) 752–3
reservations 978–9
Smuggling of Migrants Protocol 545–6
unaccompanied minors 755–6, 758–9
UNHCR 747, 751–5

Convention on the Rights of Persons with Disabilities *see* Disabilities Convention
Convention relating to the International Status of Refugees 1933 36–40
country of origin (COI) information 90, 92–3, 577, 607–8, 617, 636
Convention relating to the Status of Refugees *see* Refugee Convention
cosmopolitan ethics of refugee protection 115, 121–9
  agency-centric views 115, 122–5
  cosmopolitics 1186–90
  postcolonial views 115, 127–9
  power-centric views 115, 125–7
Council of Europe *see also* European Convention on Human Rights (ECHR)
  Committee of Ministers (CM) 364–5, 593–4
  decision-making bodies 362
  work, right to 962–4
  European Committee on Social Rights 364–5
  European Social Charter 364–5
  gender-based violence 565–8
  human trafficking 557–8, 562, 568
  Istanbul Convention 565–8
  non-judicial institutions 362
  Parliamentary Assembly 364–5, 369, 996
  social group, concept of membership of a particular 364–5
  soft law 352, 362, 369, 593–4
  stateless refugees 159–60
credibility assessments
  appeals 607–8
  behavioural psychology 614–15
  benefit of the doubt 612–13
  coherency 612–14, 616–17, 620–1
  consistency 614, 616–17
  criteria 609, 614–17
  culture 617, 620
  deception detection 614–16, 620
  digital transformation of refugee governance 1007–8, 1022–4
  disabilities, people with 786–7, 790–1
  discretion of decision-makers 607–9, 619–22
  European Union 609, 612–13, 616–18
  general credibility 612–17
  group-based determinations 622
  individual determination 591
  lie detectors 614–15
  plausibility 612–14, 617, 620
  psychology 614–15, 620
  Qualification Directive (EU) 609, 614, 617
  recognition 618–20
  refugee status determination (RSD) 583–4, 586–7, 591, 771, 775–6
  reliability 614–16
  sexual orientation and gender identity (SOGI) claimants 79, 771, 773–7
  standard of proof 609, 613
  traumatology 614–15, 620
  women 732, 734–5
crimes against humanity 17, 712–13, 715–18, 850, 1136, 1174–1190
crimes against peace 712–13, 715–18
criminal offences/criminalization *see also*; exclusion; international criminal law (ICL)
  age of criminal responsibility 752
  asylum, right to 253
  detention 927
  expulsion 991
  extradition 362–3, 716–17, 724–5
  human rights 927–9, 932
  human trafficking 557–9
  liberty, right to 945–7, 950–1
  non-penalization 917–18, 927–31
  persecution 771
  procedure 611
  prostitution 555
  Residence Permit Directive (EU) 558
  sexual orientation and gender identity (SOGI) claimants 763–5
  silent, right to remain 611–12
  smuggling of migrants 536, 538–42, 548–50
  terrorism 253
culture *see also* economic, social and cultural rights; International Covenant on Economic, Social and Cultural Rights (ICESCR)
  credibility assessments 617
  ethics 118
  female genital mutilation (FGM) 65, 732–3, 739–40, 775–6

forced compliance with cultural conventions 732–3
gender 61–2, 732–3
liberal nationalism 116
naturalization and integration 1053–4, 1060
sexual orientation and gender identity (SOGI) claimants 90, 95–6
customary international law (refugees) 240–57, 511–12, 661
accountability of international organizations 1161–2, 1166–8
asylum, right to 242–3, 253–6, 933
cessation 1042–3
constitutions 263–4
erga omnes obligations 257, 1163
housing, land, and property rights 1122–4, 1132–3
interdiction at sea 485–6
international armed conflicts (IACs) and non-international armed conflicts (NIACs) distinguished 224, 231
international humanitarian law 222–4, 1148, 1150, 1152–3
jus cogens 54, 120, 248–9, 256, 901–2, 904–5, 1162
liberty, right to 933, 942
non-refoulement, principle of 242–9, 899, 901–2, 904–5, 912, 915
exclusion 721–2
jus cogens 256, 901–2, 904–5
opinio juris 256–7, 904, 915
politics 102
non-State armed groups (NSAGs) 1142, 1150, 1152–3
opinio juris 240–1, 255–7, 904, 915
practices as custom 257
protection 242–57
restricted role 241–3
stateless refugees 15, 166
temporary refuge 242–3, 249–52, 256–7, 684–5
Cyprus 25, 696, 1132

D

data protection 1007–8, 1010–17
databases 1008, 1018–21
death penalty, risk of 665, 669
Declaration of Privileges for Hamelin 1690 571
Declaration on Territorial Asylum 1967 41
declaratory, refugee status as 175–7, 183
definition of refugee *see* refugee, definition of
deportation/expulsion 35–6, 38–9, 894–5, 905–6
border crimes 1175, 1178, 1181–2
collective expulsion 600, 905
criminal offences 991
exclusion 712–13, 717, 724–5
fair hearing, right to a 724–5
family reunification, right to 989, 991–3
human rights 905–6, 934–5, 991–4
international humanitarian law 234
destitution 363, 839–40, 913–15, 965–6, 970
detention 217 *see also* liberty, right to
alternatives to detention 42, 217
arbitrary detention 147, 217, 922
border crimes 1175, 1179–83
criminalization 929
deterrence 509–10, 922
disabilities, people with 788–9, 795–6
Dublin system 524
extraterritoriality 507, 509–10
habeas corpus 936
human rights 217, 363–4
human trafficking 561
interdiction at sea 487
international humanitarian law 234
internment 234
necessity requirement 363–4
non-penalization 922, 926
prisoners of war 24–8, 237–8
smuggling of migrants and refugees 13, 545
deterrence 100–1, 104–5, 141–3, 148–50
asylum, right to 872, 875–6
border crimes 1180–5, 1190
cooperative deterrence 503–5, 511–12
detention 509–10, 922
extraterritoriality 502–5, 507, 509–12
human rights 510, 945–6
interdiction at sea 497
resettlement 75

digital transformation of refugee governance 15–16, 1007–25
accountability 1007–8, 1010–15
algorithms 619–22, 1008–9, 1095–6
artificial intelligence 586–7, 619–22
automated decision-making 1007–8, 1011–12
biometrics 1007–8, 1016–18
credibility assessments 1007–8, 1022–4
data protection 1007–15
data protection principles 1012–14
General Data Protection Regulation (EU) 1011–12, 1015
identity data, sharing 1016–17
databases 1008, 1018–21
Deepfake images 1022–3
digital bodies 1009–15
digital identities 1010
digitization 1008–9, 1021–5
due process 1008–9, 1022–4
evidential assessments 619–22
false attribution of imagery 1023
knowledge management 1018–21
legal identity 1015–18
personal identifiable information (PII) 1010
privacy 1007–11
Refugee Assistance Information System (RAIS) 1019
refugee status determination (RSD) 586–7, 592, 1007–8, 1012–13, 1022–3
resettlement 1008, 1023–4
results-based management (RBM) systems 1007–8
search and seizure 1023
security 1009, 1024–5
social media 1022
verification issues 1023–4
videos/generative adversarial networks (GANS) 1022
visibility, duty of refugee 1008–9, 1016
vulnerability assessments 1007–8, 1019–20
diplomatic and consular authorities 329, 633–4, 912
Caracas Convention 320–1, 324, 332–3
Cartagena Declaration on Refugees 633–4
cessation 1032
embassies 912, 1091–2
human rights 216
international protection, use of term 870
political asylum 318–21, 324, 332–3
Vienna Convention on Consular Relations 545–6
Disabilities Convention 780–1
Committee on Disabilities 779–81, 785–6, 794–6
Convention against Torture (CAT) 784
credibility assessments 786–7
detention 795–6
disasters 781, 784, 794–5
discrimination 785–6, 795–6
durable solutions 793–6
entry into force 779–80
human rights 780, 784, 791–4, 796
international humanitarian law 780, 784
medical terms, seeing disability in 794
non-refoulement, principle of 784–5
Optional Protocol 779–80
reasonable accommodations 780, 785–7, 789, 791–3
refugee, definition of 784–5
refugee status determination (RSD) 791–3
resettlement 793–4
UNHCR 781, 785, 787, 793–4
well-founded fear of persecution 786–7
disabilities, refugees with 15, 778–96
see also Disabilities Convention
capacity 790–1
Charter on Inclusion of Persons with Disabilities 782–3
credibility assessments 790–1
detention 788–9
disasters 781–2
discrimination 782–3, 789–90
human rights 779–84
institutionalization 788–9
large-scale displacement/mass influx 781–3
Minimum Standards for Age and Disability Inclusion in Humanitarian Action 783
non-refoulement, principle of 784–5
persecution 786–90
reasonable accommodations 789–93
refugee status determination (RSD) 790–3
sexual assault and exploitation 788–9

social group, membership of a particular 790
Sustainable Development Goals (SDGs) 781–2
disappearances 208–9, 245, 397–8, 665, 900
disasters *see* climate change and disasters
discrimination and inequality 636–7, 639–40, 642
accountability 513
border crimes 1184–6
children 756–7
climate change and disasters 836–7, 840–1, 847
disabilities, people with 782–3, 785–6, 789–90, 795–6
education, right to 42, 973–5, 979–80, 984–7
work, right to 955–9, 962, 964, 969
equality before the law 216–18
family reunification, right to 1000
human rights 207, 217–18
internal displacement 855–7
international humanitarian law 223
naturalization and integration 1050, 1052
refugee, definition of 636–7, 639–42
resettlement 1095
search and rescue (SAR) obligations at sea 491
sexual orientation and gender identity (SOGI) claimants 80–1, 87, 89, 92–6, 764–5
Smuggling of Migrants Protocol 541
stateless refugees 806–7, 810–11
structural discrimination 155–6
women 742–3
distinction, principle of 223–4, 228, 232–3
distress, ships in 484–6, 490–2, 500
documentation *see also* identity certificates and passports
European Convention on Human Rights (ECHR) 999
family reunification, right to 998–9, 1001–2
recognition as a person before the law 42
stateless refugees 156–7
travel to find solutions, right to 42
domestic violence
Council of Europe Convention 565–8
refugee status determination (RSD) 582
women 65, 732–4, 736, 740, 775–6
dualism 261–4
Dublin system 353, 518–19, 521–5
Common European Asylum System (CEAS) 521, 525, 1106–7
Dublin III Regulation (EU) 1106–9
Dublin Regulation transfers 521–3
EURODAC Regulation (EU) 1106–9
financial assistance 523–4
human rights 521–5
inhuman or degrading treatment 522, 524
nationalism 1108–9
non-EU countries, transfer of responsibility to 523–5
onward migration 1106–9
procedure 525, 591
readmission agreements 523, 525
responsibility/burden-sharing 470, 1107–8
sovereignty clause 1107–8
voluntary/forced migration binary 142
xenophobia 1108–9
due process 329–30, 894–7
digital transformation of refugee governance 1008–9, 1022–4
extraterritoriality 272
fair hearing, right to a 218
liberty, right to 936
refugee status determination (RSD) 598–9
durable solutions 143–7, 1064 *see also* naturalization and integration; resettlement; voluntary repatriation
asylum, right to receive 253
cessation 1040, 1064
children 758–60
climate change and disasters 847
digital transformation of refugee governance 1023–4
Disabilities Convention 793–6
Inter-Agency Standing Committee (IASC) Framework on Durable Solutions for Internally Displaced Persons 860–1
internal displacement 849, 860–2
migrant/refugee binary 143–6
onward migration 1099, 1102–3, 1111

durable solutions (*cont.*)
restitution and other remedies 1119–20, 1127, 1129, 1135–6
stateless refugees 153, 157
temporary stays in third States for education or labour purposes 1064
use of term 1081–2

E

East Asia 11–12, 389–406
economically self-reliant refugees 1048, 1051, 1059–60, 1062–3, 1095
economic, social and cultural rights *see* International Covenant on Economic, Social and Cultural Rights (ICESCR)
children 746–7
education, right to 972
work, right to 952–3, 962
European Committee on Social Rights (ECSR) 364–5, 963
persecution 140
stateless refugees 808
Ecuador, right to asylum in Constitution in 890–1
education, right to 15–16, 745–6, 971–87
acceptability, accessibility, adaptability, availability 984–7
climate change 976–7
conflicts 972, 976–7
Convention on the Rights of the Child (CRC) 757–8, 972, 974, 978–9 enforcement 984
equal opportunities 979–80
Individual Education Plans 756
migrant/refugee binary 147–8
monitoring 984–5
quality 987
reservations 978–9
discrimination 974–5, 979–80, 984–7
Djibouti Declaration on Refugee Education 978
domestic implementation 978–84
Dubai Roadmap for Education 978
Education for All 977
Education Sector Plans 979
enforcement 984–6
free education 974–5
human rights 972, 974–9, 984–6
Incheon Declaration 977
Individual Education Plans 756
languages 972
local implementation 980–4
monitoring 984–6
Nairobi Declaration and Call for Action on Education 978
National Education Sector Plans 978
policy commitments 976–8
positive measures 976
primary education 971, 978–9, 984–5
resources 973–5
responsibility/burden-sharing 985–6
Smuggling of Migrants Protocol 545–6
soft law 976–8
Egypt 1020–1, 1160–2
Arab Charter on Human Rights 341–2
League of Nations 25
legal aid 350
Palestine 595
politics 103, 108
Refugee Convention 103, 200, 335–6, 343, 976
refugee status determination (RSD) 200, 347–9
El Salvador 105, 321–2
Canada, moratorium on deportations from 300
Caracas Conventions 1954 320
United States 300, 304–6, 532–3
work, right to 651, 955, 1048–50, 1085–6
access to the labour market 37–9, 186, 955, 1050
child labour 817–19, 953–4
civil and political rights 654, 952
civil and political rights 963
Committee on Economic, Social and Cultural Rights (CESCR) 954–6, 958–9
contesting work rights restrictions 964–9
Council of Europe system 962–4
decent work 652–3, 952, 963, 968–70
destitution 965–6, 970
dignity 954–5, 958
discrimination 42, 955–9, 962, 964, 969

exploitation, avoiding 956, 958, 962, 964, 968–9
financial assistance 953–5
forced labour 555–6, 953–4, 957, 964
gender 969
High Commissioner for Russian Refugees (League of Nations) 30
human rights 218, 952–64, 970
human trafficking 964
identity certificates and passports 31–2
informal sector 953–5
International Labour Organization (ILO) 31, 33–4, 817–19, 952, 1113–14
leveraging the right to work 966–9
litigating the right to work 964–6
minimum core obligations 652–3, 953, 956, 970
most favourable foreigner standard 651–2
national employment strategies, adopting 956, 958
national treatment standard 956
nationality 969
progressive realization standard 952–3, 955–6
Refugee Convention 959–60
regional human rights law 652–8, 953, 970
self-employment 650–1, 953–4
slavery 957
socio-economic rights 952–3, 962
standard of living 953–4
enemy aliens 234, 938, 947–8
enforced disappearances 208–9, 245, 397–8, 665, 900
epidemics 24–7, 29–30
equality *see* discrimination and inequality
ethics of international refugee protection 9–10, 114–33
cosmopolitan ethics 9–10, 115, 121–33
jurisgenerative politics 9–10, 115, 130–2
liberal internationalists 9–10, 115, 119–22, 129, 132
liberal nationalists 9–10, 115–18, 122, 129, 132
power, law as 130–1
reorientation 129–33
statist ethics of refugee protection 9–10, 115–21
Ethiopia 200, 269, 293–4, 348, 475, 631–2
camps 287
education, right to 976, 978–9, 981
work, right to 953, 966–7
Ethiopian Compact 966–9
genocide
EU–Turkey statement 367, 505, 523, 967, 1105–6
European Convention on Human Rights (ECHR) 352, 362–5 *see also* European Court of Human Rights (ECtHR)
access to asylum procedure 599–600
appeals 604
asylum 599–600, 912
burden of proof 603
children and adolescents 604–5
collective expulsions 600
complementary protection 663–6, 668, 676
confidentiality of the procedure 602
criminalization 928–9
derogations 362–3
detention 363–4
documentation and proof 999
effective remedy, right to an 363, 369, 598–9, 601–2
work, right to 962–6
expulsion 905, 991–4
fair hearing, right to a 362–4
family reunification, right to 990–4, 999, 1004
human trafficking 566
information, provision of 603
inhuman or degrading treatment 362–3
interdiction at sea 905–6
interviews, individualized and personal 602
judicial dialogue 903
legal assistance and representation, access to 601
living instrument principle 665–6
margin of appreciation 991, 994
migration management, deference to States' 363–4
naturalization and integration 900–3, 905–6, 912
necessity requirement 363–4
non-refoulement, principle of 362–3, 369

European Convention on Human Rights (ECHR) (*cont.*)
private and family life, right to respect for 990, 991, 1004
procedure 363, 597–605
sexual orientation and gender identity (SOGI) claimants 79, 89, 91–4
torture 362–3
European Court of Human Rights (ECtHR) 362–4, 369
accountability of international organizations 1164–5, 1167
complementary protection 665–8, 672, 674–5
credibility assessments 616
Dublin system 522, 524–5
exclusion 724–5
expulsion 991–2, 994
family reunification, right to 991–2, 994–6, 999, 1002
human trafficking 564–5, 567–8
internal displacement 855–6
internal protection alternative (IPA) 700, 704
migrant/refugee binary 147
non-refoulement, principle of 724–5, 902–3, 905, 912, 914–15
private and family life, right to respect for 855–6
restitution and other remedies 1132
European Social Charter (ESC) 364–5, 962–3
European Union 11–12, 353–62 *see also* Charter of Fundamental Rights of the EU; Common European Asylum System (CEAS); Dublin system; Mediterranean, rescue in the; Qualification Directive (EU)
accountability 1160–1
Africa, impact of migrant crisis on 294–5
Amsterdam Treaty 354
asylum, right to 354–6, 358, 361, 867, 880–1
border controls, abolition of internal 353
Court of Justice of the European Union 355–6, 839–40, 867, 925–6, 1038–9
climate change and disasters 839–40
conflict refugees 815–16
cooperation 353–5
credibility assessments 609, 612–13, 616–18
deflection 352–4, 369
Disabilities Convention 794–5
effective remedy, right to an 358
EUNAVFOR MED Operation Sophia 499–500
evidential assessments 609, 612–13
exclusion 714, 725–6
externalization strategy 356, 361, 366–9, 560
extraterritoriality 497–8, 505, 511–12
family reunification, right to 994–6, 998–1000, 1005
Frontex 497–9, 1158, 1169
general principles of EU law 880–1
harmonization 354, 468
human rights 353–4, 363–5, 470, 943–4
human trafficking 557–8
internal market 353–4
international humanitarian law 227–9, 239
international legal personality 1160–1
international protection, use of term 870
intra-EU responsibility-sharing 359–60
large-scale displacement/mass influx 294–5, 1180–1
Libya 131–2, 514–15
naturalization and integration 1061
non-refoulement, principle of 497–500
origins and development of asylum cooperation 353–5
Palestine 649–52
quotas 470
race 58
recognition rates 107–8, 618
Refugee Convention 357–8, 617, 714, 725–6
regional reach 365–8
Residence Permit Directive (EU) 557–8
responsibility/burden-sharing 353, 359–60, 363–5, 466, 468, 470
safe third country (STC) concept 358, 367, 470
Schengen system 353
sexual orientation and gender identity (SOGI) claimants 85
smuggling of migrants 547–50

solidarity 359–60, 466
stereotyping 89–90
subsidiary protection 227–9, 358, 365–6, 669–71, 673, 676, 815–16, 870–1
Syrian refugees 136, 365–7
temporary protection 251–2, 358, 688–94
Turkey 12, 131–2, 365–7, 505, 523–4, 967
Ukraine 368
European Union's Dublin system *see* Dublin system
evidential assessments 13, 607–14 *see also* credibility assessments
algorithms 619–22
artificial intelligence 621–2
benefit of the doubt 610–14, 621
best explanation approach 621
burden of proof 610–14, 620
country of origin (COI) information 608
credibility assessments 607–8
European Union 609, 612–13
facta probanda 613
future events, testifying about 609
judicial independence 621–2
own interests, applicants testifying in own 608–9
procedure 610–11, 613
psychological issues, expert testimony on 608
reliability 607–8
silent, right to remain 611–12
standard of proof 610–14, 620–1
exceptionalism 264–5, 267
excision of territory 899, 906
exclusion 14, 711–27
aggression, crime of 716
aiding and abetting 720–1
attempts 720
burden of proof 719
command and superior responsibility 720
complicity 720
crimes against humanity 712–13, 715–18
crimes against peace 712–13, 715–18
deportation 712–13, 717, 724–5
human rights 210, 714, 718, 721–7
monitoring bodies 711
refugee, definition of 209
serious crimes 218
individual criminal responsibility 716
internal displacement 854
International Criminal Court, Rome Statute of the 715, 720
international criminal law 711–12, 715, 720–1
international humanitarian law 711–12, 716
interpretation 711–14, 717–18, 726–7
joint criminal enterprises 720
national security 712–13, 718, 722–3, 725
non-political crimes 712–13, 717–18, 722–3, 725
non-refoulement, principle of 712–14, 721–6
nullum crimen sine lege 716
participation 720–1, 726–7
political offence, concept of the 716–18
proportionality 721–2, 724–5
public order 722–3
Qualification Directive (EU) 725–6
refugee, definition of 209
refugee status determination (RSD) 717, 720–1
serious crimes 205
standard of proof 719
subversive activities 723–4
terrorism 716–17, 721–2, 725
torture 724–5
UN, acts contrary to purposes and principles of 717–18
UNHCR 711–13, 718, 721–2
war crimes 712–13, 715–18
women 740–1
exploitation *see* sexual violence and exploitation
expulsion *see* deportation/expulsion
externalization strategy 907, 913 *see also* extraterritorial migration control
European Union 356, 361, 366–9, 560
liberty, right to 939–40
politics 104–5
race 58–9
regional regimes 311–12
voluntary/forced migration binary 142
extradition 362–3, 716–17, 724–5

extraterritorial migration control 502–17
 see also externalization strategy
 access to international mobility 13, 502
 border controls 13, 502
 complicity, law of 511–12
 contactless control 505
 country of origin, migration control in 508–9
 deterrence 502–5, 507, 509–12
 embassies in third States 912
 European Union 356, 505, 511–12
 human rights 506–13
 human trafficking 561, 568
 interdiction at sea 497–8, 506–7, 511, 907–11
 international armed conflicts (IACs) and non-international armed conflicts (NIACs)distinguished 223
 international humanitarian law 223
 legal responses to extraterritorial controls 509–12
 non-refoulement, principle of 327–8, 505–7, 509–10, 561, 568, 906–12
 search and rescue (SAR) at sea 508
 visas 503

