An Introduction to International Refugee Law

Edited by Rafiqul Islam and Jahid Hossain Bhuiyan
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Rafiqul Islam and Jahid Hossain Bhuiyan
Dedicated to the memory of
Professor Azizur Rahman Chowdhury
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PREFACE

The period after the Cold War has been marked by conflict despite what was hoped to be a peaceful and collaborative world. Violence and persecution continue to be committed in different corners of the world which compels many people to flee their countries and seek protection in neighbouring states as refugees, thereby rendering refugee protection an important international issue. Many people mistakenly think that the refugee problem is of particular concern only to the North, yet the South has as much to do being a major source of refugee influx. In the face of global crises of involuntary cross-border human displacement, the protection of refugees has assumed and will continue to assume paramount significance. Since its promulgation in 1951, the Convention relating to the Status of Refugees dominates the understanding of refugee issues. However, due mainly to the indifference and refusal of its members to keep true to their commitments under the Convention, it is no longer as relevant and adaptive as it once was. This book, An Introduction to International Refugee Law, aims to underscore the urgent need for the members to deliver their commitments and to set the stage for a deeper understanding of these assumed obligations in a global setting. It purports to fulfill this goal by underscoring, highlighting, elaborating, explaining and commenting on the salient rules and principles of international law on refuges to afford a deeper appreciation of its limitations and to pursue a reformist agenda.

We wish to extend our sincere thanks and gratitude to all contributors who have come together to make this collection an exciting publication on international refugee law. As editors, we have pursued a minimalist interventionist approach in all chapters, which remain in substance the original work of their respective author. We are also grateful to Lindy Melman and Bea Timmer of Martinus Nijhoff Publishers for their support and cooperation with this book.

Rafiqul Islam
Md Jahid Hossain Bhuiyan
DEDICATION

Sadly, during the preparation of this book the international refugee law community suffered an important loss with the passing of Azizur Rahman Chowdhury. With unfathomable sorrow but deepest admiration and everlasting gratitude, we dedicate the book, *An Introduction to International Refugee Law*, to the memory of Azizur Rahman Chowdhury in recognition of his active involvement in this book as co-editor.

Azizur Rahman Chowdhury was Professor at the Department of Law, Dhaka University. He spent 38 years of his teaching in the Dhaka University. He was Chairman of the Department of Law from 1982–1983. He had been Dean of the Faculty of Law for sometimes. He was member of the editorial board of Journal of the Faculty of Law, The Dhaka University Studies. He was the pioneer in curriculum designing and introduction of Clinical Legal Education Programme of the Faculty of Law, Dhaka University. He had participated in several national and international conferences, and made substantial contribution through his papers. He had contributed many research articles and published several textbooks in law. Some of his remarkable books are Jurisprudence, Constitutional Law, Commercial Law and K.C. Wheare’s book “Modern Constitution”. He was co-editor of *International Humanitarian Law-An Anthology* (LexisNexis Butterworths), *Issues in Human Rights* (Atlantic Publishers), and *An Introduction to International Human Rights Law* (BRILL, Martinus Nijhoff Publishers).

Beyond his myriad achievements as a professor, researcher and administrator, Professor Chowdhury will be remembered for his vibrant personality, energy, humour, pleasant, wisdom, kindness and most of all, selfless concern for others.
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Md Jahid Hossain Bhuiyan teaches law in the Department of Law, ASA University Bangladesh. He was a visiting scholar of Emory Law School, USA. During his higher studies in Belgium he gained experienced in legal practice. He is co-editor of An Introduction to International Human Rights Law (Martinus Nijhoff Publishers, 2010).