F

fair hearing, right to a 218, 362–4, 598–9, 724–5, 752–3
famine 24–7, 29–30
family reunification, right to 15–16, 988–1006
 Africa 990–1, 994
 American Convention on Human Rights (ACHR) 990–1
 best interests test 989–92, 1002–3
 border crimes 1175, 1181–2
 children 988–91, 997, 1001–5
 Convention on the Rights of the Child (CRC) 759, 989–91, 993, 996, 1002–6
 dependency, concept of 998
 documenting and proving family membership 998–9, 1001–2
 European Convention on Human Rights (ECHR) 990–3
  documentation and proof 999
  European Court of Human Rights (ECtHR) 991–2, 994–6, 999, 1002
  private and family life, right to respect for 990, 991, 998–1000, 1004
  European Union 990, 998–1000
  Family Reunification Directive (EU) 994–6, 1000, 1005
  smuggling of migrants 549
 expulsion 989, 991–4
 Family Reunification Directive (EU) 994–6, 1000, 1005
 Human Rights Committee (HRC) 989, 993, 995–6, 1005–6
 human rights 213, 989–95, 996–7
 income 1000
 marry and found a family, right to 989–90
 polygamous marriages 997
 practice, in 995–1002
 resettlement 1094
 restrictions based on status and other legal obstacles 1000–1
 sexual orientation and gender identity (SOGI) claimants 93–6
 smuggling of migrants 549
 subsidiary protection 994–5, 1000–1
 tracing 989–90, 994, 1000
 unaccompanied children 989–90, 1004–5
 women 1001
female genital mutilation (FGM) 65, 732–3, 739–40, 775–6
feminist appraisal of international refugee law 60–77
 feminist legal scholarship 60–1, 66–9, 72–3, 76–7
 gender 61–3, 67, 76
 intersectionality 67–8, 76–7
 normative movements 63–9
 normative progress 64–6
 persecution 60–2, 64–5, 67–8, 76–7
 physical movement 69–75
 reception 72–3
 Refugee Convention 60, 63–5
 refugee, definition 64–6, 76
 refugee status determination (RSD) 61, 66–7, 69
 resettlement 73–5, 77
 responsibility-sharing 75, 77
 sex/gender 62–3, 65, 76–7
 social group, membership of a particular 62–3, 65–8
 SOGI (sexual orientation/gender identity) 60–1, 66

stereotypical gender roles 60–2, 68–9, 76–7
trafficking 65, 553–4
transgender and genderqueer people 68–9, 76–7
transit 70–1
violence 61–2, 65, 67
financial contributions (sharing money) 464, 467–9, 953–4
forced marriage 732–4, 742
France
asylum, right to 126, 603, 874, 884, 887–8, 1103–4
cessation 1041
complicity, law of 512
crimes against humanity 1177
Declaration of the Rights of Man and the Citizen 1789 936
education, right to 985
extraterritoriality 512
French Revolution 574–5, 881
Huguenots 115, 571–2, 1083
internal protection alternative (IPA) 696
irregular migrants 124, 130
mandates 25
refugee status determination (RSD) 571, 574
safe third country (STC) concept 525–6
sexual orientation and gender identity (SOGI) claimants 88, 763–4, 769
statelessness 802–3
freedom fighters 253, 283–4, 630
freedom of expression 724–5
freedom of movement 42, 186, 287, 293–4
access to international mobility 13, 502
camps 287
disabilities, people with 778
durable solutions 145
ECOWAS Free Movement Protocols 1099–100
European Union 354, 359
human rights 148–50, 217–19, 935
human trafficking 559–60, 568
identity certificates and passports 31–2
internal displacement 855–6
liberty, right to 935, 941
migrant/refugee binary 145, 148–51
naturalization and integration 1048–50, 1062
OAU Convention 287
onward migration 1109–12
responsibility/burden-sharing 145
Frontex 497–9, 1158, 1169

G

gender *see also* feminist appraisal of international refugee law; sexual orientation and gender identity (SOGI) claimants; women and girls
Convention of Belém do Pará 565–6
definition 61–3, 67
work, right to 953–4, 969
human trafficking 553–4, 560, 565–8
intersectionality 46, 1134
Islam 46
Istanbul Convention 565–8
judges 618–19
knowledge gaps 76
patriarchy 46
race 46, 50–1
refugee, definition of 207
restitution and other remedies 1133–4
UNHCR 194–5
violence 553–4, 560, 565–8, 582
general principles of international law 241–2, 255, 868–9, 880–1
generative adversarial networks (GANS) 1022
Geneva Conventions and Additional Protocols 229–31, 235, 238, 850
common articles 229–30, 238–9
distinction, principle of 233
international armed conflicts (IACs) and non-international armed conflicts (NIACs) distinguished 229–31, 237
non-refoulement, principle of 236–7, 245–6, 597–8
non-State armed groups (NSAGs) 1146–53
prisoners of war 237–8
war crimes 716
genocide
accountability 438–9, 1169–70
customary international law 242
Genocide Convention 420–1
Guatemala 307–8
Holocaust 116, 1134–5

genocide (*cont.*)
International Criminal Court, Rome Statute of the 1177
non-State armed groups (NSAGs) 1144, 1155
restitution and other remedies 1123
Rohingya 49–50, 420–1, 438–9
Rwanda 631–2, 1144, 1157, 1169–70
Germany
Convention concerning the Status of Refugees coming from Germany 1938 572
harmonization 354
High Commissioner for Refugees coming from Germany (League of Nations) 23–4, 37–9
internal protection alternative (IPA) 695, 698–9
Jewish refugees 37–9, 116, 234, 410, 572, 1084
jus emigrandi and German princes 571
large-scale displacement/mass influx 143–4
Nazi Germany 4, 37–8, 82, 573, 720, 1084
Provisional Arrangement concerning the Status of Refugees coming from Germany 1936 809
recognition rates 618–19
repatriation 143–4
statelessness 809
Syrian refugees 671
Global Compact for Safe, Orderly and Regular Migration
complementary protection 666–7
disabilities, people with 783
liberty, right to 948–51
migrant/refugee binary 136–7, 149–50
onward migration 1102–3, 1112, 1115
sexual orientation and gender identity (SOGI) claimants 96
smuggling of migrants and refugees 551–2
Global Compact on Refugees 115, 196–7, 472–4
children 760
climate change and disasters 844–5
education, right to 978, 985–6
feminism 76–7
Global Refugee Forum 473
humanitarian assistance 473–4
internal displacement 861–2
large-scale displacement/mass influx 473–4
liberty, right to 948
migrant/refugee binary 136
multi-stakeholder approach 474, 481
naturalization and integration 1046–9, 1055
New York Declaration for Refugees and Migrants 75, 472
non-governmental organizations (NGOs) 474, 481
responsibility/burden-sharing 12, 286–7, 464–5, 472–4, 479–82, 870
sexual orientation and gender identity (SOGI) claimants 96
Smuggling of Migrants Protocol 551–2
soft law procedural standards 594–5
solidarity 472–3, 520–1
Support Platform 473
temporary protection 250–2, 692–3
women 76–7, 953, 966–7
Grahl-Madsen, Atle 3–4, 179, 254–5, 874–5, 1047, 1052
Greece
ancient Greece 570
asylum, right to 359–60, 364–5, 598–9
Dublin system 101, 1107–9
emergency relocation 360
work, right to 964
human trafficking 568
Turkey 366
women 70–1
Guatemala
Asylum Cooperative Agreement with US 105, 513, 532–3
Canada, moratorium on deportations from 300
deportation 894–5, 897–8
genocide 307–8
Global Compact on Refugees 477
indigenous people, restitution claims by 1131
MIRPS (Comprehensive Regional Protection and Solutions Framework) 479

organized crime 306
repatriation 684
United States 300, 304–5, 312, 513, 532–3, 684, 1105–6
Gulf Cooperation Council (GCC) 344–5, 347

H

habeas corpus 936
Haiti
Guantánamo Bay, detention in 494
humanitarian visas 1112–13
political asylees 319
refugee status determination (RSD) 304
UN, bringing cholera to 1157–8
United States
interdiction at sea 311–12, 327–8, 493–4, 506–7, 511, 908
race 52
repatriation 494
health 24–7, 93–4, 757–8 *see also* World Health Organization (WHO)
high seas *see* interdiction powers of State at sea
history of refugee law 23–42
Convention relating to the International Status of Refugees 1933 36–40
High Commissioner for Russian Refugees (League of Nations) 30–6
matters of international concern 25–7
Hong Kong SAR 389–90, 394–6, 405
work, right to 965
non-refoulement, principle of 393, 395, 405, 965
Refugee Convention and Protocol 390–1, 395, 404–5
unified screening mechanism (USM) 393–5, 405
housing, land, and property rights
customary international law 1123–4
customary or hybrid tenure systems 1122–3, 1132–3
international humanitarian law 1123–4
Residence Permit Directive (EU) 557–8
restitution and other remedies 1119–34
right to property 216
secondary occupants, balancing rights of 1131–2
Hudson, Manley O 809–10
human rights *see also* African Charter on Human and Peoples' Rights (ACHPR); American Convention on Human Rights (ACHR); complementary protection; human rights law and Refugee Convention, integrated approach to; inhuman or degrading treatment; International Covenant on Civil and Political Rights (ICCPR); life, right to; Office of the High Commissioner for Human Rights (OHCHR); procedural standards under human rights treaties; Universal Declaration of Human Rights (UDHR)
accountability 512–16
agency-centric views of refugee protection 123–5
asylum, right to 253–5, 868, 870–1, 873–4, 876, 878–9
border control 546–7, 1180
Cartagena Declaration on Refugees 635, 641
citizenship 123, 1050–1
climate change and disasters 457, 832, 837–41, 847
complementary protection 588–9
constitutions 266–7, 269, 884–5, 888–9, 897
criminalization 927–9, 932
customary international law 243, 246, 254–5
disabilities, people with 779–84, 791–4, 796
education, right to 972, 974–9, 985
work, right to 952–64, 970
ethics 114–15, 132
European Convention on Human Rights (ECHR) 364
European Union 353–4, 361–2, 548–9
Dublin system 521–5
responsibility/burden-sharing 470
exclusion 711, 714, 718, 721–7
extraterritoriality 506–13
freedom of movement 148–50
Human Rights Council (HRC) 211, 976–7, 985, 1170

human rights (*cont.*)
human trafficking 553–4, 557, 560–2, 564–8
interdiction at sea 486, 488
internal displacement 849, 851–7, 862–3
internal protection alternative (IPA) 702–3, 707–10
international humanitarian law 92, 222
liberal internationalism 119–20
liberty, right to 933, 938, 941, 943–4, 947–8, 951
migrant/refugee binary 136–7, 146–8, 151
monitoring by UN treaty bodies 855
naturalization and integration 1050–1
non-refoulement, principle of 900–3, 906
non-State armed groups (NSAGs) 1142–3, 1148, 1150–1
OAU Convention 283–4, 641
onward migration 1109–11, 1115
persecution 114, 120–1
politics 106, 124–5
private and family life, right to respect for 89, 855–6, 963, 990–1, 1004
progressive development 159–60
refugee, definition of 629–30, 635, 641
refugee status determination (RSD) 581–2, 586–7
regional instruments 886–7
residence permits 567
responsibility/burden-sharing 470
restitution and other remedies 1120–1, 1126–7
safe third country (STC) law and practice 520, 534
search and rescue (SAR) obligations at sea 489–93, 500
self-determination 117–18
sexual orientation and gender identity (SOGI) claimants 78–9, 87, 89–92, 95–6
smuggling of migrants 548–9
Smuggling of Migrants Protocol 538–43, 545–7, 550–1
stateless refugees 800, 808, 810–11, 813
de facto statelessness 123
impunity 155–6
nationality, right to 158, 806–7
progressive development of law 159–60
subsidiary protection 588–9, 593
supranational courts, jurisprudence of 906
temporary protection 678–9, 683–6
Universal Periodic Review (UPR) mechanisms 855
violence, protection against 565–6
women 565–6, 731, 734–5, 739, 742
World Bank 1158
Human Rights Committee (HRC)
complementary protection 666–9, 674–5
digital transformation of refugee governance 1011
fair hearing, right to a 599
family reunification, right to 989, 993, 995–6, 1005–6
human trafficking 567
liberal internationalism 120
human rights law and Refugee Convention, integrated approach to 11, 202–20
additional rights 213, 215–16
architecture of the Refugee Convention 177–81
complementary protection 202–4, 209–12, 216, 218
content of refugee status 207–8
cumulative approach 212
decentralized, refugee law as 205–6
detention 217
equality before the law 216–18
evolution of refugee protection 207–9
exclusions 205, 209–10
fair hearing, right to a 218
freedom of movement 217–19
gap-filling 212–15
identity papers and travel documents 216
illegal entry 215, 217
inhuman or degrading treatment 215
International Covenant on Civil and Political Rights (ICCPR) 208, 211–13, 217–19
International Covenant on Economic, Social and Cultural Rights (ICESCR) 208, 211–12, 214–15, 218
international humanitarian law 211
international law, changing pattern of protection under 204–9
interpretation 207–8, 210–11, 213–14
minimum standards 216, 218

non-discrimination, principle of 207, 217–18
non-refoulement, principle of 202–3, 208–9, 213, 215, 219–20
normative content of human rights-based approach 212
protection of refugees 203–19
procedural guarantees 212
refugee, definition of 202–3, 207, 209, 213
regional protection 212–13
selective, refugee law as 205–6
simultaneous application of international refugee law, international humanitarian law, and international human rights law 211
well-founded fear of persecution 205–7
human trafficking 553–68
Anti-Trafficking Directive (EU) 557–8
ASEAN Convention against Trafficking in Persons 558
Bali Process 448–52
border control 557–60
children 557
consent 537–8
Council of Europe Anti-Trafficking Convention 557–8, 562, 568
criminalization 559, 562
definition 536–7
detention/containment 561
work, right to 964
feminism 65, 553–4
freedom of movement 559, 568
gender-based violence 553–4, 560, 565–8
human rights 553–4, 557, 560–2, 564–8
humanitarian objectives 559–60
internal displacement 1155
international cooperation 539
non-penalization 930–1
non-refoulement, principle of 561, 568
onward migration 1115
procedural standards 600
regional measures 557
resettlement 75
Residence Permit Directive (EU) 557–8
Smuggling of Migrants Protocol 537–40, 551
South Asian Association for Regional Cooperation (SAARC) Convention on Preventing and Combating Trafficking in Women and Children for Prostitution 558–9
trafficking, definition of 559
trafficking regime 554–62
victims as refugees, protection of 13, 554, 559, 562–8
humane treatment and non-discrimination 42
humanitarian relief/assistance
camps 72
children 746–7, 756–8
climate change and disasters 846
conflict refugees 827–8
criminalization 542–3
work, right to 953–4
internal displacement 849, 857–9
non-State armed groups (NSAGs) 1145, 1151–2, 1156
power-centric views of refugee protection 125–6
public opinion 110
responsibility/burden-sharing 468, 479–80
smuggling of migrants 542–3, 548–9
statistics and data 112
visas 1112
workers 827

I

identity certificates and passports 31–4
access to documents 1110–11, 1114
biometrics 1110
certificates of identity and passports 38–9
carrier liability 542, 556
Convention Travel Document (CTD) 1110–11
digital transformation of refugee governance 1016
family members 543
fraud 541–2
freedom of movement 31–2, 150
High Commissioner for Russian Refugees (League of Nations) 31–2
human rights 216
human trafficking 556

identity certificates and passports (*cont.*)
humanitarian visas/humanitarian corridors 144–5
Nansen Passport 145, 1016, 1099
onward migration 1110–11, 1114
procuring, providing, or possessing fraudulent documents 541–2
returns 546
Russian refugees 31–2
Smuggling of Migrants Protocol 541–3, 546
visas 31–2, 144–5, 503, 907, 1112
illegal entry *see* irregular migration; smuggling of migrants and refugees
immunities 223, 1158–9, 1162, 1170–1
India 415–19 *see also* Partition of India 1947
ad hoc mechanisms 412
Australia 911
Bangladeshi refugees 199, 417
camps 417–18
case law 418–19
Chakma refugees 416, 418
colonialism 410
constitutional provisions 199, 418–19
Delhi Agreement 417
different privileges for different groups of refugees 412, 416
human rights 199, 415–16, 418–19
Jewish refugees 410
large-scale displacement/mass influx 417
League of Nations 410
national security 417–18
Nepal 421–2, 527
non-refoulement, principle of 199, 418–19
political asylum 413
racial discrimination 415–16
Refugee Convention and Protocol 198–9, 246, 407, 413, 417, 976
refugee status determination (RSD) 412–13
reputation 413
residence permits 416–18
Rohingya Working Group 415–16
State practice 416–19
Tamil refugees 416–18
Tibetan refugees 198–9, 412–13, 416–17
Universal Declaration of Human Rights (UDHR) 199
work permits 417–18
indigenous populations 1131, 1134
Indonesia 400, 435, 575–6
inequality *see* discrimination and inequality
inhuman or degrading treatment
border crimes 1182–3
climate change and disasters 839–42
complementary protection 663–70, 676–7
derogations 362–3
destitution 363, 839–40
Disabilities Convention 784
Dublin system 522, 524
effective remedy, right to an 594
European Convention on Human Rights (ECHR) 362–3
exclusion 724–5
interdiction at sea 907–8
internal protection alternative (IPA) 708–9
liberty, right to 943
migrant/refugee binary 147
non-refoulement, principle of 902–5
Refugee Convention 215
sexual orientation and gender identity (SOGI) claimants 91–2
innocent passage, right of 485–6
integration *see* naturalization and integration
Inter-American Commission on Human Rights (IAComHR) 297–8, 326–30
appeals 604
Canada 328, 531
climate change and disasters 839
work, right to 962
family reunification, right to 995
heard, right to be 328
Inter-American Principles 600
judicial review 604
Latin America 326–8
migrant/refugee binary 147
procedure 328, 598, 600, 604
restitution and other remedies 1126–7
Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará) 565–6
Inter-American Court of Human Rights (IACtHR) 297–8, 326, 598–9
appeals 604

asylum, right to 867, 872, 878–80
children and adolescents 604–5
complementary protection 661–2, 666–7, 903
customary international law 904
declaratory, refugee status as 176
diplomatic asylum 329, 912
domestic courts 606, 879–80
due diligence 600–1
work, right to 962
excision of territory 906
expanded refugee definition 872
expulsion 992–3
extraterritoriality 879
family reunification, right to 879, 992, 995–7
freedom of movement 855–6
human trafficking 564–5, 567–8
interception at sea 909–10
internal displacement 855–7
international protection, use of term 872
interviews, individualized and personal 602
judicial review 604
Latin America 323–4, 326–30
legal assistance and representation, access to 601
migrant/refugee binary 147
non-refoulement, principle of 900–4, 911, 915
psychological assistance 603
reparations 1121
seek and receive asylum, right to 879
territorial asylum 329
translators or interpreters, access to 601–2
United States 298

interdiction powers of State at sea 485–9
see also Mediterranean, rescue in the; search and rescue (SAR) obligations at sea
board ships, right to 488
Caribbean interdiction programme 493–5, 500
coastal States 485–8
contiguous zones 487–8
customary international law 485–6
deflection strategy 493
detention 487
direct interdiction 484, 493–5, 500
distress, ships in 486
exclusive jurisdiction 488
extraterritoriality 497–8, 506–7, 511
flag States 485
flagless ships 488–9
foreign vessels, interference with 485, 487
freedom of navigation 488
good faith 493
hot pursuit 487
human rights 486, 488, 902–5
indirect interdiction 484, 495–7, 500
Indochinese boat people 396–7, 483–4, 907–8
inhuman or degrading treatment 911
innocent passage, right of 485–6
jurisdictional competence 485
large-scale displacement/mass influx 681–2
limited constabulary functions 487–8
militarization 497
nationalism and anti-refugee sentiment 501
nationality, vessels without 488–9
negation strategy 493
non-refoulement, principle of 486, 497–500, 900–3, 907–11
omissions 497–501
place of safety provisions 499–500
police powers, quasi-plenary 485–6
private actors 484
pushbacks 497–9
responsibility/burden-sharing 907–8
saving lives rhetoric 500
securitization of maritime borders 501
seizure 489
smuggling of migrants and refugees 535
spaces of non-protection, creating 493–500
State practice 486
State sovereignty 483–4
temporary protection 686–7
territorial jurisdiction, doctrine of 487
territorial waters 485–7
third countries 484, 500
UN Convention on the Law of the Sea (UNCLOS) 485–9
use of force 488–9
visit, right of 488–9

Inter-Governmental Committee on Refugees (IGCR) 39–40, 1085–6
internal displacement 15, 848–63
- climate change and disasters 834–5, 846, 848, 858–9
- cluster system 857–8
- Comprehensive Refugee Response Framework (CRRF) 861
- convergence 859–62
- coordination between agencies 857–8
- crimes against humanity 850
- discrimination 855–7
- durable solutions 849, 860–2
- Emergency Relief Coordinator 857–8
- ending displacement 859–62
- European Court of Human Rights (ECtHR) 855–6
- evacuation 1148
- feminism 69
- Global Compact on Refugees 861–2
- Great Lakes IDP Protocol 835
- Guiding Principles on Internal Displacement 849–55, 859–60, 863
  - non-State armed groups (NSAGs) 1148, 1151–2
  - restitution and other remedies 1119–20, 1126–7, 1129
- human rights 849, 851–7, 862–3, 1151–2
- human trafficking 1155
- humanitarian assistance 849, 857–9
- Inter-Agency Standing Committee (IASC) Framework on Durable Solutions for Internally Displaced Persons 860–1, 1119–20, 1127, 1129
- Internal Displacement Monitoring Centre (IDMC) 832–3
- international humanitarian law 850–2, 854–7, 863, 1147–9
- international refugee law, comparison with 849, 853–4, 861
- Kampala Convention 835, 849, 852–4, 1119–20, 1128
- military reasons 1148–9
- national protection 850–1
- necessity 1148
- non-State armed groups (NSAGs) 1146–52, 1155
- normative framework 849–53
- Pinheiro Principles 1119–20, 1127–30
- proportionality 1148
- Refugee Convention 849–50, 854–5, 859–60
- refugee definition in Refugee Convention 854
- refugee status determination (RSD) 854
- repatriation 849, 855–6, 859–61
- Representative of the Secretary-General on Internally Displaced Persons 850–1
- Resident Coordinators (UN) 861–2
- restitution and other remedies 1119–37
  - Guiding Principles on Internal Displacement 1119–20, 1126–7, 1129
  - Inter-Agency Standing Committee (IASC) Framework on Durable Solutions for Internally Displaced Persons 1119–20, 1127, 1129
  - Kampala Convention 1119–20, 1128
  - Pinheiro Principles 1119–20, 1127–30
  - standards 1126–8
- soft law 850–5, 859–60, 863
- standards 1126–8
- subsidiary role of the international community 857–9
- women 848

internal flight alternative *see* internal protection alternative (IPA)
internal protection alternative (IPA) 14, 695–710
- accessibility 706, 710
- Cartagena Declaration on Refugees 632–3, 700–1
- complementary protection 700
- conditions 702–3
- conflict refugees 828
- criteria 702–10
- definition 695–6
- divergent approaches 696–7
- durability of protection 703–5, 708
- effective protection from original risk of persecution 702–3, 707–8, 710
- escape routes, distance from or unavailability of 701
- European Union 357, 695, 699–700, 703–4, 706
- history and development 698–701
- human rights 702–3, 708–10

humanitarian aid 828
inhuman or degrading treatment 708–9
international organizations 703–4
new risk of persecution, must be no 708–10
non-governmental organizations (NGOs) 703–4
non-refoulement, principle of 702–3, 708–10
non-State actors 703–4
OAU Convention 700–1
prospective, protection/relocation analysis as being 696–7
Qualification Directive (EU) 695, 699–700, 703–4, 706
reasonableness requirement 702–3, 708–10
Refugee Convention 695–700, 702–10
refugee, definition of 632–3, 696–8, 705
refugee status determination (RSD) 695, 698–9
resettlement 1083–90
sexual orientation and gender identity (SOGI) claimants 79, 92–3
standards 702–5, 708–9
State as agent of persecution 703
State practice 706, 710
State sovereignty 697
torture 700, 708–9
treaty interpretation 705–10
well-founded fear of persecution 698–9, 702–3, 707–8, 710
women 735–7

internally displaced persons (IDPs) *see* internal displacement

international armed conflicts (IACs) *see also* conflict refugees; Geneva Conventions and Additional Protocols; international humanitarian law; non-State armed groups (NSAGs), responsibility of; war crimes
classification of conflicts 230–1
customary international law 224, 231
extraterritoriality 223
Geneva Conventions 229–31, 237
housing, land, and property rights 1123–4
internationalized non-international armed conflicts NIACs 230–1
non-international armed conflicts (NIACs) distinguished 222–3, 226–31, 239
customary international law 224, 231
extraterritoriality 223
factual test 229
Geneva Conventions 229–31, 237
internationalized non-international armed conflicts NIACs 230–1
non-State organized armed groups (OAGs) 229–30, 233
prevention of displacement 234
non-State organized armed groups (OAGs) 229–30, 233
occupation 229
protracted armed violence 229–30
provisional measures 226–7
International Committee of the Red Cross (ICRC) 231

International Committee of the Red Cross (ICRC) 27–9

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families *see* migrant workers

International Court of Justice (ICJ)
asylum, right to receive 255–6
customary international law 240–2, 246–7
enhanced role 585–6
Latin America, asylum in 41
locus standi 1158–9
refugee status determination (RSD) 585–6
Statute 929–30
World Health Organization (WHO) 1161–2

International Covenant on Civil and Political Rights (ICCPR) 422 *see also* Human Rights Committee
asylum, right to 872, 876
complementary protection 663–6
derogations 179–80
detention 217
emergency, derogations in a time of 179
enter and remain in one's own country, right to 806
equality before the law 218
extraterritoriality 508–9
family reunification, right to 213, 993
freedom of movement 148–9, 218–19, 935
liberal internationalism 119–20

International Covenant on Civil and Political Rights (ICCPR) (*cont.*)
liberty, right to 935
migrant/refugee binary 147–8
onward migration 1103
Refugee Convention 179–80, 208, 211–13, 217–19
sexual orientation and gender identity (SOGI) claimants 79
Smuggling of Migrants Protocol 541, 545–6
stateless refugees 806, 808
territorial sovereignty 119
International Covenant on Economic, Social and Cultural Rights (ICESCR)
Committee on Economic, Social and Cultural Rights (CESCR) 974–5, 984–5, 987
work, right to 954–6, 958–9
Refugee Convention 214–15
developing countries 179
discrimination 214
education, right to 972, 974–5, 984–5, 987
work, right to 218, 652–3, 952–9, 962–4, 966, 970
enforcement 984–5
internal displacement 858–9
liberal internationalism 119–20
minimum core obligations 218
monitoring 984–5
progressive realization of rights 178–9, 952–3, 955–6
Refugee Convention 178–9, 208, 211–12, 214–15, 218
reservations 958
responsibility/burden-sharing 985–6
Smuggling of Migrants Protocol 545–6
stateless refugees 808
territorial sovereignty 119
travaux préparatoires 957
International Criminal Court (ICC), Rome Statute of the
actus reus 1178, 1188–9
apartheid 1189–90
border crimes 1175–81, 1183–90
chapeau requirement 1178, 1185–6
crimes against humanity 715, 1136
border crimes 1175–81, 1183–90
internal displacement 850
exclusion 715, 720
genocide 1177
internal displacement 850
international community, crimes of concern to the 1183–5
joint criminal enterprises 720
mens rea 1178, 1180–1, 1188–9
participation 720
Rohingya 112–13, 438–9
war crimes 223, 1136
international criminal law (ICL) *see also*; genocide; International Criminal Court (ICC), Rome Statute of the; war crimes
accountability 1154–5
ad hoc tribunals 720, 1136, 1183–4
border crimes 1175, 1177–8, 1183–6, 1189–90
crimes against humanity 712–13, 715–18, 850, 1136
crimes against peace 712–13, 715–18
exclusion 711–12, 715, 720–1
genocide 1155
individual criminal responsibility 716, 1138–9, 1154–5
internal displacement 850
International Criminal Tribunal for Rwanda (ICTR) 1183–4
International Criminal Tribunal for the Former Yugoslavia (ICTY) 720, 1183–4
non-State armed groups (NSAGs) 1138–9, 1153–5
policies and practices 41
restitution and other remedies 1136
war crimes 1186–7
International Development Assistance (IDA) programme 475–6
international humanitarian law 11, 221–39
adherence to international humanitarian law 232
aggression, crime of 227
armed conflict, existence of an 222–3
attacks on refugees 1147
Cartagena Declaration on Refugees 227, 239, 634–5

civilians and combatants, distinction between 223–4, 228, 232–4
civilians, definition of 224–5, 228, 233
classification of individuals and obligations 223
combatant immunity 223
combatant privilege 233
conflict refugees 815, 823, 825, 828, 830–1
customary international law 222–4, 1148, 1150, 1152–3
deportation or transfers 234
Disabilities Convention 780, 784
displaced persons in conflict 234–6
displacement 221–4, 231–9
distinction, principle of 223–4, 228, 232–3
enemy aliens 234
equality of rights and obligations 223
European Union 227–9, 239
exclusion 711–12, 716
extraterritoriality 223
global protection regimes 224–9
hors de combat, persons who are 223, 233
human rights 211, 222
indiscriminate violence, definition of 227–9
individual status in conflict 233
internal displacement 850–2, 854–7, 863
international armed conflicts (IACs) and non-international armed conflicts (NIACs) distinguished 222–3, 226–31, 233, 237, 239
internees, return of 238
means and methods of warfare 224, 232
military necessity principle 222
military objectives 232
non-refoulement principle and repatriation during and after conflicts 224, 236–9, 243, 246
non-State armed groups (NSAGs) 1138–9, 1146–51, 1155–6
  customary international law 1148, 1150, 1152–3
  direct obligations and responsibility 1141–3
  refugees, attacks on 1147
OAU Convention 227, 239
occupied territory, persons in refugee-like situations 235
other protection regimes, distinguished from 222–3
persecution 226, 236–7
precautions in attack 232
pre-conflict refugees 235–6
prevention of displacement 232, 234
prisoners of war during conflict and after cessation of active hostilities 237–8
protected persons, definition of 223, 233–7
protected zones 828
provisional measures 226–7
Qualification Directive (EU) 227–9, 239
Refugee Convention 211, 223, 225–8, 238–9
refugee, definition of 226–7, 234–5, 634–5
regional protection regimes 224–9
regime interaction 224–5
restitution and other remedies 1123–4, 1136
return, presumption of 236
scope of application 229–31
simultaneous application of international refugee law, international humanitarian law, and international human rights law 211
States, obligations of 221–39
status-based distinctions 221–3
subsidiary protection 227–9
temporal restrictions 222–3
war crimes 223
International Labour Organization (ILO) 31, 33–4, 817–19, 952, 1113–14
International Law Commission (ILC)
  Articles on State Responsibility 1121, 1160–7, 1172
  Draft Articles on the Expulsion of Aliens 905–6
  international humanitarian law 224–5
  non-penalization 931–2
  non-refoulement, principle of 914
  statelessness 810
international legal personality 1160–1
International Organization for Migration (IOM)
  accountability 1158, 1163, 1167–9, 1171–2
  resettlement 1092
  Smuggling of Migrants Protocol 539–41, 545–6
  United Nations 1168
  Venezuelan refugee crisis 332

international organizations, accountability of 17, 1157–73
International Refugee Organization (IRO)
Constitution 40, 1076–7
Eligibility Manual 1950 573, 578–9
first instance interviews 576
refugee status determination (RSD) 573, 576–9
repatriation 1076–7
resettlement 1085–6
review, right of 576
Second World War, after 1085
UNHCR 41
winding up 41
international statelessness law *see* stateless refugees
internationalism 105–6 *see also* liberal internationalism
intersectionality
feminism 67–8, 76–7
gender 46, 1134
migrant/refugee binary 136, 150
race 8, 46–9, 58–9
sexual orientation and gender identity (SOGI) claimants 80–1, 89–94
Iran
Afghanistan 1111, 1113
Almaty Process 340–1
Australia, lobbying of Indonesia and Malaysia by 504
constitutional law 274
human rights 337
Organisation of Islamic Cooperation (OIC) 337–8
Philippines 437
recognition rate 398
Refugee Convention 240, 335–6
religious minorities in Persia 25
sexual orientation and gender identity (SOGI) claimants 80, 601, 768–9
Iraq
Bali Process 340–1
human rights 337, 817
India 418–19
Kurds 1073–4
Kuwait, invasion of 1135–6
non-refoulement, principle of 914–15
non-State armed groups (NSAGs) 1144, 1147, 1151, 1155
onward migration 1099–100
Palestine 647
Qualification Directive (EU) 1038–9
Refugee Convention 103, 336
repatriation 1073–4
restitution and other remedies 1122, 1135–6
sexual orientation and gender identity (SOGI) claimants 80, 93
UNHCR 345–9, 817
United States invasion 693–4
irregular migration *see also* smuggling of migrants and refugees
detention 217
deterrence 150
human rights 215, 217
migrant/refugee binary 140–1
non-penalization 917–32
non-refoulement, principle of 215
public opinion 110–11
Islam 337–8, 424
Ashgabat Declaration 341, 569–70
discrimination 1095
gender 46, 50–1
Organisation of Islamic Cooperation (OIC) 337–8, 341, 346
public opinion 110
race 45–6, 50–1
refuge, grant of 569–70
Refugee Convention 341
Shari'a Law 337
United States' travel ban affecting Muslim countries 106
ISIS 817, 1144, 1151–3, 1155
Israel 335–8 *see also* Palestine
Istanbul Convention (Council of Europe's Convention on Preventing and Combating Violence against Women and Domestic Violence) 565–8
Italy
access to asylum procedure 599, 884
emergency relocation 360
European Union 142, 360, 1136
interdiction at sea 497–8, 505–7, 511–12, 514–15

internal protection alternative (IPA) 696
Libya 294–5, 505–7, 511–12, 515, 911, 1089
non-refoulement, principle of 911
onward migration 1108–9
Refugee Convention 887–8, 1110
persecution 87–8
politics 101
privacy 89
resettlement 1089
voluntary/forced migration binary 142

J

Japan 389, 396–400
appeals 399
civil society 399–400
Constitution 397
compliance with international refugee law 398–9
deportation 398–9
detention 398–9, 405
domestic law 397–8
history of refugee law 396–7
human rights 397–9, 405
humanitarian protection 397–8, 405
Immigration Control and Refugee Recognition Act 1982 (ICRRA) 396–9, 404–5
Indochinese boat people 396–7
institutions 399–400
judiciary 399
law and practice 397–9
legal advice and advocacy 399–400
North Korean refugees 406
recognition as refugees 397–8, 405
Refugee Convention and Protocol 396–7, 399, 404–5
refugee status determination (RSD) 396–9, 405
residence status 397–8, 405
time limits 396–9
work permits 398
Jewish refugees
Australia 526
Canada 298–9
extraterritoriality 503
Holocaust 116, 1134–5
India 410
Israel 656–7, 803
Latin America 270
Nazi Germany 4, 37–8, 1084
resettlement 1083–4, 1086
United States 1084
West Bank 656–7
joint criminal enterprises 720
Jordan
work, right to 967–9
human rights 337
Jordan Compact 967–9
Palestine 644–5, 647–8, 652, 654
Syrians in exchange for World Bank loans, work permits for 967–9
zonal development model 969
judicial review 260–1, 263–4, 594, 604, 1095
judiciary
activism 363–4
asylum, right to 897
constitutions 265, 883, 887, 897
evidential assessments 621–2
human rights 433
independence 621–2, 887, 897
International Association of Refugee Law Judges (IARLJ) 579
judicial dialogue 265, 903
refugee roulette/lottery 581–4
refugee status determination (RSD) 403–4
training 583–4
weakness 883, 887–8
jus cogens 54, 120, 248–9, 256, 901–2, 904–5, 1162

K

Kant, Immanuel 127, 1176, 1179–80, 1183–5, 1187–8, 1190
Kazakhstan 373–4, 383, 385–7
courts 381–2
extradition 383–7
institutional framework 377–8
legal framework 375–9
Refugee Convention 370–2, 375–9, 381–2
refugee status determination (RSD) 376, 378–80, 382–3, 385
temporary status 376–7

Kazakhstan (*cont.*)
Turkey, extradition of asylum seekers from 387
UNHCR 376–83, 387
Uzbek and Chinese mandate refugees, extradition of 385–7
Kenya
African Charter on Human and Peoples' Rights (ACHPR) 880
camps 200, 268–9, 294–5, 981–2, 1061, 1073, 1102, 1104
Comprehensive Refugee Response Framework (CRRF) 474
education, right to 971, 978–9, 981–2
freedom of movement in 267–9, 294
genocide 631–2
naturalization and integration 1056
new constitution with a bill of rights 267–9
non-refoulement, principle of 269, 914
onward migration 1109
Refugee Consortium of Kenya 293
refugee status determination (RSD) 577
sexual orientation and gender identity (SOGI) claimants 80
South Sudan 284, 631
Uganda 80
UNHCR 200
Kosovo 688–90
Kyrgyzstan 370–4, 381–2
Andijan refugees 384–5
Constitution 375–6
energy crisis 384–5
ethnic clashes 371
family connections 383
human rights 375, 383–5
institutional framework 377–8
legal framework 375–9
national security services 382
poverty 381
pull factors 379–80
Refugee Convention 370–2, 375–9, 381–2
refugee status determination (RSD) 376, 378–80, 382–3
resettlement 384–5
stateless persons 375–6
temporary status 376–7
UNHCR 377–85
Uzbek refugees 384–5