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Thanos Zartaloudis, Ph.D, University of London, UK is a Senior Lecturer in Law at the University of London, Birkbeck College, UK. He has published in the fields of legal theory, refugee and asylum law and legal history.
INTERNATIONAL LEGAL PROTECTION FOR REFUGEES:
ARTICULATING CHALLENGES AND OPTIONS

Rafiqul Islam and Jahid Hossain Bhuiyan

CONTEXT, NATURE, SCOPE, AND AIDS

Refugee protection has become one of those contemporary challenges that have bewildered the international community in search of an enduring solution. Despite the high expectation of a peaceful and collaborative world generated by the end of the cold war, the post cold war era has been experiencing a conflict-ridden world where violence is a constant feature in nearly every parts of the world and is out of control. The internecine strife due to surging ugly faces of extreme nationalism in pursuit of ethnic cleansing and the disintegration of central authority in the former Yugoslavia and Rwanda in the 1990s, prolonged Sri Lankan separatist civil war, the so-called wars on terrorism in Iraq and Afghanistan, devastating famine and ruthless civil conflicts in Africa, and the ongoing Arab spring terrified, persecuted, and displaced millions of people. Persecution on the basis of ethnicity and religion continues to deprive people of their most basic human rights recognised in international law and the 1945 Charter of the United Nations. Many of them fleeing their homeland for fear of their lives and safety and have taken shelter in neighbouring states and beyond as refugees. They remain non-citizens of their states of refuge, which retain full discretion in the admission of refugees and extent of protection. As a result, refugees are unable to claim their status recognised and access to protection as a matter of right. Their basic rights remain elusive.

A series of recent factors, such as global financial crises, rising unemployment, austerity measures and their consequential socio-political unrest, people smuggling, refugee xenophobia, and issues of national security fears have led many, if not most, governments to play populist politics and pursue blatant refugee non-admission policy and practice. The refugee protection obligation of states has receded in favour of seemingly more urgent needs and imperatives of domestic constituency. The force of law has become powerless and made subservient to the dogmatic pursuit of national interests. Moreover, the mainstream international discourse seems to nourish an erroneous perception that refugee is a
problem of the North, when the South has been a major contributor to the causes of producing refugee flows. Amidst this state of global affairs, the protection of refugees has been marginalised even further. Side by side, the number of refugees is on the rise everyday as violence and persecution continue unabated in many parts of the world.

The 1951 Convention relating to the Status of Refugees (the 1951 Refugee Convention) has been the main legal instrument for protection. But it is no longer as resilient as it used to be largely because of the reluctance of its members to deliver their assumed commitments under the Convention. The current level of protection is not only grossly inadequate for traditional refugees but also new groups of refugees resulted from a myriad of new causes and sources of persecution are falling between the cracks of the system. Global climate change induced human displacement has assumed and will continue to assume paramount importance as it is predicted to be one of the biggest drivers of refugees, which would expose the fragility of, and ongoing disillusionment about, the 1951 Refugee Convention. There is an urgent need to pursue a reformist agenda to render the Convention adaptable to the new challenges of the 21st century.

It is in this context that this book has been planned and written, covering those issues pertaining to the international law of refugee protection that are contemporary and controversial in nature amenable to their progressive development. The primary nature of the book is introductory, backed by research orientation, analytical approach, and innovative ideas about the future direction of refugee protection law. It blends the theoretical and applied aspects of international refugee law in that the provisions of the 1951 Refugee Convention have been applied to fact situations in order to test their operational effectiveness in real life situations. While most authors are leading scholars in the area who offer their wealth of experience, some are young and early career academics who present their thoughts on refugee protection from the perspective of new and future generations. The scope and contents of each chapter are pre-determined and guided by the editors with key points and issues to be addressed and stretched to deal with contemporary situations and their problems. The authors however had absolute freedom of analyses and views that they individually wished to ventilate through their respective chapter. While each chapter is distinct and provides diverse perspective of a given issue, yet they combine and share their jurisprudential wisdom on the current state of refugee protection with a common sense of purpose of its positive change.
The overarching aim of the book is to contribute to the progressive academic and intellectual construction of international refugee law amidst polarised debates on the issue. The proper understanding of refugee law has the potential of launching a consciousness-raising campaign to appreciate the fact that refugee protection is not charity or a discretionary goodwill gesture but a combination of legal, moral, and human right issues. The pledge that the contracting states have made under the 1951 Refugee Convention entails precise legal obligations. The aim of this book is to underscore the urgency of adhering to this pledge in good faith and to lay the foundation for the understanding of this pledge in a truly global context from which the Convention has emerged and within which it operates and encounters challenges. The book attempts to accomplish this goal by highlighting, explaining, and commenting upon important rules and principles of international refugee law to afford a clear and better understanding the law and its limitations. By flushing out various issue-specific inadequacy of the 1951 Refugee Convention, the book seeks to pursue a reformist agenda with the hope that it will trigger a legal and human rights friendly refugee protection regime.