L

labour *see* work, right to
languages 711–13, 719, 972
large-scale displacement/mass influx
Cartagena Declaration on Refugees 633–7, 641–2
Common European Asylum System (CEAS) 359–60
complementary protection 671
digital transformation of refugee governance 1008–9
disabilities, people with 781–3, 977
First World War, after 1083–4
Global Compact on Refugees 473–4
group determinations 592
naturalization and integration 1058
non-State armed groups (NSAGs) 1140
OAU Convention 636–7, 641–2, 680
procedural standards 606
recognition 573–4
Refugee Convention 680–2
refugee, definition of 633–7, 641–2
refugee status determination (RSD) 584, 591–2
responsibility/burden-sharing 464–5, 468–9, 471–2, 481
restitution and other remedies 1121–2
temporary protection 249–51, 678–91
UN Relief and Rehabilitation Administration (UNRRA) 40
Latin America 11–12, 41, 315–33 *see also* Cartagena Declaration on Refugees
American Convention on Human Rights (ACHR) 323–4, 326–9
American Declaration of the Rights and Duties of Man 323–4, 326, 329
asylum regime and sub-regimes 315–17
committees and commissions, setting up 325–6, 330–1
constitutions 883–4, 886–7, 889–97
contemporary challenges 330–2
crimes, exclusion of asylum seekers who have committed common 319
diplomatic asylum 317–20, 329

work, right to 267–8
exclusion 319
forced migration 329–30
Havana Convention on Asylum 1928 319
human rights 317, 323–4, 326–30, 889–90
institutional framework 325–30
Inter-American Commission on Human Rights (IACHR) 326–8
Inter-American Court of Human Rights (IACtHR) 326, 328–30
MIRPS (Comprehensive Regional Protection and Solutions Framework) 477–9
national committees and commissions, setting up 325–6, 330–1
national legislation 324, 331–2
naturalization and integration 1057, 1059
non-penalization 931–2
non-refoulement, principle of 316, 327–9
political asylee status (*asilado político)* 316–21, 324–5, 332–3
Refugee Convention 317, 321–4, 327, 331
refugee, definition of 321–4, 330–3
refugee status (*refugiado*) 317–18, 321–6, 329–30
safe third country (STC) law and practice 518–19, 529–30, 533–4
subsidiary or complementary protection 316
temporary protection 316
territorial asylum 317, 319–20
UNHCR 315, 317–18, 321–3, 606
United States 304, 306
Venezuelan refugee crisis 331–3
well-founded fear of persecution 318
League of Arab States (LAS) 336–9, 652–3
League of Nations 24–5
Bolshevik revolution 24–5
Convention relating to the International Status of Refugees 1933 37, 40
country of origin or nationality, refugees without the protection of 24–5
Covenant 24–6
epidemics 24–7, 29–30
famine 24–7, 29–30
health matters 24–7, 29–30
High Commissioner for Refugees 27–36, 39–40, 1083–4, 1099
International Committee of the Red Cross (ICRC) and Red Cross movement 27–30
internal displacement 849–50
legal status of refugees 27–30
Nansen International Refugee Office 34–5
Partition of India 1947 410
population displacement 25
prisoners of war 24–8
refugee status determination (RSD) 572, 575–6
Russian refugees 27–30
Lebanon
civil society 350–1
customary international law (refugees) 240, 246
education, right to 978–9, 982–3
human rights 203
kafala system 344
Palestine 335–6, 338, 644–645, 647, 650–5, 1144
Refugee Convention 103, 203
safe third country (STC) 528
sexual orientation and gender identity (SOGI) claimants 80
Syrian refugees 348–9, 982–3, 1020–1, 1089–90, 1145
UNHCR 344–8, 1020–1
legal assistance and representation, access to 601
lex specialis 204, 210–11, 224–5
liberal internationalism 116, 119–22
ethics 9–10, 115, 119–22, 129, 132
human rights 119–20
State sovereignty 121
territorial sovereignty 119, 129
liberal nationalism 116–18, 122
bounded political communities, responsibility to 116, 129
culture and values, continuance of 116
ethics 9–10, 115–18, 122, 129, 132
self-determination 117–18
territorial sovereignty 116–18
liberty, right to 15–16, 933–51
administrative character 934–5, 940–1, 943–4, 946
arbitrary detention 936, 941–2

liberty, right to (*cont.*)
asylum, right to seek 933
border control, detention as 933, 938–9, 945, 950
camps 935
children 942
complementary protection 663–4, 667–8
context 936–40, 944
criminalization 945–7, 950–1
customary international law 933, 942
deportation 934–5
deterrence 945–6
due process 936
enemy aliens during war, detention of 938, 947–8
European Union 524, 943–4
externalized migration controls 939–40
foreigners 937–8
freedom of movement, right to 935, 941
genuine and 'non-genuine' refugees, binary distinction between 949
Global Compact for Safe, Orderly and Regular Migration 948–51
Global Compact on Refugees 948
global refugee crisis of 1990s 939, 947
history 936–40
human rights 933, 938, 941, 943–4, 947–8, 951
identities(mis)using fragile legal 949
immigration detention, definition of 934–5
increase in detention 933–4
inhuman or degrading treatment 943
international legal architecture 941–3
islands, open prisons on 935
jurisprudential developments 943–4
mental health 933–4
New York Declaration for Refugees and Migrants 948
overcrowding 941
physical health 933–4
precedent 937–8
punitiveness 946
racialization 937–9, 945, 948
rationalization 945–8
Refugee Convention 935, 938, 949
research, proposals for 950–1
securitization discourse 945, 947–8, 950–1
sexual or gender-based violence 941
sexual orientation and gender identity (SOGI) claimants 91–2
soft law 943
sovereign relativism 939–40
standards 934, 936, 940–5, 947–8
State practice 934, 936, 938, 941, 945, 949–50
State sovereignty 934, 937–9
statistics 933–4, 949–50
torture 943
voluntary detention 941–2
wall discourses 939
wartime internment as a security measure 947
Working Group on Arbitrary Detention (UN) 942, 947–8
xenophobia 948
Libya
European Union 131–2, 295, 505, 514
human rights 294–5, 993
interdiction at sea 497–500, 514, 1089
Italy 294–5, 505–7, 511–12, 515, 911, 1089
non-refoulement, principle of 131–2, 506–7, 911
non-State armed groups (NSAGs) 1147, 1154
onward migration 1102
UNHCR 286–7
life, right to
children 757–8
climate change and disasters 838–9
complementary protection 663–4, 669
exclusion 724–5
non-refoulement, principle of 900–1
search and rescue (SAR) obligations at sea 490–1

M

Macau 389, 394–6, 404–5
admissibility decisions 392–4
civil society 396, 405
non-governmental organizations (NGOs) 396, 405
judiciary 395
Refugee Convention and Protocol 390–3
refugee-receiving State, as 389–91
refugee status determination (RSD) 392–3, 395, 405
residence status 405

Malaysia
Australia 273–4, 504, 528–9
detention 435
work, right to 438
flogging 436
nationality 436
Refugee Convention 434
Rohingya 438
Manus Island 511, 514
class actions 1134–5
Constitution of Papua New Guinea 267–8, 273–6
crimes against humanity 1179–80
liberty, right to 515
marry and found a family, right to 989–90
mass influx *see* large-scale displacement/ mass influx
Mediterranean, rescue in the 497–500
abandonment at sea 497
deterrence 497
EUNAVFOR MED Operation Sophia 499–500
extraterritoriality 497–8
Frontex 497–9
interdiction by omission 497–500
Lampedusa tragedy 497–9
Mare Nostrum, replacement of 497–9
militarization 497
place of safety provisions 499–500
pushbacks 497–9
refugee crisis 497
Triton 497–9
Mexico 12, 296–8, 307–11
asylum system 309–11, 313–14
30-day deadline 892–4, 897
Asylum Cooperative Agreement with US 531–3
children 897
COMAR 308–10, 892, 895–7
deadlines 892–7
delay in processing 895–7
deportation 894–5
due process 894–7
judges, role of 897
locations, lack of 892
right to asylum 892–7
women 897
border control 101, 308, 313–14
camps 308
Cartagena Declaration on Refugees 128, 298, 309
class actions 892
COMAR 308–10, 892, 897
complementary protection 309
Constitution 308–10, 892–7
Convention against Torture (CAT) 297
criminalization of undocumented immigration 307–8
deportations 309–12, 894–5
detention 309–12
drugs cartels 310
expulsion 308
General Law of Population 307–9
Guatemalan refugees 307–8, 310–11, 892, 894–5, 1102
guest worker programme 310–11
human rights 297, 307, 309, 893–4
Instituto Nacional de Migración (INM) 309–10
Mérida Initiative (Plan Mexico) 310–12
Mexico Declaration 310–11
Migration Protection Protocol (Remain in Mexico) 312
non-refoulement, principle of 297, 307, 309, 533, 893–4
Northern Triangle States 296, 309, 311–14
number of petitions 309
precedent 892, 896
procedural erosions 313
Puebla Process (Regional Conference on Migration) 297–8
racial homogeneity 307–8
Refugee Convention 297, 307–9
refugee, definition of 298, 309–11
resources, lack of 309–11
safe country, treatment by US as a 313–14
Southern Border Program 310–12
UNHCR 189–90, 192, 308
United States 101, 192, 296, 309–12
deportation 311–12
detention centres on border 189–90
drugs cartels 310
Mérida Initiative (Plan Mexico) 310–12

Mexico (*cont.*)
metering 312
Migration Protection Protocol (Remain in Mexico) 312
Northern Triangle States 311–12
safe country, treatment of Mexico as a 313–14
Southern Border Program 310–12
Venezuelan refugee crisis 270, 309
violence, escalation in 310–11
Michigan Guidelines on Protection Elsewhere 519–20
Middle East 334–51
African Union (AU) 338
agreements and declarations, use of non-binding 342
Almaty Process 340–1
Arab Charter on Human Rights 342
Arab Child Charter 343
Arab Convention on Regulating Status of Refugees in the Arab Countries 1994 339–40
Arab States and non-Arab States, bifurcation of 337–8
Bali Declarations 340–1
Bali Process 340–1
Bangkok Principles 335–6, 340
civil society 350
Comprehensive Refugee Response Framework (CRRF) 336–7
contemporary challenges 351
Council of Europe (CofE) 338
courts 350–1
domestic law 343–4, 351
enforcement 337–8, 342
European Union 101
Gulf Cooperation Council (GCC) 344–5, 347
human rights 337–9, 341–2, 350–1
institutional framework 344–51
kafala system 344
large-scale displacement/mass influx 336–7, 340
League of Arab States (LAS) 337–9
legal advocacy 350
legal aid 350
legal framework 334–45
New York Declaration for Refugees and Migrants 336–7
non-discrimination, principle of 340
OAU Convention 335
Organisation of Islamic Cooperation (OIC) 337–8, 341, 346
permanent residence 335–6
Refugee Convention
accessions and ratifications 334–5, 339, 343–5
domestic legislation 343
drafting 336
North African States 335
politics 103
Protocol 1967 334–5
refugee, definition of 339–40, 346
reservations 335
refugee, definition of 339–40, 346
refugee status determination (RSD) 343, 347–50
regional law 337–42
registration 347–50
resettlement 346–50
statelessness 1055
temporary protection regimes 340–1, 348–9, 351
UN Relief and Works Agency (UNRWA) 344–5
UNHCR 280–1, 336–7, 340, 343–50
migrant/refugee binary 10, 134–51
additional grounds for protection 138
complementary pathways to protection 144–5
Comprehensive Refugee Response Framework (CRRF) 144–5
deterrence 148–50
developing countries, proportion of refugees in 144
durable solutions, limits of 143–6
freedom of movement 145, 148–51
global mobility regime, proposal for a 137
human rights 136–7, 146–8, 151
international migrant, definition of 134–5
long-term migrant, definition of 134
migrant, definition of 135
migrant worker, definition of 135
migration crises 148, 150–1

political/economic binary 136–41
secondary movement 144–5
social inclusion 145
voluntary/forced migration binary 136–43, 150
migrant workers 135, 337, 344, 390, 398, 604–5, 956
MIRPS (Comprehensive Regional Protection and Solutions Framework) 477–9
Cartagena Declaration on Refugees 478–9
Central America 477–9
Comprehensive Refugee Response Framework (CRRF) 478–9, 594–5
financial assistance 477
large-scale displacement/mass influx 478–9
National Action Plans 478
North America 477–9
organized criminal gangs 478
refugee status determination (RSD) 479
responsibility/burden-sharing 477–9
technical cooperation 477–8
mitigation of risk 1132–3
monism 261
Muslims *see* Islam
Myanmar *see also* Rohingya refugees from Myanmar
Kachins and Kokangs 393–4, 396
large-scale displacement/mass influx 425, 435–6, 438–9
nationality 436
Thailand 399

N

Nansen certificates 37
Nansen, Fridtjof 26–7, 30–4, 1083–4, 1099
Nansen Initiative on Disaster-Induced Cross-Border Displacement 781–2, 844–6
Nansen International Refugee Office 36–8
Nansen Medal 106, 299, 302
Nansen Passport 145, 1016, 1099
nation-State
democracy, emergence of 574–5
emergence 570
modern State, development of 98–9
nation-building 97–8
newly-established or reconstituted States 574–5
refugee status determination (RSD) 570, 574–5
shelter and sanctuary, offering 570
statist ethics of refugee protection 115
national constitutions 11, 258–76 *see also* national constitutions and right to asylum
accountability 513
amendment of constitutions 260
antagonistic relationship between constitutional law and international refugee law 265–8, 272–6
asylum, right to 260, 262–3, 868–9, 881–2
bills of rights 261
common law 261–3
complex relationship between international refugee law and constitutional law 259–65
constitutional courts 259, 264, 881–2
context of a national constitution 260
criminalization 927
customary international law, taking into account 263–4
dualism 261–4
economic blocs 266–8
work, right to 267–8
exceptionalism 264–5, 267
human rights 266–7, 269
international law, taking into account 263–4
judicial review 260–1, 263–4
judiciary, role of 265
legal systems, nature of 261
MERCOSUR 266
nativism, unilateralism, and isolationism 267
protection of refugees 258–76
State perspectives 260–2
State practice 260–1
symbiotic relationship between constitutional law and international refugee law 265–9
taxonomy 265–76

national constitutions and right to asylum 883–98
anti-globalization, rise in 883, 887
blurred distinction between refugee status and asylum 887–8
Cartagena Declaration on Refugees, expanded refugee definition in 886–7
civil society 897
domestic law 885–6
escape clauses 888
evolution of a constitutional right 884–5
human rights 884–9, 897
increase in countries with right in constitution 884–5
interpretation of right according to domestic law 888
judiciary
independence 887, 897
weakness 883, 887–8
lawyers, influence of 883, 897
limitations of constitutional right 885–9
motivations for inclusion, non-humanitarian 883–4
nationalism, rise in 883, 887
non-refoulement, principle of 885
potential of right 885–9, 897
Refugee Convention 883–8
refugee definition in Refugee Convention 885–6
Second World War, aftermath of 884–5
xenophobia 887
window-dressing, as 888–9, 897
nationalism
constitutions 883, 887
Dublin III Regulation (EU) 1108–9
ethics 9–10, 115–18, 122, 129, 132
interdiction at sea 501
liberal nationalists 9–10, 115–18, 122, 129, 132
liberty, right to 947
procedural standards 606
national security
databases 1020–1
exclusion 712–13, 718, 722–3, 725
expulsion 905
liberty, right to 945, 947–8, 950–1
procedure 589
public opinion 109–11
search and rescue (SAR) obligations at sea 500–1
securitization discourse 501, 945, 947–8, 950–1, 1095
nationality
birth (*jus soli*) 436–7, 802–3, 813, 1051, 1055
cessation 1044–5
children 164–5
conflict refugees 822, 826–7
denial of nationality 806–7, 813–14
descent (*jus sanguinis*) 436, 1051, 1055
effective right to nationality 152–3, 158
work, right to 969
European Convention on Nationality 1997 159–60, 1056
genuine link 156
ineffective nationality 798, 809–12, 814
interpretation 164
League of Nations 24–5
loss of nationality 35–6
multiple nationalities, persons with 627–8
naturalization and integration 1051–6
non-State parties 1042
not having a nationality, meaning of 798–803, 814
offer of nationality, rejection of 813
outside the country of nationality requirement 810
parentage, nationality based on 802–3
political participation 1052
principled approach to not having a nationality 801–3
race 47–8, 154–5
refugee, definition of 34, 629
stateless refugees 152–60, 163–5, 167–8, 798–812
climate change 843
ineffective nationality 798, 809–12, 814
naturalization 1056
offer of nationality, rejection of 813
Universal Declaration of Human Rights (UDHR) 158
vessels without nationality 488–9
withdrawal of nationality 807–8, 813–14
nativism/populism 111, 267, 606, 946
natural rights theory 123

naturalization and integration 16–17, 812–13, 1046–63
assimilation 1048, 1053–4
camps 1048–9, 1061–2
cessation 1030, 1047, 1053
challenges, past and contemporary 1051–5
citizenship 1047–8, 1057
civil citizenship 1060
human rights/citizenship conundrum 1050–1
plural 1054
political citizenship 1060
social citizenship 1048, 1060
costs of proceedings 1046, 1051–2
culture 1053–4, 1060
Disabilities Convention 793
discrimination 1050, 1052
economic integration 1060, 1062
economically self-reliant refugees 1048, 1051, 1059–60, 1062–3
work, right to 1048–50
European Convention on Nationality 1056
European Union 1061
expedition of proceedings 1046, 1051–2
forced/semi-forced naturalization 1052–3
freedom of movement 1048–50, 1062
Global Compact on Refugees 1046–9, 1055
human rights 1050–1
intergenerational refugeehood 1055
large-scale displacement/mass influx 1058
legal integration 1060
local integration 1046–8, 1051, 1059–63
more favourable conditions than other non-citizens 1051–2, 1057–8
national integration regimes 1096–7
nationality 436–7, 1051–6
OAU Convention 1055, 1061
onward migration 1102–3, 1111
permanent residence 1058
plural citizenship 1054
political participation rights 1048–51, 1058–60
procedure 1051–2
progressively wider range of rights and entitlements, provision of 1046–7
protracted refugee situations 1062–3
Qualification Directive (EU) 1056, 1061
Refugee Convention 1030, 1046–9, 1051–8, 1060–2
regional instruments 1055–8
repatriation 1047–8, 1063
reservations to Refugee Convention 1055–8
resettlement 1080–1, 1096–7
residence, assigned 1048–9
resistance to naturalization 1058–9
return, right to 1054
self-reliant refugees 1048, 1051, 1060, 1062–3
sexual orientation and gender identity (SOGI) claimants 82–4
social/cultural integration 1060
social integration 1048–9, 1051
South America 1059
State practice 1055–8
stateless refugees 798, 812–13, 1055
subsidiary protection 1056, 1058, 1061
supranational organizations, membership of 1054
temporary protection 1058
terminology 1048
UNHCR 1046–9, 1056, 1060, 1062
Nauru
aid, offers of 451–2
Cambodia for medical treatment, refugees from Nauru flown to 399
Constitution 272–3
detention and processing 449–51, 496, 505
domestic law 445
private contractors 1180–1
regional processing centre agreement 528–9
safe third country (STC) 525, 528–9
tortious litigation 514
UNHCR 446
winding down operations 505
Nepal 421–2
ad hoc mechanisms 412
Bhutan, Lhotsampas refugees from 421–2
camps 421
Refugee Convention and Protocol 407
resettlement 421–2
State practice 421–2
Tibetan refugees 413, 421
World Food Programme 421

New York Declaration for Refugees and Migrants 904
Comprehensive Refugee Response Framework (CRRF) 144–5
disabilities, people with 782–3
education, right to 972, 978
Global Compact on Refugees 75, 472
interdiction at sea 907–8
internal displacement 861
liberty, right to 948
Middle East 336–7
onward migration 1112
repatriation 1070
responsibility/burden-sharing 464, 481
stateless refugees 154
voluntary/forced migration binary 139
New Zealand 444–5
Australia, offshore detention and processing 451
civil society 446–7, 451
climate change and disasters 454–5, 457–8, 836–7, 839–41, 843
colonialism 58
complementary protection 454, 662–3, 670–1, 673–4
Convention against Torture (CAT) 444
human rights 454
human trafficking 563–4
Immigration and Protection Tribunal (IPT) 5–6, 454, 839
large-scale displacement/mass influx 425
life, right to 455
Oceania, as part of 442–3
race 58
Refugee Convention 495, 576–7
resettlement 1081
specialist bodies 576–7
well-founded fear of persecution 804
no compulsory return, principle of see *non-refoulement*, principle of
non-governmental organizations (NGOs) 474, 481, 1172
accountability 1172
extraterritoriality 511–12
internal protection alternative (IPA) 703–4
resettlement 1097
non-international armed conflicts (NIACs)
customary international law 224, 231
extraterritoriality 223
international armed conflicts (IACs) 222–3, 226–31, 234, 239
customary international law 224, 231
factual test 229
non-State organized armed groups (OAGs) 229–30, 233
Geneva Conventions 229–31, 237
internationalized non-international armed conflicts NIACs 230–1
non-State organized armed groups (OAGs) 229–30, 233
prevention of displacement 234
non-penalization 15–16, 917–32
asylum procedures, access to 926
criminalization 917–18, 927–31
crimmigration 917–18
detention 922, 926
directness of flight 920, 922–5
European Union 925–6
general principle of non-penalization 929–32
good cause 920, 922–5
human rights 927–9, 932
irregular migration 917–32
people smuggling and human trafficking 930–1
promptness 920, 922–4
prosecutorial authorities 926
safe third country (STC) practices 922–4
subsidiary protection 920–1
non-international armed conflicts (NIACs) 1138–40, 1144, 1156
Cartagena Declaration on Refugees 635
cross-border displacement 1149–50
international humanitarian law 1146–9
non-refoulement, principle of 1150–1
resources and disruption of business 1147
non-refoulement, principle of 15, 33–4, 42, 899–916 *see also* complementary protection
airline liaison officers abroad, placement of 907
American Convention on Human Rights (ACHR) 900, 902–3, 912

American Declaration of the Rights and Duties of Man 902, 910–12
asylum, right to 244, 253–5, 874–7
beneficiaries of the obligation 903
border controls 592–3, 596, 907, 913
Cartagena Declaration on Refugees 626, 636, 900, 903
chain *refoulement* 547, 708–9, 911, 915, 1151
children 753–6, 900–1, 906
climate change and disasters 838, 847
Committee on the Elimination of Discrimination against Women 900–1
constructive or disguised *refoulement* 708–10, 899, 913–16
content of obligation 905–6
Convention relating to the International Status of Refugees 1933 37–9
customary international law 242–9, 721–2, 899, 904–5, 912, 915
  jus cogens 256, 901–2, 904–5
  opinio juris 245, 247, 256–7, 904, 915
  politics 102
  UNHCR 191–2
de facto duty to admit asylum seekers 506
destitution 913–15
diplomatic asylum 912
disabilities, people with 784–5
disguised *refoulement* 899, 913–16
Dublin system 525
embassies in third States 912
Enforced Disappearances Convention 208–9, 245, 900
European Convention on Human Rights (ECHR) 362–3, 369, 900–3, 905
  diplomatic asylum 912
  European Court of Human Rights (ECtHR) 902–3, 905, 912, 915
  high seas, asylum seekers on the 905–6
evidential assessments 610
excision of territory 899, 906
exclusion 712–14, 721–6
expulsion 905–6
externalization of border controls 907, 913
extradition 362–3
extraterritoriality 505–7, 509–10, 906–12
  embassies in third States 912
  enforcement 899
  human trafficking 561, 568
  interdiction at sea 907–11
foreign territory, control within 506–7
Geneva Conventions 245–6, 597–8
genocide 120
geographical scope 509
hierarchy of rights 901–2
high seas, asylum seekers on the 506–7, 905–6
human rights 202–3, 208–9, 219–20, 900–3
  Committee against Torture 213
  customary international law 243, 246
  expulsion 905–6
  irregular migration 215
  legal fictions 906
  supranational courts, jurisprudence of 906
  treaties 505–6, 900
human trafficking 561, 568
Inter-American Court of Human Rights (IACtHR) 900–4, 906, 909–12, 915
identity certificates 33–4
implicit obligation, as 610, 900–1, 1151
indirect or secondary *refoulement* 237, 244
inhuman or degrading treatment 902–5
interdiction at sea 486, 497–500, 907–10
internal protection alternative (IPA) 702–3, 708–9
international humanitarian law 224, 236–9, 245
jus cogens 256, 901–2, 904–5
legal fictions 899, 906
liberal internationalism 120
life, right to 900–1
Michigan Guidelines on Protection Elsewhere 519–20
New York Declaration for Refugees and Migrants 904
non-State armed groups (NSAGs) 1140–2, 1150–1, 1156
OAU Convention 286, 626, 900, 903
onward migration 1106–7, 1114
opinio juris 245, 247, 256–7, 904, 915
present within territory, protection for those already 506–7
prisoners of war 237–8
procedure 588–9, 592–3, 597–9

non-refoulement, principle of (*cont.*)
race 49–50, 900–1
Refugee Convention 182–3, 626, 899–900
customary international law 243–4, 246–7, 904
dangerous refugees 903
expulsion 905–6
extraterritoriality 907–8
interpretation 908–10
Protocol 1967 246, 903
refugee status determination (RSD) 909–10
State practice 906, 909
travaux préparatoires 909–10
refugee, definition of 636, 903
regional instruments 900
repatriation 33–4, 913, 1066, 1069, 1077
resettlement 1090, 1098
restitution and other remedies 1120–1, 1134–5
safe third country (STC) law and practice 519–20
scope of obligation 899, 905–6
search and rescue (SAR) obligations at sea 501
shrinking approach 899
Smuggling of Migrants Protocol 540–1, 546
soft law procedural standards 592–3
sources of obligation 900–3
spontaneous return 913
State practice 244, 247, 906
temporary protection 678–9, 682–3, 686–7, 691–4
threshold for violation 901
torture 213, 243, 245, 443–4, 900–2, 904–5, 909–10
treaty law 900–3
UNHCR 186, 191–2, 199, 247–8, 256–7, 509–10
visa controls 907
zones or areas from State's territory, exclusion of 899, 906
non-refoulement as principle of customary international law 242–9
asylum seekers 244
crystallization of custom 244
declaratory sense, refugees in the 244
direct *refoulement* 244
Enforced Disappearances Convention 245
Geneva Conventions 245–6
human rights 243, 246
indirect *refoulement* 244
international humanitarian law 245
jus cogens 256
norm-creating character 244–5
opinio juris 245, 247, 256–7
persistent objection 247–8
Refugee Convention 243–4, 246–7
State practice 244, 247
torture 243, 245
UNHCR 245, 247–8, 256–7
non-State armed groups (NSAGs), responsibility of 17, 1138–56
accountability 1138, 1152–5
camps 1145
compliance, enhancement of 1155–6
cross-border (external or internal) displacement 1149–50, 1156
customary international law 1142, 1150, 1152–3
de facto State authority, exercise of 1138–42, 1144, 1146, 1150
direct obligations and responsibility 1141–3
Geneva Conventions and Additional Protocols 1146–53
genocide 1144, 1155
group responsibility 1152–4
human rights 1142–3, 1148, 1150–1
humanitarian relief 1145, 1151–2, 1156
imputed to the State, where conduct is 1140
internally displaced persons (IDPs) 1146–7, 1151–2
cross-border displacement 1149–50
evacuation 1148
Guiding Principles on Internal Displacement 1148, 1151–2
human trafficking 1155
international humanitarian law 1147–9
military reasons 1148–9
necessity 1148
proportionality 1148
international armed conflicts (IACs) and non-international armed conflicts (NIACs) 229–30, 233

international criminal law 1138–9, 1153–5
international humanitarian law 1138–9, 1146–51, 1155–6
customary international law 1148, 1150, 1152–3
direct obligations and responsibility 1141–3
refugees, attacks on 1147
investigations by ad hoc mechanisms 1153
large-scale displacement/mass influx 1140
non-international armed conflicts (NIACs) 1138–40, 1144, 1156
cross-border (external or internal) displacement 1149–50
international humanitarian law 1146–9
non-refoulement, principle of 1150–1
resources and disruption of business 1147
non-refoulement, principle of 1140–2, 1150–1, 1156
norms, development of 1155–6
protection, provision of 1140–6, 1149–50, 1156
Qualification Directive (EU) 1142–3
Refugee Convention 1139–43
reparations 1154–6
sources of persecution, as 1139–40
State, assistance from the 1139
State responsibility 1138–41
transitional justice 1154
UNHCR 1140, 1145
non-State actors *see also* non-State armed groups (NSAGs), responsibility of
cessation 1041–2
citizenship and nationality, rights and obligations of 1042
controlling a State or substantial part of territory 1041–2
European Union 357
internal protection alternative (IPA) 703–4
League of Nations 29–30
private entities 1041
Qualification Directive (EU) 1041–2
State, definition of 1041–2
North America 12, 296–314 *see also* Canada; Mexico; United States
American Declaration of the Rights and Duties of Man 297–8, 663–4
Cartagena Declaration on Refugees 297–8
containment practices 311–12
contemporary challenges 311–13
externalization of borders 311–13
gender-based claims 314
inter-American human rights system 297–8
legal framework 297–8
MIRPS (Comprehensive Regional Protection and Solutions Framework) 477–9
naturalization and integration 1057
procedural erosions 313
Puebla Process (Regional Conference on Migration) 297–8
race 55–6
Regional Consultative Process (IOM) 297–8
regional instruments and processes 297–8
safe third country (STC) law and practice 518–19, 529–34
North Korea 393–4, 396, 400, 406
nullum crimen sine lege 716
Nuremberg Military Tribunal (NMT) 720, 1177, 1183–4

O

OAU Convention 279, 281–7, 295 *see also* refugee definition in OAU Convention
accountability 515–16
Assembly 282
camps 287
cessation provisions 285–6
climate change and disasters 284–5, 837–8
colonialism 283–4, 828–9
complementary protection 662
Conference on the Legal, Economic and Social Aspects of African Refugee Problems 283
conflict refugees 828–31
constitutions 886–7
Council of Ministers resolution 281–3
decolonization 281–4
draft 281–3

OAU Convention (*cont.*)
entry into force 283
exclusion 285–6, 722–4
expert committee 282–3
history 281–3
human rights 283–4
internal protection alternative (IPA) 700–1
international humanitarian law 227, 239
large-scale displacement/mass influx 680
naturalization and integration 1055, 1061
newly independent countries 281–2
non-refoulement, principle of 286, 900, 903
Refugee Convention 282–7, 290
refugee status determination (RSD), allocation of responsibility for 286
responsibility/burden-sharing 286–7, 466
restitution and other remedies 1123–4
revision 282
Secretariat (AUC) 282–3, 287
serious crimes 285–6
soft law procedural standards 595
solidarity 286–7, 466
statistics 287
subversion 283–6
temporary protection 251–2
UNHCR 197–8
Obama, Barack 306–7, 494–5, 1113, 1174–5
occupation 229, 235
Oceania 441–59 *see also* Australia; New Zealand; Pacific Island States
Asia Pacific Refugee Rights Network (APRRN) 447
Bali Process 450
boundaries 442
civil society 441–3, 446–8
climate change and disasters 442, 453–9
colonialism 442, 455, 459
dependent territories 442–3
displacement, approaches to 452–8
domestic law 444–6
international refugee law regime 443–8, 452–3
intra-regional flight 447–8
Melanesia 442–3
Micronesia 442–3
non-governmental organizations (NGOs) 456
non-State actors 443
Pacific Island States 442, 444, 446–8, 452–3, 455, 457, 459
Pacific Islands Forum (PIF) 442–3, 458
Polynesia 442–3
ratification of international refugee law regime instruments 441–2
Refugee Convention and Protocol 443–4, 448
refugee, definition of 443, 447–8
region, idea of Oceania as a 442
stateless persons, treaties on 443–4
UNHCR 443, 446
Office of the High Commissioner for Human Rights (OHCHR)
accountability 1158, 1170
Smuggling of Migrants Protocol 539–41, 545
Office of the UN High Commissioner for Refugees (UNHCR) 9, 186–201
accountability 18–19, 1092, 1158, 1165–72
administrative systemization 577–8
Agenda for Protection 196
Almaty Process 381
alternative protection interventions 584–5
amicus curiae briefs 191
asymmetrical relationship with States 195–6
bribery and corruption 1092
budget 193–4
camps 200, 1166–7
condemnation of States 196–7
contributions 188–93, 195–6, 201
cooperation 188–9, 193, 196–7, 201, 1082
criticisms 196
development and implementation of international refugee law 10, 186
Eligibility Guidelines 580
Emergency Handbook 1169
Emergency Transit Mechanism 1089
employment, access to 186
enforcement mechanisms 196
first point of entry 189–90
funding 188–93, 195–6, 201
gaps in protection 196
gender-based persecution 194–5
General Assembly (UN) 188–9, 201
General Office of Internal Oversight Services (UN) 1171–2
Global Compact on Refugees 196–7

Global Consultations on International Protection 580, 871, 1088
Guidance Notes on International Protection (GIPs) 580
Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection 176, 194–5, 225–6, 256, 580, 609, 640
human-rights-based solutions 200
Humanitarian Accountability Project (HAP) 1167–8
immunity 1170–1
institutional interests 195–6, 201
international contexts for making and implementation of international refugee law 195–7, 201
interpretation 186, 191–2, 194–6
judicial body, proposal for a 585–6
making and implementation of international refugee law 195–201
  international contexts 195–7, 201
  national contexts 195, 199–201
  regional contexts 195, 197–9, 201
mandate responsibilities 187–95, 197, 201, 578–84
Middle East and North Africa Bureau 280–1
national contexts for making and implementation of international refugee law 195, 199–201
non-governmental organizations (NGOs) 1172
non-refoulement, principle of 186, 191–2, 199
operational functions 187–8, 192–5, 199–200
Organisation of Islamic Cooperation (OIC), MOU with 346
politics 190, 193–4, 201
productive power 186–7, 194–5
recommendations 1035–6
referral process 1092–5
Refugee Convention 189–91, 194–5, 197–9, 1167
  architecture 183–4
  Protocol 1967 189, 196
  supervisory functions 187–90
refugee status determination (RSD) 191, 577–8, 1167, 1170–1
regional contexts for making and implementation of international refugee law 195, 197–9, 201
Resettlement Handbook 74–5, 793–4, 1024, 1081, 1088, 1092–5
responsibility/burden-sharing 196–7
Rohingya refugees 413, 420–1
sexual orientation and gender identity (SOGI) 194–5
soft law 195–6
staff 193–4
Statelessness Handbook 802
Statute 1950 187–8, 192–3, 196, 201
Sub-Saharan Africa Bureau 280–1
terminology 140
transparency 1092
treaties and conventions, promoting 196
ultra vires 1165
United States
  contributions of 188–9, 192
  detention centres on US–Mexico border 189–90
  Interim Asylum Rule 191–2
  Mexico 189–92
  Safe Third Country (STC) Agreement between US and Canada 189–90, 192
Venezuelan refugee crisis 332
violations of international refugee law 33–4, 186
onward migration 16–17, 1099–116
  alternative solution, using migration as a 1111–15
  asylum 1103–9, 1115
  camps 1109–10
  complementary pathways 1102–3, 1113
  criminalization 1115
  definitions 1101–3
  directly from territory where life of freedom threatened 1104–5
  documents, access to travel 1110–11, 1114
  Dublin III Regulation (EU) 1106–9
  durable solutions 1099, 1102–3, 1111
  ECOWAS Free Movement Protocols 1099–100
  effective protection 1100, 1105–6
  first safe country concept 1102–6, 1108–9
  forced migrants, definition of 1101
  freedom of movement 1109–12

onward migration (*cont.*)
 Global Compact on Refugees 1102–3, 1112, 1115
 historical background 1113–14
 human rights 1109–11, 1115
 humanitarian visas 1112
 integration 1102–3, 1111
 internal movements 1102
 mobility 1099–100
 non-refoulement, principle of 1106–7, 1114
 people smuggling and human trafficking 1115
 politicization 1101, 1103, 1108, 1114
 Refugee Convention 1099, 1104–5, 1109–10
 refugee, definition of 1101, 1103
 repatriation 1102–3, 1105–6, 1111
 resettlement 1102–3, 1111–13
 responsibility/burden-sharing 1106
 safe third country (STC), effective protection in a 1105–6
 secondary movements 1101–2, 1111
 standards 1106–7
 structural asymmetry of borders 1115–16
 well-founded fear of persecution 1114–15
opinio juris 240–1, 245, 247, 251–2, 255–7
orbit, refugees in 596
Organization for Security and Co-operation in Europe (OSCE) 375–6, 1160–1
Organization of African Unity Convention Convention Governing the Specific Aspects of Refugee Problems in Africa *see* OAU Convention
Organization of American States (OAS) 297–8, 326–7, 477, 594, 961
Organisation of Islamic Cooperation (OIC) 337–8, 341, 346
organized criminal gangs 478, 543–4, 550 *see also* smuggling of migrants and refugees

P

Pacific Island States 447–8, 456–8
Pacific Islands Forum (PIF) 442–3, 458
Pakistan 145, 419–20 *see also* Partition of India 1947
 ad hoc mechanisms 412
 Afghan migrants 419–20, 1100, 1111, 1113
 Bangladesh, secession of 417, 419
 Delhi Agreement 417
 education, right to 976
 human rights 203
 muhajirs 411–12
 Partition in 1947 407–9, 419
 proof of registration cards 420
 Refugee Convention and Protocol 198, 203, 246, 407, 419, 577–8
 refugee status determination (RSD) 419–20
 repatriation 419, 1072–3
 State practice 419–20
 temporary protection 419
 UNHCR 413, 419–20, 466–7
 women 735–6
Palestine *see also* UN Relief and Works Agency for Palestine Refugees in the Near East (UNRWA)
 Casablanca Protocol on the Treatment of Palestinian Refugees 1965 338
 integrate, obligation to 335–6
 Jordan 644–5, 647–8, 652, 654
 Lebanon 335–6, 338, 644–645, 647, 650–5, 1144
 regional instruments 338
 Turkey 365–6
 UNHCR 345
Papua New Guinea (PNG) 447–8
 aid, offers of 451–2
 Constitution 272–6, 452
 detention and processing 449–51, 505, 515
 judicial review 445
 liberty, right to 451, 513
 private contractors 1180–1
 regional processing centre agreement 528–9
 safe third country (STC) 525, 528–9
 tortious litigation 514
 UNHCR 446
 winding down operations 505
participation
 children 757
 exclusion 720–1, 726–7
 indirect 720
 politics 1048–51, 1058–60
 public opinion 109–11
 responsibility/burden-sharing 480–1

particular social group (PSG) ground
see social group, membership of a particular
Partition of India 1947 407–9, 419
colonialism, end of British 407–8, 410–11
large-scale displacement/mass influx 408, 412
League of Nations 410
muhajirs 411–12
Nehru-Liaquat Pact 411–12
racial discrimination 409
Refugee Convention 198, 408–9
religious discrimination 409
passports *see* identity certificates and passports
peace agreements 1125–6
peace, crimes against 712–13, 715–18
Peace of Westphalia 571
penalties *see* non-penalization
persecution *see also* well-founded fear of persecution
association, by 827
being persecuted, meaning of 750–2
children 746–7, 749–52
conflict refugees 825–6
definition 357, 732–7, 787–9
disabilities, people with 787–9
economic, social and cultural rights 140
European Convention on Human Rights (ECHR) 363–4
European Union 357
evidential assessments 609, 611–12
feminism 60–2, 64–5, 67–8, 76–7
'for reasons of' 789–90
grounds 357, 749, 751–2
international humanitarian law 226, 236–7
liberal internationalism 120–1
pursuit, likelihood of 707
race 49–50
reasons 737–9
rights, denial of 808
sexual orientation and gender identity (SOGI) claimants 88–9, 761–2
social group, membership of a particular 357
State responsibility 1139–40
stateless refugees 805–6, 808
statist ethics of refugee protection 115
stereotypical gender roles, non-conformity to 60–2
threshold 746–7, 750
women 731–9
physical responsibility-sharing (sharing people) 467, 469–70
Pinheiro Principles 1119–20, 1127–30, 1132–3
political opinions
border control 109–10
children 749, 751–2
conflict refugees 822, 826–7
crisis, using the language of 109–10
economic threats 109–10
domestic electoral politics 109–11
international humanitarian law 236–7
media coverage 110–11
Muslims, bias against 110
national security threats 109–11
racialized beliefs 109–10
refugee, definition of 629
right-wing populist backlash 111
scapegoating and demonization 111
sexual orientation and gender identity (SOGI) claimants 80
social media 111
terrorism 111
women 738–9
political refugees
diplomatic asylum 318–21, 324, 332–3
identity certificates and passports 32
political/economic binary 136–41
refugee status determination (RSD) 582
political rights *see also* International Covenant on Civil and Political Rights (ICCPR)
citizenship 1058–60
formal rights and informal rights 1048–9
nationality 1052
naturalization and integration 1048–51, 1058–60
participation 1048–51, 1058–60
politics 97–113 *see also* political opinions; political refugees; political rights
agency-centric views of refugee protection 123–6
border control 97–101