Structure

The book consists of 15 chapters. In the book’s opening chapter, entitled “The Origin and Evolution of International Refugee Law”, Rafiqul Islam traces the development of international refugee law from its establishment through to the present day. He then argues that geopolitics and bloc rivalries have greatly influenced the foundations of the framework of the international refugee law since it first developed after the First World War and then the 1951 Refugee Convention and its Protocol in 1967. Since there is a greater drive for every state to preserve its own autonomy, we cannot neglect the effect or sway of politics in a refugee crisis. The recommendation is that politics need not play an exclusive role, rather it should consider the burdens of any refugee dilemma as its responsibility. The major role politics can play is to firstly avoid the probabilities of the occurrence of refugee crisis. Finally, international refugee law should be implemented by all to give protection to all the refugees around the world without discrimination.

Md Jahid Hossain Bhuiyan in his chapter entitled “Refugee Status Determination: Analysis and Application” states that for refugee applicants to have an official recognition of their refugee status is important in
order for them to obtain the rights and benefits of being one. The 1951 *Refugee Convention* does not contain provision on refugee status determination. He argues that such non-inclusion is not convincing, as it leads states to take different approaches in determining refugee status. Thus the refugees in some countries do not enjoy the necessities they deserve under international law and they are not granted refugee status following the concerned states’ strict procedure on the determination of refugee status. The author then mentions some requirements for procedure to determine refugee status and takes the position that the adherence to these procedures is important taking into consideration the plight of the refugees across the globe.

Vanessa Bettinson in her chapter entitled “Loss and Denial of Refugee Status” states an important issue in relation to the protection of state security. States have always demonstrated this interest during the drafting process of many international human rights instruments. They ensured certain limitations on the obligations created by international human rights instruments to protect state security. The 1951 *Refugee Convention* highlighted this fact and reasons to exclude a person from refugee status were mentioned in Article 1F. The author discusses the exclusion clause which allows for the authority of the state to deny certain refugees status within the state on the basis of certain conditions. However, states also have an interest in reviewing refugee status due to the conduct of the refugee within the state. She also discusses the exclusion clause’s historic as well as contemporary applications in some national jurisdictions. She takes the position that the exclusion clauses show an evolution which reflects how terrorism has affected most of the states; therefore, the commitments noted for the rights of refugees are being shortened before serious violation is experienced. However, the 1951 *Refugee Convention* supports those refugees who have been displaced by their own government.

Md Jahid Hossain Bhuiyan in his chapter entitled “Protection of Refugees through the Principle of *Non-Refoulement*” examines the general law in relation to the principle of *non-refoulement*, which protects refugees from being returned to places where their lives or freedoms would be threatened. He then examines the status of the principle in international law and takes the position that the principle of *non-refoulement* is now part of international law and it has now acquired the status of *jus cogens* in spite of the fact that the principle contains exceptions. He also discusses how the principle of *non-refoulement* protects the vast majority of refugees who are victims of civil wars, military takeovers, wars between states, natural catastrophes, gross human rights violations, economic desolutions
and so on. The author is of the opinion that the principle of *non-refoulement* has extraterritorial as well extradition implications.

Rebecca M.M. Wallace and Fraser A.W. Janeczko in their chapter entitled “The Concept of Asylum in International Law” focuses on the status of asylum in current international law. The history of refugee sanctity has been explored on both regional and international levels. At the regional level, the idea of asylum has been discussed and explored from different perspectives. The concept behind refugee definition remains roughly the same as the 1951 *Refugee Convention* but some parts have been modified that take into perspective the differences in political, geographic and temporal setting. The human rights laws have played an important role in the formation of a strong concept of asylum in the present era. They argue that the concept of asylum demands that individual rights have high value without undermining the sovereignty of the states in relation to their right to determine who may be present on their territory.