politics (*cont.*)
categorization, politics of 107–9
civil and political rights 746–7, 808
Cold War 99–100, 102
colonialism 100–2
compliance 102–5
construction, process of refugee 98–100
cosmopolitics 1186–90
customary international law 102, 241–2
data and statistics 112–13
deterrence 100–1, 104–5
displaced people 98–101, 104
externalization and deterrence 104–5
geopolitics 9, 97–8, 100–2
humanitarian crises 100–1
internationalism 105–6
legal formalism versus political action 9–10, 129
modern State, development of 98–9
onward migration 1101, 1103, 1108, 1114
political offence, concept of the 716–18
post-colonial transition 9, 98–9
power-centric views of refugee protection 126–7
public opinion and domestic electoral politics 109–11
Refugee Convention 99, 102–5, 109
refugee, definition of 99–100, 104, 107
refugee rentier States 101–2
reputation, politics of 105–7
resettlement 1084, 1093–4
sexual orientation and gender identity (SOGI) claimants 762–3
social group, membership of a particular 99
soft law 99
sovereignty 104–5
technocratization of adjudication 127
territoriality 98–9, 104–5
UNHCR 99, 101, 103–5, 190, 193–4, 201
universal political standards 1034
xenophobia 46–7
population management 1083
populism/nativism 111, 267, 606, 946
postcolonial views of refugee protection 115, 127–9
decolonization, migration as 129
globalization 128
neocolonialism 128–9
self-determination 128–9
State sovereignty 128–9
power-centric views of refugee protection 115, 125–7
precarious migrants concept 142–3
precedent 99, 937–8, 992
prisoners of war 24–8, 237–8
privacy *see also* private and family life, right to respect for
data protection 1011
digital transformation of refugee governance 1007–11
discrimination 87, 89
human trafficking 557
sexual orientation and gender identity (SOGI) claimants 80–1, 87–9
private and family life, right to respect for 89, 855–6, 963, 990–1, 1004
privileges and immunities 223, 233, 1158–9, 1162, 1170–1
procedural standards under human rights treaties 588, 590, 597–606
access to the asylum procedure 599–600
appeals 604
asylum, right to 877
border control 596
burden of proof 603
children and adolescents 604–5
effective remedy, right to an 588–9, 595
European Convention on Human Rights (ECHR) 597–605
first country of asylum 596–7
identification of international protection needs and special needs 600–1
information, provision of 603
inter-American system 597–602, 604–6
interviews, individualized and personal 602
large-scale displacement/mass influx 606
legal assistance and representation, access to 601
nationalism and populism 606
psychological assistance 603
safe third country (STC) concept 596–7
screening 600–1
translators or interpreters, access to 601–3

procedure *see also* procedural standards under human rights treaties; procedure in Refugee Convention and Protocol
asylum, right to 873–4, 876–7
clarity 1035–6
credibility assessments 612
criminal procedure 611
Dublin system 525
evidential assessments 610–11, 613
fairness 1093
guarantees 212, 363
naturalization and integration 1051–2
refugee status determination (RSD) 591–4
resettlement 1093
sexual orientation and gender identity (SOGI) claimants 83
procedure in Refugee Convention and Protocol 13, 588–97
accelerated procedures 597
admissibility decisions 596–7
border control 596
complementary forms of protection 588–90
design 589
Dublin system 596
effectiveness, principle of 590
implementation 589
national security 589
reception conditions 596–7
recognition of status 589–90
refugee, definition of 589–90
regional bodies 590
soft law 588–90
specific issues 595–7
standards 588–606
subsidiary protection 588–90
summary examinations 597
UNHCR 589–90, 597
property *see* housing, land, and property rights
prostitution 555
protection at sea and denial of asylum *see* interdiction powers of State at sea; search and rescue (SAR) obligations at sea
Protocol against the Smuggling of Migrants by Land, Sea, and Air *see* Smuggling of Migrants Protocol
Protocol relating to the Status of Refugees *see* Refugee Convention
Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, *see* Trafficking in Persons Protocol
protracted refugee situations 1062–3

Q

Qualification Directive (EU) 357, 870–1
actors of protection, definition of 1041–2
asylum, right to 870–1
cessation 1038–9, 1041–3
Common European Asylum System (CEAS) 92, 355–6, 583
complementary protection 669–72, 676
credibility assessments 609, 614, 617
disabilities, people with 788
exclusion 725–6
exemption provisions of Refugee Convention 1042–3
internal protection alternative (IPA) 695, 703–4, 706
international humanitarian law 227–9, 239
lowest common denominator approach 626–7
naturalization and integration 1056, 1061
non-State armed groups (NSAGs) 1142–3
Qualification Directive (EU) 670–1, 695, 699–700, 1056, 1061
Qualification Regulation (EU), proposal for 670–1
refugee, definition of 583
sexual orientation and gender identity (SOGI) claimants 763
subsidiary protection 870–1
Queen's Charity (England) 571

R

race 5–6, 46–55, 58
apartheid 56–7, 1176, 1178, 1189–90
border crimes 1189
camps 51–2

race (*cont.*)
children 749
citizenship 46–7
class 48–9
colonialism 44–5, 55–8
Committee on the Elimination of Racial Discrimination 666–7, 900–1
conceptual terrain 44–9
conflict refugees 822, 826–7
constitutions 887
country of origin bans 50–1
Critical Race Theory 8, 59
work, right to 969
ethnic cleansing 821–2, 1123, 1125
ethnicity 45–6, 98–9, 108, 572–4
European Union 58, 1108–9
foreignness, status of 46–9, 54–5
gender 46, 50–1
geopolitics 55–9
global apartheid 56–7, 1176, 1178, 1189–90
indigenous populations 45–6, 1131, 1134
institutionalized racism 51–3
International Convention on the Elimination of All Forms of Racial Discrimination 52–5
intersectional conception of race 8, 46–9, 58–9
liberty, right to 937–9, 945, 948
Muslims 45–6, 50–1
nationality 47–8, 154–5
persecution 49–50
politics 46–7, 108
public opinion 109–10
race, definition of 44
Refugee Convention 50–2, 54–6, 629
refugee, definition of 55–6, 629
refugee status determination (RSD) 572–4
regime analysis 55–8
religion 45–6, 49–51
restitution and remedies 1133–4
Rohingya 49–50, 57
Second World War, after 55, 1085–6
social construction 8, 44, 47–8
structural conception of race 8, 44–6, 54–5, 58–9
structural discrimination 54–5
Third World Approaches to International Law (TWAIL) 8, 59
well-founded fear of persecution 629
White supremacy 44–5
women 738–9
xenophobic discrimination, definition of 46–9, 52–5, 58
reception
conditions 596–7
feminism 72–3
politics 97
Reception Directive (EU) 92
sexual orientation and gender identity (SOGI) claimants 93–4
sexual violence and exploitation 72–3
UNHCR 584
Red Cross *see also* International Committee of the Red Cross (ICRC)
Refugee Convention *see also* architecture of the Refugee Convention and Protocol; exclusion; human rights law and Refugee Convention, integrated approach to; procedure in Refugee Convention and Protocol; refugee definition in Refugee Convention; well-founded fear of persecution
Africa 281, 289–90, 293–4
architecture of the Refugee Convention and Protocol 171–85
cessation of refugee status 16, 205, 1029–45
camps 1166–7
complaint mechanism, lack of a 213
contingent, refugee law as 205–6
customary international law 42, 253–7
decentralized, refugee law as 205–6
design 204–6
duty-driven instrument 205
Eurocentricism 55–6, 127–8
evolution of refugee protection 207–9
human rights 42
internal displacement 849–50, 853–5, 860–1
League of Nations 849–50
Preamble 207–8
Protocol 1967 41–2, 189, 196
ratification and accession 119–21
reservations 103, 174, 335, 920, 976, 1055–8

selective, refugee law as 205–6
simultaneous application of international refugee law, international humanitarian law, and international human rights law 211
soft law standards 592–5
State-centric, international refugee law as 205
supervisory functions 187–90, 206
UNHCR 189–91, 194–5, 197–9, 1167
refugee definition in Cartagena Declaration 322–3, 633–6
additional grounds for protection 138
climate change and disasters 635–6, 639–40
conflict refugees 639, 815–16, 828–31
constitutions 886–7
discrimination 636–7, 639–40, 642
domestic legislation, incorporation into 634
enumerated events 635–6, 638–9, 641–2
evolutionary interpretation 635
expanded definition 626, 636–7
foreign aggression 322, 635, 641
generalized and indiscriminate violence 635, 639–41
human rights 635, 641
internal conflicts 322, 635
international humanitarian law 227, 634–5
large-scale displacement/mass influx 633–7, 641–2
lives, safety or freedom, threats to 635–6, 638
non-binding status 634
non-refoulement, principle of 626, 636
OAU Convention, comparison with 14, 625–42
objectivity 636–9
public order, events seriously disturbing 635, 639, 641
Refugee Convention 14, 625–42
refugee status determination (RSD) 637, 641–2
subjectivity 636–9
UNHCR 634–5, 637, 642
refugee definition in OAU Convention 283–5, 293–4
additional grounds for protection 138
Cartagena Declaration on Refugees 14, 625–42
climate change and disasters 631–2, 639–40
colonialism 630–1
compelled to leave requirement 631–3, 638
conflict refugees 639, 815–16, 828–31
discrimination 636–7, 639–40, 642
domestic law of African States, inclusion in 630–1
enumerated events 631–3, 638–9, 641–2
expanded definition 626, 636–7
external aggression 284, 631, 641
foreign domination 283, 631
freedom fighters 284, 630
generalized and indiscriminate violence 629, 639–41
habitual residence 284, 632–3
human rights 283–4, 641
internal protection alternative (IPA) 632–3
international humanitarian law 227
large-scale displacement/mass influx 636–7, 641–2
non-refoulement, principle of 626
objectivity 636–9
occupation 631
public order, events seriously disturbing 631–2, 639, 641
Refugee Convention 14, 625–42
refugee status determination (RSD) 637, 641–2
subjectivity 633, 636–9
UNHCR 631–2, 637, 642
refugee definition in Refugee Convention
architecture of Refugee Convention 171, 174–6, 179–80, 183–5
Cartagena Declaration on Refugees, comparison with 14, 322–3, 625–42
children 746, 749–53
climate change and disasters 629, 637, 639–40
complementary protection 677
conflict refugees 629, 637, 815–16, 828–9
constitutions 885–6
criteria for protection 628
discrimination 639–42
Eurocentricism 629

refugee definition in Refugee Convention (*cont.*)
exclusions 209
expanded definition 626–7, 636–8, 641
gender 207
generalized and indiscriminate violence 629, 639–41
human rights 202–3, 207, 209, 213, 629–30, 641
identity, being forced to conceal one's 629–30
individualized aspects of definition 638–9
internal displacement 854
interpretation 174–5, 183–5
large-scale displacement/mass influx 637, 641–2
multiple nationalities, persons with 627–8
nationality 629
nexus requirement 629, 639
non-refoulement, principle of 626
OAU Convention, comparison with 14, 279–94, 625–42
out-of-date, as being 629
outside country of origin requirement 628
political opinion 286, 629
procedure 290, 589–90
public order, serious disturbances of 284, 641
race 629
refugee status determination (RSD) 628–9, 637, 641–2
religion 629
serious harm, risk of 628–9
social group, membership of particular 286, 629
stateless refugees 797–809, 814
temporal limitation, removal of 627–8
UNHCR 642
universal definition 625–30, 636–40, 642
well-founded fear of persecution 627–9, 638–40, 642
refugee, definition of *see also* refugee definition in Cartagena Declaration; refugee definition in OAU Convention; refugee definition in Refugee Convention
accountability 513
categorization, politics of 107–8
conflict refugees 815–16, 823
Disabilities Convention 784–5
economic migrants 100
European Union 358
exclusions 209
feminism 64–6, 76
human trafficking 554
internal protection alternative (IPA) 696–8, 705
international humanitarian law 227–8, 234–5
non-refoulement, principle of 903
onward migration 1101, 1103
politics 99–100, 104, 107
precedent 99
Qualification Directive (EU) 227–8
race 55–6
recommendations 34–5
refugee status determination (RSD) 579, 581–2
regional definitions 227
repatriation 1077
responsibility/burden-sharing 467
soft law 99
standards 34–5
stateless refugees 153–4
unaccompanied children 749
women 64–6, 76, 730–7, 739–40, 742–3
refugee roulette/lottery 581–4
refugee status determination (RSD) 13, 569–87
administrative systemization 575–8
artificial intelligence (AI) 586–7
asylum, right to 255–6
automated decision-making systems 586–7
backlogs 581
before flight, recognition 570–1
best interests test 753
bogus and genuine refugees, distinguishing between 576–7
Cartagena Declaration on Refugees 637, 641–2
categorization, politics of 107–8
challenges 580–5
children 752–3
classical tradition 570
conflict refugees 823

country information and assessment of risk 577
credibility assessments 583–4, 586–7, 771, 775–6
culture of disbelief 775–6
digital transformation of refugee governance 1007–8, 1012–13, 1022–3
Disabilities Convention 791–3
ethnicity 572–4
exclusion 717, 720–1
extraterritoriality 506
feminism 61, 66–7, 69
gender and domestic-based violence 582
Global Compact on Refugees 584–5
group-based recognition 570, 572–4, 586, 641–2
Guidance Notes for managing caseloads in high-volume systems 580
heard, right to be 752–3
human rights 581–2, 586–7
individual-based determination 572–4
  access, limits of 581
  League of Nations 575–6
  reform 585–6
  refugee, definition of 641–2
  resources 581
  refugee roulette/lottery 583–4
internal protection alternative (IPA) 695, 698–9
International Refugee Organization (IRO) 573, 576–9
juridification 578–80
large-scale displacement/mass influx 584
League of Nations regime 572, 575–6
mandate RSD 577–8, 581, 584
nation-States 570, 574–5
OAU Convention 286, 641–2
one protection tool, as 584–5
origin and development of RSD 569–76, 587
parents' claims, children subsumed into 752–3
political refugees 582
procedural standards 591–4
reception 584
recognition 570, 572–4
reform 585–6
Refugee Convention 574, 577–9, 581–2, 585–6, 628–9, 637, 641–2
refugee, definition of 579, 581–2, 628–9, 637, 641
refugee roulette/lottery 581–4
regional agreements 584
registration 574, 584
repatriation 1074–5
risk assessment 586–7
sexual orientation and gender identity (SOGI) claimants 79–80, 761, 765, 771, 773, 775–7
specialist bodies 576–7
systemization of RSD 574–80
technology, use of 586–7
temporary protection mechanisms 584
UNHCR 343–4, 347–50, 578, 585
  accountability 1167, 1170–1
  alternative protection interventions 584–5
  creation of 577–8
  Eligibility Guidelines 580
  Guidance Notes on International Protection (GIPs) 580
  Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection 176, 194–5, 225–6, 256, 580, 609, 640
  judicial body, proposal for a 585–6
  mandate UNHCR 578
  Statute 1950 577–8
unwillingness to return, definition of 572–3
well-founded fear of persecution 628–9
regional instruments
  asylum, right to 878–82
  constitutions 266
  diplomatic asylum 41
  work, right to 953, 960–4, 970
  family reunification, right to 990–5
  human rights 212–13
  human trafficking 557
  international humanitarian law 224–9
  naturalization and integration 1055–8
  non-penalization 931–2
  non-refoulement, principle of 900
  refugee, definition of 227
  responsibility/burden-sharing 466
  territorial asylum 208–9

religion and philosophy *see also* Islam
asylum, right to 868–9
bans based on religion 50–1
Buddhism 424
children 749, 751–2
conflict refugees 822, 826–7
Confucianism 389
conventions, forced compliance or punishment for failure to comply with 732–3
feminism 67–8
hospitality, duty of 868–9
international humanitarian law 236–7
minorities 25
non-refoulement, principle of 49–50
patriarchy 67–8
race 45–6, 49–51
reactionary religious and political movements 83
refuge, grant of 569–70
refugee, definition of 629
religious cleansing 821–2
sexual orientation and gender identity (SOGI) claimants 83, 763
strangers, protection of 868–9
well-founded fear of persecution 629
women 67–8, 738–9
remedies *see* restitution and other remedies
reparations 1121–2
repatriation *see* voluntary repatriation
reputation, politics of 105–7
rescue at sea *see* search and rescue (SAR) obligations at sea
reservations to Refugee Convention 103, 174, 335, 920, 976, 1055–8
resettlement 16–17, 1080–98
1990s, resettlement since the 1087–90
accountability 1092, 1095
algorithmic models for allocation 1023–4, 1095–6
alternatives 77
asylum 1080–3, 1087–8, 1090–1, 1098
colonialism 1083–4
Common European Asylum System (CEAS) 356
community sponsorship 1097
contemporary resettlement 1090–7
costs 1090–1
decision-making 1091–6
deterrence 75
digital transformation of refugee governance 1008, 1023–4
Disabilities Convention 793–4
discretion 1080–1, 1092, 1096
discrimination 1095
disproportionate distribution between Global South/Global North, rebalancing 73–4
early refugee population movements 1083
embassies, consulates, or special missions 1091–2
family criteria 1094
feminism 73–5, 77
First World War, mass displacement after 1083–4
governance of resettlement 1092
groups of refugees 1084
historical background 1083–90
humanitarian criteria 1094
individual protection 1085, 1087–8
Indochina refugee crisis 1081–2, 1087
integration 74, 1080–1, 1096–7
international institutions, development of 1083–4
inter-war years 1083–4
legal analysis of schemes 74–5
national integration regimes 1096–7
non-refoulement, principle of 1090, 1098
OAU Convention 286–7
obligation, lack of connection to 1081
onward migration 1102–3, 1111–13
permanent resident status 1096
population management 1083
procedural fairness, lack of 1093
reciprocal arrangements 1089
referral process 1092–5
Refugee Convention 74–5, 181, 1081–2, 1085, 1087, 1090, 1096, 1098
repatriation 1076, 1080–1
responsibility/burden-sharing 75, 467, 1081–2, 1088, 1098
screening and triage 1094–5
Second World War, displacement after 1085–6

securitization post-9/11 1095
selection missions 1093–4
sexual orientation and gender identity (SOGI) claimants 79, 94–5
sexual violence and human trafficking 75
solidarity 1089–90, 1092, 1097–8
State practice 74–5
State sovereignty 1090–1, 1098
sub-State entities 1097
temporary or renewable status 1096
trade-offs 1089–90
UNHCR 346–50, 1090–5, 1098
cooperation 1082
Emergency Transit Mechanism 1089
Executive Committee (ExCom) 1081–2, 1087–8
Global Consultations on International Protection 1088
guidelines 1088
Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection 176, 194–5, 225–6, 256, 580, 609, 640
vulnerable groups 1094
responsibility/burden-sharing 10, 463–82
accidents of geography mechanism 184–5
accountability 515–16
approaches to responsibility-sharing 467–71
Bangkok Principles 340
burden-sharing, use of term 467
burden-shifting 518–19
Comprehensive Refugee Response Framework (CRRF) 474–7, 481–2
conceptual basis 465–72
cooperation 465–6, 471
developing countries 463–4, 466–7
disincentives 471–2
distribution arrangements 470
education, right to 985–6
emergency assistance budgets 468
European Union 353, 359–60, 466
Common European Asylum System (CEAS) 359–60, 369
Dublin system 470, 1107–8
harmonized norms or laws 468
human rights 470
quotas 470
safe third country (STC) concept 470, 521, 523–5
solidarity 466
feminism 75, 77
financial contributions (sharing money) 464, 467–9
freedom of movement 145
functional necessity, as 471
funding 480
future risks, as insurance against 471–2
gap in international refugee law regime 464
Global Compact on Refugees 12, 286–7, 464–5, 472–4, 479–82
harmonized norms or laws (sharing norms) 467–8
human rights 470
humanitarian aid 468, 479–80
interdiction at sea 907–8
international legal sources 465–7
large-scale displacement/mass influx 464–5, 468–9, 471–2, 481
legal foundations 465–72
MIRPS (Comprehensive Regional Protection and Solutions Framework) 477–9
OAU Convention 286–7, 466
onward migration 1106
participation of refugees 480–1
physical responsibility-sharing 467, 469–70
politics 101
private actors 12
progress, basis for 479–81
race 55–6
quotas 470
rationales and disincentives 471–2
Refugee Convention 182, 184–5, 465, 479
refugee, definition of 467
regional instruments 466
resettlement 75, 464, 469, 1081–2, 1088, 1098
safe third country (STC) law and practice 520–1
skills, knowledge, and insights of refugees 480

responsibility/burden-sharing (*cont.*)
solidarity 466–7, 471, 520–1
temporary protection 683, 685–7
UNHCR 196–7, 466–7, 469, 471, 480
Executive Committee (ExCom) 466–7, 479
restitution and other remedies 17, 1137
adverse possession 1131
age 1133–4
challenges 1130–7
class 1133–4
class actions 1134–5
colonialism 1131
conflicts 1123, 1125–6, 1130–1, 1134–5
durable solutions 1119–20, 1127, 1129, 1135–6
ethnic cleansing 1123, 1125
expenses of sheltering large numbers of refugees, compensation for 1136–7
gender 1133–4
genocide 1123
housing, land, and property rights 1119–37
human rights violations 1120–1, 1126–7
indigenous populations 1131, 1134
inhuman or degrading treatment 594
internally displaced persons (IDPs) 1119–37
international humanitarian law 1123–4, 1136
large-scale displacement/mass influx 1121–2
migrant/refugee binary 147
mitigating risk 1132–3
non-refoulement, principle of 1120–1, 1134–5
norms, developing 1123–30
OAU Convention 1123–4
peace agreements 1125–6
Pinheiro Principles 1119–20, 1127–30, 1132–3
primary remedy for displacement, restitution as 1121–3
race 1133–4
reparations 1121–2, 1154–6
repatriation 1121–2
restorative justice 1129
secondary occupants and people in protracted displacement, balancing rights of 1131–2
soft law 1123–4
standards 1119–20, 1122–4, 1126–8, 1132
transitional justice 1120–1
UN Reparations Principles 1120–1, 1135–6
UN resolutions 1124
women 1133–4
young people 1133–4
restorative justice 1129
returns see also *non-refoulement*, principle of; repatriation
cessation 1030, 1032–4, 1040
discrimination 1033–4
durable solutions 1040
escape clause 1033–4
frequency and duration 1033
information on situation, in order to gather 1033
international humanitarian law 236
naturalization and integration 1054
purpose of trips 1032
Smuggling of Migrants Protocol 546
trial periods 1033–4
UNHCR 1166
unwillingness to return, definition of 572–3
right to asylum *see* asylum, right to
right to liberty *see* liberty, right to
right to life *see* life, right to
right to work *see* work, right to
Rohingya refugees from Myanmar 162–3, 425, 435–6, 439
Andaman Sea refugee crisis 908
Bangladesh 412, 420–1, 425, 438–9, 908
camps 112–13, 420
detention 434–5
genocide 49–50, 420–1, 438–9
human trafficking 435–6
India 415–16
Malaysia 438
non-refoulement, principle of 187
race 49–50, 57
repatriation 420
Rohingya Working Group 415–16
statelessness 155–6, 162–3, 165–6
Roma refugees 51–2, 54
Roosevelt, Franklin Delano 39–40, 1084
rule of law 267, 579, 936, 1008–9

Russia 25–7, 32
- Bolshevik revolution 24–5
- famine 26–7, 29–30
- High Commissioner for Russian Refugees (League of Nations) 30–6
- identity certificates and passports 31–2
- International Committee for Russian Relief 26–7
- League of Nations 24–5, 27–30
- Minsk Convention 375, 383–4
- October Revolution 1917 25
- Poland 32

Rwanda
- accountability of international organizations 1157, 1169–70
- cessation 1036, 1045
- Comprehensive Refugee Response Framework (CRRF) 474
- expulsion 880
- genocide 631–2, 1144, 1157, 1169–70
- International Criminal Tribunal for Rwanda (ICTR) 1183–4
- Libya, refugees from 286–7, 1089
- *non-refoulement*, principle of 187
- non-State armed groups (NSAGs) 1144, 1147
- Refugee Convention 281–2
- repatriation 1072–3
- reparations 121
- restitution and other remedies 1122
- Uganda 980–1

S

safe third country (STC) law and practice 37, 518–34 *see also* Dublin system
- 2010–20, developments between 518–19
- deterrence 509–10
- effective protection 1105–6
- European Union 358–9, 470, 518–19, 521–5, 534
- evolution 37, 518–34
- human rights 520, 534
- non-penalization 922–4
- North America 518–19, 529–34
- onward migration 1105–6
- procedural standards 596–7
- Refugee Convention 519–21, 534
- responsibility/burden-sharing 520–1
- solidarity principle 518–21, 534
- standards of third countries 519–20, 534

Sahrawi camps 72, 1144–5

scholarly field, international refugee law 1–19

sea, interdiction at *see* interdiction powers of State at sea

search and rescue (SAR) obligations at sea 13, 489–93, 500–1
- coastal States 491–3, 508
- deaths 500–1
- distress 484–5, 490–2, 500, 508
- flag States 490–1
- human rights and refugee protections, intersection with 489–93, 500
- International Maritime Organization (IMO) Guidelines 492
- life, right to 490–1
- operation and maintenance of SAR facilities 491–2
- place of safety 484–5, 491–2, 500, 508
- Rescue Coordination Centre 491–2
- rescue, definition of 490–1
- rhetoric 484–5, 500
- Safety of Life at Sea Convention (SOLAS) 490–1
- SAR regions 491–2
- security-related interdiction 500–1
- UN Convention on the Law of the Sea (UNCLOS) 489–91

secondary movements 144–5, 1081–2, 1101–2, 1111

security *see* national security

self-reliant refugees 1048, 1051, 1060, 1062–3, 1095

sexual orientation and gender identity (SOGI) claimants 14, 78–96, 733–4, 761–77
- act/identity distinction 775, 777
- camps 93–5
- concealment 768–71
- conflict refugees 817, 819–20
- credibility assessments 79, 771, 773–7
- criminalization 763–5
- culture 90, 95–6
- discretion 87–8, 768–71, 774–5
- discrimination and exclusion 92–4, 764–5

sexual orientation and gender identity (SOGI) claimants (*cont.*)
  equality 80–1, 87, 89, 95–6
  European Convention on Human Rights (ECHR) 79, 89, 91–4
  European Union 79, 88–9, 92, 769, 771–2
  family rights 93–6, 997
  feminism 60–3, 65, 76–7
  freedom of information 765–6
  future, looking to the 95–6
  Global Compact on Refugees 96
  heteronormative power relations 81, 87–8, 93–6
  human rights 78–9, 87, 89–92, 95–6
  immutable/protected characteristics approach 763–4
  institutional changes 83
  integration 82–4
  internal protection alternative (IPA) 79, 92–3
  intersectionality 80–1, 89–94
  legal instruments 81, 87
  liberty and security, right to 91–2
  lobbying by LGBTIQ+ or refugee organizations 90
  medical care, access to 93–4
  non-conformity 60–2, 68–9, 76–7, 743–4
  non-Western expressions 773–4
  paradigm, sexuality and gender identity claims as a 775–6
  performance of sexuality 773
  persecution 87–9, 761–2
  privacy 80–1, 87–9
  protection, ensuring 84–8
  public/private divide 763–5
  Qualification Directive (EU) 763
  queer theory 69, 76–7, 80–1, 83, 88, 96
  queering international refugee law 78–96
  recognition 83, 95
  Refugee Convention 78–9, 82, 87–8, 95, 761–3, 769
  refugee status determination (RSD) 79–80, 761, 771–3, 775–7
  religion 83, 763
  resettlement 79, 94–5
  sex/gender 62–3, 65, 76–7
  social group, membership of a particular 82–3, 762–5
  sociocultural factors 83–4
  specific needs, addressing 90–5
  stereotyping 68–9, 90–2, 95–6, 771–2
  stigma 79, 88, 90–2
  training 90, 95–6, 772–4
  transgender and genderqueer people 68–9, 72–3, 76–7, 743–4
  UNHCR 89–90, 92, 194–5, 762–3
  vulnerable group, as 90–2, 94–5
  Western gay culture 83
  women 743–4
  Yogyakarta Principles 2007 89–90, 92–6
sexual violence and exploitation 732–3, 740
  camps 72
  disabilities, people with 788–9
  exploitation, definition of 555–6
  human trafficking 553–6, 560, 565–8
  liberty, right to 941
  prostitution 555
  psychological evidence 732
  rape 732–4
  reception 72–3
  resettlement 75
  severity threshold 555–6
slavery and practices similar to slavery 555–6, 957, 1155
smuggling of migrants and refugees 535–52 *see also* Smuggling of Migrants Protocol
  binding regional law 547–50
  criminalization 536
  detention 13
  European Union 547–50
  interdiction at sea 908
  non-penalization 930–1
  onward migration 1115
  regional law 547–50
Smuggling of Migrants Protocol 13, 535–47
  aggravating circumstances, obligation to legislate for 542
  border measures 546–7, 551
  carrier liability 542
  consent 537–8
  consulates, communication with 545–6
  criminal justice instrument, as 536, 540, 550

criminalization and offences 536–45, 550
education 545–6
European Union 548–50
exceptions and limitations 542–3
family members, smuggling of 543
financial or other material benefit 536–7, 543
holistic approach 551
human rights 538–43, 545–7, 550–1
humanitarian assistance 542–3
international cooperation 538–9
International Organization for Migration (IOM) 539–41, 545–6
lives or safety or migrants, endangering 542
non-criminalization 544–5, 550
non-discrimination clause 541
non-refoulement, principle of 540–1, 546
Office of the High Commissioner for Human Rights (OHCHR) 539–41, 545
opportunity to make asylum claims 541
organized criminal gangs 543–4, 550
outline and purpose 537–9, 545
protection of smuggled migrants 537, 545–6
Refugee Convention 540, 544–5, 551–2
return of migrants 546
saving clause 539–41
smuggling, definition of 536–7
terminology 536–8
trafficking in persons 536–40, 551
travel or identity documents 541–3, 546
UN Convention against Transnational Organized Crime (UNTOC) 536, 538, 550
UNHCR 539–41, 545
UNICEF 539–41, 545
victims, no reference to smuggled migrants as 537
Working Group on the Smuggling of Migrants (UNTOC) 538
social group, membership of a particular 99, 364–5, 763–4
age 751–2
children 749, 751–2
conflict refugees 822, 826–7
disabilities, people with 790
feminism 62–3, 65–9
refugee, definition of 629
sexual orientation and gender identity (SOGI) claimants 82–3, 737–8, 762–5
stereotyping 742–3
women 730–1, 737–8, 740
feminism 62–3, 65–9
innate and unalterable characteristics 737
stereotyping 742–3
social media 111, 1022
social rights *see* economic, social and cultural rights; International Covenant on Economic, Social and Cultural Rights (ICESCR)
soft law *see also* soft law procedural standards under Refugee Convention
Council of Europe (CofE) 352, 362, 369
disabilities, people with 783–4
education, right to 976–8
extraterritoriality 511
human trafficking 557
internal displacement 850–5, 859–60, 863
liberty, right to 943
politics 99
procedure 588–90
Refugee Convention 592–5
restoration and other remedies 1123–4
UNHCR 195–6
soft law procedural standards under Refugee Convention 592–5
administrative standards 594
appeals 592–4
complementary forms of protection 593
Council of Europe 593–4
effective remedy, right to an 594
facilities, providing applicants with adequate 592–3
harmonization of national law and practice 593–4
inter-American human rights system 594–5
judicial review 594
minimum recommended standards 592–3
MIRPS (Comprehensive Regional Protection and Solutions Framework) 594–5
OAU Convention 595

soft law procedural standards under Refugee Convention (*cont.*)
  Organization of American States, role of 594
  subsidiary forms of protection 593
  UNHCR 592–5
solidarity principle 472–3, 520–1
  Dublin system 521–5
  European Union 359–60, 466, 521–5
  OAU Convention 286–7, 466
  resettlement 1089–90, 1092, 1097–8
  responsibility/burden-sharing 466–7, 471, 520–1
  safe third country (STC) law and practice 518–21, 534
  temporary protection 682–3
South Africa 284–5, 577
  asylum, right to 873, 882, 965
  colonialism 58
  Constitutional Court 965, 997
  crimes against humanity 1129
  work, right to 953, 964–5
  family reunification, right to 997
  gender 72–3
  naturalization and integration 1056, 1058
  race 47–8, 52, 54–5, 58
  resettlement 286–7
  restitution and other remedies 1122
  sexual orientation and gender identity (SOGI) claimants 80
South Asia 12, 407–22
  Asia-Pacific Consultation on Refugee Rights (APCRR) 415–16
  Asia Pacific Refugee Rights Network (APRRN) 415–16
  Asian–African Legal Consultative Organization (AALCO) 414
  background 408–11
  Bangkok Principles 414
  colonialism 407–8, 410–11
  Convention against Torture (CAT) 422, 444
  Eurocentrism 407–8
  human rights 422
  human trafficking 558–9
  Informal Consultations on Refugee and Migratory Movements 414–15
  myth of difference 410–11
  non-refoulement, principle of 412, 422
  political interests 414–15
  Refugee Convention and Protocol 198–9, 407, 411–12, 422
  refugee, definition of 411–22
  refugee status determination (RSD) 412–14
  regional initiatives 413–16
  South Asia Declaration on Refugees 2004 414–15
  South Asian Association for Regional Cooperation (SAARC) 407, 558–9
  women, trafficking in 558–9
South Korea 389, 400–4
  civil society 403–4
  compliance and gaps with international refugee law 402–5
  Constitution 401
  detention 403–5
  domestic law 400–2, 404–5
  employment 402
  family unity 401
  financial aid 402–3
  human rights 405
  humanitarian protection 401–2, 405
  Immigration Control Act 400
  Indochinese refugees, mass influx of 400
  institutions 403–4
  judiciary 403–5
  law and practice 401–3
  non-referral decisions 404
  North Korean refugees 400, 406
  ports of entry, applications at 402–3
  recognition as refugees 401–2, 405
  Refugee Act 2013 400–4
  Refugee Convention 390, 400–1, 405
  refugee, definition of 401–3, 405
  refugee-receiving State, as 389–90
  refugee status determination (RSD) 400–5
  resettlement 400
  residence permits 401–2
  sexual orientation and gender identity (SOGI) claimants 80
  simplified procedure 403
  statistics 402–4
  treaties, ratification of 401
  UNHCR 401, 404

United Nations, joining the 400
Southeast Asia 12, 423–40
accountability 438–9
ASEAN countries 423–40
ASEAN Inter-governmental Commission on Human Rights (AICHR) 429
Asian–African Legal Consultative Organization (AALCO) 428
Bali Declaration 430
Bali Process 429–30
Bangkok Principles 428–9, 439–40
birth registration 436
boat departures 428
Buddhism 424
children 426–9, 434, 438
civil society 433
colonialism 424
Comprehensive Plan of Action (CPA) 425, 428, 439–40
Convention against Torture (CAT) 422, 426–7, 444
deportation 438–9
detention 435, 438
Disabilities Convention 426–7
domestic law 430–2
work, right to 438
expulsion 426–7
future directions 439–40
human rights 426–9, 433–4, 438
illegal immigrants 424, 435–8
Indochina war 424
inhumane treatment 435–6
institutional framework 432–3
Islam 424
Laotian refugees 425, 428
large-scale displacement/mass influx 424–6
legal perspectives 426–32
marry, right to 438
national immigration law 399
national security 429–30
nationality, acquisition of 436–7
NGOs 433
non-refoulement, principle of 426–32, 434
non-State actors, persecution by 433
persons of concern cases 432–3
Refugee Convention and Protocol 68–9, 426–7, 429
domestic courts 434
Eurocentrism 426, 440
ratification 426, 440
refugee, definition of 69, 424, 428–9, 440
refugee status determination (RSD) 432–3
regional instruments 428–30
resettlements 399–400
soft law 428
statelessness 427, 437
Sustainable Development Goals (SDGs) 427–8, 434
temporary refuge 424, 428–9, 438–9
treaties, ratification of 440
UNHCR 68–9, 400, 432–3
women 428–9
sovereignty *see* State sovereignty
Sri Lanka
Australia 496–7, 911
Eminent Persons Group 414–15
India, Tamil refugees in 416–18
interdiction at sea 911
large-scale displacement/mass influx 412
non-State armed groups (NSAGs) 1152
Refugee Convention and Protocol 407
refugee status determination (RSD) 412
standard of proof 662, 667–8, 719
credibility assessments 609, 613
beyond reasonable doubt 611–12
burden of proof 612–13
evidential assessments 610–14, 620–1
standards *see also* procedural standards under human rights treaties
absolute and contingent standards, mix of 182–3
climate change and disasters 835, 838, 844–6
complementary protection 662, 667–8
detention 42
development 33–6
digital transformation of refugee governance 1011
Dublin system 524–5
work, right to 952–3, 956, 964
High Commissioner for Russian Refugees (League of Nations) 33–6

standards (*cont.*)
internal protection alternative (IPA) 702–5, 708–9
liberty, right to 934, 936, 940–5, 947–8
no compulsory return, principle of 33–4
onward migration 1106–7
procedure 588–606, 877
protection of refugees 35–6
refugee status determination (RSD) 591–4
refugees, definition of 34–5
restoration and other remedies 1119–20, 1122–4, 1126–8, 1132
safe third country (STC) law and practice 519–20, 534
soft law 592–5
temporary protection 681, 683, 690–1
universal political standards 1034
women 736
State practice 42, 197, 244, 247, 255–6, 867, 906
cessation 1034
complementary protection 661–2, 671–2, 675–6
constitutions 260–1
customary international law 240–1
extraterritoriality 516
interdiction at sea 486
internal protection alternative (IPA) 706, 710
liberty, right to 934, 936, 938, 941, 945, 949–50
naturalization and integration 1055–8
Smuggling of Migrants Protocol 552
temporary protection 249–52
State sovereignty 116–18, 121, 193 *see also* territorial sovereignty
accountability of international organizations 1160–1
border control 546
collective sovereignty 46–7
ethics 114–15
exclude, right to 128
human rights 119–20
interdiction at sea 483–4
internal protection alternative (IPA) 697
liberty, right to 934, 937–9
politics 104–5
quasi-sovereignty, regime of 128–9
resettlement 1090–1, 1098
responsibility/burden-sharing 472
Westphalian sovereignty 119
stateless refugees 15, 158, 797–814
birth, nationality acquired at place of 802–3, 813
birth registration, access to 156–7
burden of proof 801
cessation 1044–5
child-rights-based approach 164–5
citizenship, denial of 154–5
climate change and disasters 832, 843–4
consent to nationality 802–3
continuity of States 843–4
Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession 2006 159–60
customary international law 15, 166
de facto statelessness 798, 809–12, 814
de jure statelessness 798, 809–10, 813
denial of nationality 806–7, 813–14
discrimination 806–7, 810–11
displacement/statelessness nexus 153–7, 160–1, 163–4, 167–8
documents, lack of 156–7
durable solutions 153, 157
extinction of States 843–4
habitual residence, country of 804–5
Hague Convention on Certain Questions relating to the Conflict of Nationality Laws
Protocol on Statelessness 158
human rights 123, 155–6, 158–60, 800, 808, 810–11, 813
humanitarian issue, as 799–800
ineffective nationality 798, 809–12, 814
intergenerational statelessness 167–8
nationality 154–60, 163–5, 167–8, 798–808, 813, 843
effective right to nationality 152–3, 158
ineffective nationality 809–12, 814
not having a nationality, meaning of 798–803, 814
naturalization and integration 798, 812–13, 1055

non-returnability as an eligibility requirement 805–6
offer of nationality, rejection of 813
outside the country of nationality requirement 810
parentage, nationality based on 802–3
persecution 805–6, 808
preventative action 158
production of refugeehood 158
Reduction of Statelessness Convention 1961 152–3, 158–60, 163–5, 797, 800, 1044, 1055
refugee as also stateless or stateless person as also a refugee 160–7
Refugee Convention 10, 152–68, 797–814
refugee definition in Refugee Convention 797–809, 814
rights, denial of 808
Statelessness Convention 1954 797, 799–803, 805–6, 810
Refugee Convention, intersection with 152–4, 157–60
technical issue, as 799–800
UNHCR 159–65, 167, 798, 801–2, 814
virtual citizenship 802–3
well-founded fear of persecution 804, 806–8, 813–14
withdrawal of nationality 807–8, 813–14
statist ethics of refugee protection 115–21
liberal internationalism 9–10, 116, 119–22
liberal nationalism 9–10, 116–18, 122
subsidiary protection *see* complementary protection
asylum, right to 870–1
complementary protection 670–1
European Union 355–6, 358–9, 369, 815–16
family reunification, right to 994–5, 1000–1
human rights 593
international humanitarian law 227–9
naturalization and integration 1056, 1058, 1061
non-penalization 920–1
procedure 588–90
superior responsibility 720
Sustainable Development Goals (SDGs) 149, 781–2, 977, 987, 1015
Syria
disabilities, persons with 779
Dublin system 523–4
Germany 671
Golan 645
Jordan 967–9
Lebanon 348–9, 982–3, 1020–1, 1089–90, 1145
migrant/refugee binary 136
nationality 157
Palestine 644–5, 647–8, 654–6
race 50–1
repatriation 143–4
sexual orientation and gender identity (SOGI) claimants 80
statelessness 162
temporary protection 691
Turkey 365–7, 967
World Bank loans, work permits for 967–9

T

Taiwan 389, 395–6
civil society 396, 405
Hong Kong asylum seekers 394–5
human rights 404–5
National Immigration Agency 393
NGOs 396, 405
Refugee Convention 391–2, 394–5, 404–5
refugee-receiving State, as 389–90
Tajikistan 370–1, 374, 380–2
civil war 371
Constitution 375–6
extradition treaties 383–4
institutional framework 377–8
legal framework 375–9
reasons for refusal 378–9
Refugee Convention 370–1, 375–9, 381–2
refugee status determination (RSD) 376, 378–9
stateless persons 375–6
temporary status 376–7
UNHCR 376–81

technology *see* digital transformation of refugee governance
temporary protection/temporary refuge 14, 678–81, 686–91
  Cartagena Declaration on Refugees 251–2
  cessation 1042–4
  complementary protection 678–9
  customary international law 242–3, 249–52, 256–7, 684–5
  durable solutions 249–51, 682–4
  duration of protection 688
  emergency protection 687, 689–90
  European Union 251–2, 688–94
  flexibility 686–7
  human rights 678–9, 683–7
  interdiction at sea 686–7
  large-scale displacement/mass influx 249–50, 678–91
  naturalization and integration 1058
  non-refoulement, principle of 678–9, 682–3, 686–7, 691–4
  OAU Convention 251–2
  Refugee Convention 250, 678–81, 686–7, 690–3
  resettlement 1096
  responsibility/burden-sharing 686–7
  solidarity 682–3, 694
  standards of treatment 681, 683, 690–1
  State practice 249–52
  UNHCR 251–2, 256–7, 686–8
  visa facilitation obligations 358
territorial asylum 320–1, 324, 332–3
territorial sovereignty
  absolute sovereignty 119
  asylum, right to 874–5
  ethics 9–10, 129
  extraterritoriality 502
  Inter-American Court of Human Rights (IACtHR) 329
  liberal internationalism 119, 121, 129
  liberal nationalism 116–18
territorial waters 485–7
terrorism
  asylum, right to receive 253
  exclusion 716–17, 721–2, 725
  political offence, concept of a 716–17
  public opinion 111
  September 11, 2001, terrorist attacks on United States 302, 306–7, 1095
  war crimes 109
  war on terror 109, 494–5, 939, 947
  women 740–1
third countries *see* resettlement; safe third country (STC) law and practice
Third World Approaches to International Law (TWAIL) 8, 59
Tibetan refugees 198–9, 412–13, 416–18, 421
torture
  Committee against Torture 213, 674–5, 700, 909–10, 914
  complementary protection 663–4, 669, 674–5, 677
  Convention against Torture (CAT) 422, 426–7, 444
  derogations 362–3
  Disabilities Convention 784
  European Convention on Human Rights (ECHR) 362–3
  exclusion 724–5
  internal protection alternative (IPA) 700
  jus cogens 904–5
  liberty, right to 943
  non-refoulement, principle of 208–9, 243, 245, 397–8, 443–4, 900–2
  208–9, 245, 663–4, 674, 902
trafficking *see* human trafficking; Trafficking in Persons Protocol
Trafficking in Persons Protocol 555, 557
  ASEAN Convention against Trafficking in Persons 558
  carrier liability 556
  consent 555
  criminal law 557
  exploitation, definition of 555–6
  forced slavery 555–6
  freedom of movement 559–60
  identity 556–7
  immigration position 556
  privacy 557
  prostitution 555
  recruitment, transportation, transfer, harbouring, or receipt 555

regional measures 557
repatriation 556
severity threshold 555–6
slavery and practices similar to slavery 555–6
Smuggling of Migrants Protocol 540, 551
trafficking, definition of 554–6
transnational criminal law 556
travel documents 556
transgender and genderqueer people 68–9, 72–3, 76–7, 743–4
transitional justice 1120–1, 1154
translators or interpreters, access to 601–3
Transnational Organized Crime Convention (UNTOC) 536, 538, 550 *see also* Smuggling of Migrants Protocol
travel documents *see* identity certificates and passports
treaty interpretation 705–10
Trudeau, Pierre 106, 300
Trump, Donald 105–6, 141, 189–90, 306–7, 312, 494–5, 531, 533, 648, 659–60, 907, 1091–2, 1105–6, 1113, 1174–5, 1179, 1181–2, 1190
Turkey 334, 337–8, 365–6, 369
conditional refugee status 365–6
Council of Europe (CofE) 369
work, right to 967, 969
European Convention on Human Rights (ECHR) 342
European Union 12, 131–2, 365–7, 505, 523–4, 967
extradition 387
Greece 366
human rights 337
Kazakhstan 387
Palestinian refugees 365–6
Refugee Convention 335, 344, 365–6, 523
refugee status determination (RSD) 343–4, 348, 365–6
EU 365–6
religious minorities 25
resettlement 523–4
safe third country (STC), Turkey as a 367
solidarity principle 523–4
subsidiary protection 365–6
Syrian refugees 365–7, 523–4, 967
temporary protection status 340–1, 365–7, 369
Turkmenistan 370–1, 373

U

UDHR *see* Universal Declaration of Human Rights (UDHR)
Ukraine 367–8
capacity-building 368
Council of Europe (CofE) 368–9
European Union 368
externalization projects 368–9
internally displaced persons 367–8
subsidiary protection 368
visa liberalization 368
UN High Commissioner for Refugees (UNHCR) *see* Office of the High Commissioner for Refugees (UNHCR)
UN Relief and Rehabilitation Administration (UNRRA) 40, 1076, 1085–6
UN Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) 14, 41, 344–5, 643–60
Arab host States 651–8
Arab League 653–4, 658
budget deficit 648–9, 653–4, 659–60
Casablanca Protocol 653
categories of refugees 649–51
citizenship 643, 656–7
Consolidated Eligibility and Registration Instructions 644–5
current challenges 658–60
discrimination 654–5
durable solutions 645–7, 649, 651–2, 658–60
East Jerusalem 645, 654
eligibility criteria 645
establishment 644–5
European Union 649–52
fundraising 648
future prospects 658–60
Gaza 644–5, 654, 656–9
General Assembly (UN) 644–9, 656–7, 659–60

UN Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) (*cont.*)
grandfathered persons 644–5
Hamas 657–8
human rights 656–9
humanitarian relief 644–5, 657–8
intifadas 647–8, 652
Jordan 644–5, 647–8, 652, 654
large-scale displacement/mass influx 643–4, 647–8
Lausanne Treaty 643–4
League of Arab States (LAS) 652–3
Lebanon 644–5, 647, 650–1, 654–5, 1144
non-refoulement, principle of 658
non-State armed groups (NSAGs) 1144
Operations Support Office (OSO) Programme 647–8
Oslo Process 656–7
Palestine Liberation Organization (PLO), politics of 652–8, 1144
Palestinian Authority 652–3, 656–7
Palestine refugee, definition of 644–5, 651–2
passports, travel, and identity documents 654–5
peace agreements 659–60
political solutions, lack of 649
property database 649
protection gap 649, 651–2
protection officers under Refugee Affairs Officer programme 647–8
Refugee Convention 643, 645–6, 649–51
registration 654–5
resource shortages 648
return, right to 644, 649, 653, 658–9
Special Rapporteur on the Occupied Palestinian Territories 656–7
statelessness 643–4, 646–7, 654
Syria 644–5, 647–8, 654–6
temporary protection 658
UN Conciliation Commission on Palestine (UNCCP) 644–6, 649–52, 659
UN Mediator for Palestine 644
UN ongoing engagement 647–8
UN Relief for Palestine Refugees (UNRPR) 644–5
UN resolutions 644, 646
UNHCR 645–52, 655
United States, withdrawal of funds by 648, 659–60
wall 656–7
West Bank 644–5, 654, 656–9
unaccompanied children 745–6, 755–6, 758–9
age assessments 1004
age of majority, reaching the 1005
anchor children 1005
best interests test 1004
family reunification, right to 989–90, 1004–5
procedural standards 600
refugee, definition of 749
siblings 1005
UNICEF 539–41, 545
United Kingdom
Aliens Act 1905 575
Bolshevik revolution 25
Criminal Cases Review Commission (CCRC) 926
gender 76
Guidance Notes on managing caseloads 580
Human Rights Act 1998 965–6
jus emigrandi 571
mandates 25
refugee, definition of 174–5
refugee status determination (RSD) 575, 580, 585
religious minorities 25
Roma people 54
refugee roulette/lottery 583
United Nations (UN) *see also* Charter of the UN; Global Compact for Safe, Orderly and Regular Migration; Global Compact on Refugees; New York Declaration for Refugees and Migrants; Office of the High Commissioner for Human Rights (OHCHR); Refugee Convention; UN High Commissioner for Refugees (UNHCR)
accountability 1157–8, 1160–1, 1168–72
acts contrary to purposes and principles of UN 717–18
General Office of Internal Oversight Services 1171–2

Haiti, bringing cholera to 1157–8
Human Rights Council (HRC) 211, 976–7, 985, 1170
international legal personality 1160–1
International Organization for Migration (IOM) 1168
procedural standards 597–8
Reparations Principles (UN) 1120–1, 1135–6
resolutions 1124
Rwandan genocide 1157, 1169–70
Special Rapporteur on Trafficking in Persons 567–8
UN Office on Drugs and Crime (UNODC) 537

United States 12, 296–8, 303–7
advocates 305
American Convention on Human Rights (ACHR), non-ratification of 298
American Declaration of the Rights and Duties of Man, denial of legal obligations imposed by 298
American Revolution 574–5
arbitrary decisions 141
asylum adjudications 304–5
Asylum Cooperative Agreements with Guatemala, Honduras, and El Salvador 105, 312, 513, 532–3
Bill of Rights 936
burden of proof 306–7
Canada 296, 298–301, 304–5, 313–14
Immigration Reform and Control Act 1986
Safe Third Country (STC) Agreement 71, 189–90, 192, 302, 312–14, 530–1
Salvadorans and Guatemalans 300
September 11, 2001, terrorist attacks on

United States 302
Caribbean interdiction programme 493–5, 500
Central America 299–300, 304, 306
children 297, 303–4, 328, 745–7, 1175, 1181–2
Cold War 303–4
colonialism 58
communism, refugees fleeing 303, 305, 576
Convention against Torture (CAT) 297, 422, 426–7, 444, 514
cosmopolitanism 303
crimes against humanity 1175
criminalization of entry 131–2, 305
deportation 305, 311–12
detention 189–90, 305–7, 311–12, 1175
deterrence 494–5
drugs cartels 311–12
enforcement 305–7
externalization 311–12
extraterritoriality 504, 506–7, 510–11
family separation 303–4, 328, 1175, 1181–2
fast-track deportation 305
gender-based claims 76, 305
Guantánamo, offshore processing in 494–5
Guatemalans 105, 300, 304–6, 312, 684
Asylum Cooperative Agreement 105, 513, 532–3
safe country, Guatemala treated as 312, 513
Haiti 311–12
Caribbean interdiction programme 493–4
interdiction programme 311–12, 327–8, 493–4, 506–7, 511, 908
race 52
repatriations 494
human rights treaties, failure to ratify 297, 303
Inter-American Court of Human Rights (IACtHR), rejection of mandate of 298
Illegal Immigration Reform and Immigrant Responsibility Act of 1996 305–7
Immigration and Nationality Act 1965 529–30
interdiction at sea 141, 506–7, 908
direct 493–5, 500
Haiti 311–12, 327–8, 493–4, 506–7, 511, 908
Interim Asylum Rule 191–2
judiciary 306–7, 618–19
judicial review 305
media coverage 110–11
Mexico 191–2, 296, 309–12
detention centres on border 189–90
deportation 311–12
drugs cartels 310
Mérida Initiative (Plan Mexico) 310–12
Migration Protection Protocol (Remain in Mexico) 312
Northern Triangle States 311–12
policing of border 101, 313–14

United States (*cont.*)
safe country, treatment of Mexico as a 313–14
Southern Border Program 310–12
Muslim countries, travel ban from 106
national identity 303
national origins system for quotas, ending of 303–4
non-refoulement, principle of 131–2, 191–2, 297, 311, 493–4, 506–7
Northern and Western Europeans, favouring immigration by 298–9
Northern Triangle States 311–12
Operation Coyote 311–12
overseas refugee resettlement programme 304–5
overseas screening systems 311
parole authority 303
Pilgrims of Plymouth 1083
political opinion 751–2
political refugees 576
populism/nativism 303
Puebla Process (Regional Conference on Migration) 297–8
pull factors 494
quotas 303–4
race 50–1, 307–8
recognition rates 107–8
Refugee Act of 1980 and subsequent legislation 304–7
Refugee Convention 304–5, 494, 529–30
drafting, participation in 303
extraterritoriality 510–11
implementation 304
Protocol 1967 297, 303–4, 306–7
refugee, definition of 303–5
refugee status determination (RSD) 304, 583
religion, bans based on 50–1
removal 306
repatriation 556
safe third country (STC) law and practice 71, 131–2, 189–90, 192, 302, 312–14, 529–31
Salvadorans 300, 304–6
September 11, 2001, terrorist attacks on United States 302, 306–7, 1095
Southern Border Program 310–12
sovereign capture 493–4
specialist bodies 576–7
Temporary Protected Status 251–2
UNHCR 188–92
UNRWA, withdrawal of funding from 648, 659–60
violent regimes, support for 296
visa requirements 503
war on terror 494–5
well-founded fear of persecution 304–5
Universal Declaration of Human Rights (UDHR)
asylum, right to 256, 872–8, 882
asylum, right to seek 873–8
carve-out relating to prosecutions for non-political crimes 874
changing nature 877–8
constitutions 262–3
customary international law 253–5, 877–8
deterrence 877–8
discrimination 541
drafting 873, 875
work, right to 952
exclusion 711, 718
extraterritoriality 505–6
fair and public hearing, right to 876–7
freedom of movement 148–9
general principles of law 877–8
liberty, right to 938
migrant/refugee binary 137
nationality, right to 158
onward migration 1103
Refugee Convention 205
resettlement 1085
scope of right, identification of the 876
State sovereignty 873–4
stateless refugees 158
territorial sovereignty 119
Universal Periodic Review (UPR) process 159–60
Uzbekistan 370–3, 384–7

V

Vanuatu's National Climate Change and Displacement Policy 457–8
Venezuelan refugee crisis 331–3
Cartagena Declaration on Refugees 270, 635–6

work, right to 267–8, 270–2
Joint UNHCR–IOM Special Representative 332
Mexico 270, 309
MIRPS (Comprehensive Regional Protection and Solutions Framework) 478–9
Quito Process 140–1, 271, 331–2
refugee, definition of 331–2, 635–6
refugee/migrant binary 140–1
safe third country (STC) concept 520–1
travel documents, acceptance of expired 271

Vienna Declaration on Human Rights and Programme of Action 875
visas 31–2, 144–5, 503, 907, 1112
voluntary/forced migration binary 136–43, 150
voluntary repatriation 16–17, 40, 1064–79
camps 1073
cessation 1033–4, 1039–40, 1068–70, 1072–5, 1078–9
change in circumstances 1064–5, 1068–70, 1078–9
conditions conducive to return 1069–70, 1078–9
de-escalation zones 1064–5
definition 1064–5, 1077
Disabilities Convention 793
durability 1079
expenses 1067
facilities, reduction in or cutting off 1074
human trafficking 556
identity certificates and passports 32
internal displacement 849, 855–6, 859–61
international protection 1066–7
International Refugee Organization (IRO) Constitution 1076–7
legal framework 1067–71
limitations 1070–1
migrant/refugee binary 143–4
minority populations 1071
naturalization and integration 1047–8, 1063
non-refoulement, principle of 33–4, 913, 1066, 1069, 1077
objections, validity of 1076–8
onward migration 1102–3, 1105–6, 1111
origins 1075–7
practice 1072–5
prioritization 1063
Refugee Convention 1066–8, 1077
refugee, definition of 1077
refugee status determination (RSD) 1074–5
refusal to return 1074–6, 1078
resettlement 1076, 1080–1
restitution and remedies 1121–2
safe havens 1064–5
Second World War, after the 1075–7
sign repatriation forms, forcing refugees to 1074
timing 1069–70, 1073–4, 1078
trial periods 1033–4
UN Relief and Rehabilitation Administration (UNRRA) 40
UNHCR 1064, 1066–75, 1078–9
unrepatriable persons 1064–5, 1069, 1077–8

W

war *see* conflict refugees; international armed conflicts (IACs); international humanitarian law; non-international armed conflicts (NIACs); non-State armed groups (NSAGs), responsibility of; war crimes
war crimes
child soldiers 817–19
crimes against humanity 1186–7
exclusion 712–13, 715–18
international humanitarian law 223
tribunals 1136
Weis, Paul 1, 3–4, 254–5, 809
well-founded fear of persecution 731–2, 740–1
absence of persecutory risk 1037–9
capacity 786–7
children 749–50, 753
climate change and disasters 836–7, 842–3
complementary protection 662–3
conflict refugees 822, 831
disabilities, persons with 786–7
discrimination 629
effective protection from original risk of persecution 702–3, 707–8, 710
human rights 205–7, 628–9
internal displacement 854

well-founded fear of persecution (*cont.*)
internal protection alternative (IPA) 698–9, 702–3, 707–10
international humanitarian law 226
nationality, denial or withdrawal of 806–8, 813–14
no new risk of persecution 708–10
non-refoulement, principle of 628–9
objectivity 731, 749–50, 786–7
onward migration 1114–15
persecution, definition of 207, 629–30
race 49–50
refugee, definition of 41–2, 627–9, 638–40, 642
rights, denial of 808
serious harm, definition of 628–9
serious violations of human rights 207
State as agent of persecution 703
stateless refugees 804, 806–8
subjectivity 638, 731, 749–50, 786–7
women 731–2, 740–1
witchcraft, allegations of 732–5, 775–6
women and girls 728–44 *see also* feminist appraisal of international refugee law
abortion 732–3
advocacy and scholarship, overlap between 743
asylum, right to 897
causation 733–5, 739–40
Committee on the Elimination of Discrimination against Women 900–1
credibility assessments 732, 734–5
cultural conventions, forced compliance or punishment for failure to comply with 732–3
domestic violence 732–4, 736, 740, 775–6
equality 742–3
exclusion 740–1
exclusivity 732–5
exoticization vector 733–6
family reunification, right to 1001
female genital mutilation (FGM) 732–3, 739–40, 775–6
forced marriage 732–4, 742
gender non-conforming persons 733–4
human rights 731, 734–5, 739, 742
human trafficking 553–4, 560, 565–8
internal protection alternative (IPA) 735–7
jurisprudence, women in refugee 14, 728–44
lack of progress 728–30, 741–3
LGBTIQ+ claimants 743–4
men as victims 733–4
nexus 733–5, 739–40, 742–3
non-binary persons 743–4
non-gendered harms, effect on women of 735
persecution 732–9
race 738–9
reasons for persecution 737–9
refugee, definition of 730–7, 739–40, 742–3
religion 732–3, 738–9
restitution and remedies 1133–4
serious harm 732–5
sexual violence 732–4, 740
social group, membership of a particular 730–1, 737–8, 740, 742–3
State protection 735–7
sterilization 732–4
terrorism 740–1
training 742
transgendered persons 743–4
witchcraft, allegations of 732–5, 775–6
work, right to 218, 267–8, 270–2, 438, 651, 652–3, 654, 952–64, 962–6, 967–9, 970, 1048–50, 1085–6
World Bank 475–6, 1157–8
World Health Organization (WHO) 779, 1157, 1160–2

X

xenophobia *see* race

Y

Yogyakarta Principles 2007 89–90, 92–6
Yugoslavia, crisis in former
International Criminal Tribunal for the Former Yugoslavia (ICTY) 720, 1183–4
Kosovo 688–90, 821–2, 1041, 1089–90, 1158, 1171
temporary protection 686–90

Z

zones or areas from State's territory, exclusion of 899, 906