V. Seshaiah Shasthri in his chapter entitled “Armed Conflicts and Protection of Refugees” states that the three basic laws followed to protect the individuals when at war are the international humanitarian law (IHL), international human rights law (IHRL) and international refugee law (IRL). With the variation in the implementation of these rules, they come together to serve three main purposes i.e., protection of life, health and dignity of people. He then notes that the 1951 *Refugee Convention* does not cover the issues of war or situations seriously disturbed public order as a reason to obtain refugee status. The author also tries to determine if the IHL and IRL can function separately as well as together, and when a war breaks out then can the people act as both a refugee and a civilian. If legally IHL forces the people to cross the border they would be refugees for another country. The author is of the opinion that refugees should always be protected from forced participation in armed groups. Furthermore, due respect should always be given to civilian and humanitarian nature of refugee camps and settlements that are situated in places of non-international armed conflicts.

Natalia Szablewska and Md Saiful Karim in their chapter on “Protection and International Cooperation in the International Refugee Regime” express the view that, as of the time of writing, the problem with the modern refugee protection framework is its inability to properly balance the discretionary nature of granting asylum from persecution with the issue of possible discrimination and the commitment to international human rights. The asylum seekers and refugees who seek shelter within their own states are in trouble as their states find it hard to fulfil the commitments
they have made to safeguard their rights. The authors are of the opinion that more public awareness has to be developed so that the refugees, migrants and deprived can all be provided with proper shelter. However, the internal political preferences are still influential on the states’ refugee policy. Though states are obliged to cooperate with the international community to protect refugee rights, many do not take an interest; thus, it is hard to make them cooperate.

Rafiqul Islam in his chapter entitled “Climate Refugees and International Refugee Law” states that the League of Nations addressed the refugee crisis that took place due to the First World War through the conclusion of different international instruments. The Kilaki persecution in the Armenian, Assyrian, Syrian, Kurdish, and Turkish areas of the Soviet Union caused refugee flows and refugees of these areas were the beneficiaries of these instruments. The establishment of the 1951 *Refugee Convention* became important due to the inability of the arrangements to tackle the refugee dilemma that occurred after the Second World War. This new Convention was based upon an individual approach rather than group approach, meaning that they attended to individual people rather than to groups. He then argues that the prevailing refugee law can therefore encompass the situations that occur in a changing world. If the 1951 *Refugee Convention* can cover the post war refugees with regard to protection and rights then it is not very difficult for the present refugee law to encompass those displaced people that have been made refugees due to the natural climatic disasters. He then states that, formerly, people who had lost their homes and belongings were not treated as refugees because they were displaced due to climate and human rights were taken to be different in context and meaning. However, thanks to a growing awareness, the term human rights violation now includes climate displacement. This calls for proper framework and guidelines to contribute to the well-being of climate-displaced victims.

V. Seshaiah Shasthri in his chapter entitled “The Role of International Organisations in the Protection of Refugees” argues that the United Nations High Commissioner for Refugees (UNHCR) should participate along with the UN to fight for the rights of refugees by helping in human rights standard-setting. Its participation in protecting the refugees is necessary to show the interest of the officials as well. According to the author, although there is much authority given to the human rights treaty bodies, international human rights is not up to the correct standard. He also expresses the view that as the control of states includes much more than refugee protection, more activities must be done by different bodies and
organisations such as the UNHCR so that the refugees are better protected. One good step taken is the understanding that UN human rights system can be a possibly good way of dealing with the issue.

Gary Wilson in his chapter entitled “The United Nations Security Council and Refugee Flows as ‘Threats to the Peace’” demonstrates that some limitations that are linked to international refugee law can theoretically be addressed through the use of the UN Security Council’s collective security for the specific case of refugees can be used for the elimination of the restriction of international Law. This can be done by controlling the situations that lead to these limitations or the circumstances that accelerate the threats to peace under Article 39 of the Charter of the United Nations. Article 41 and 42 are the clauses through which the UN can respond to the situations of mass population flow due to natural disasters. Military implementation activities and sanctions that can be used when weak procedures are inadequate to address the situation where the refugees need their assistance, overlooking whether or not they are identified as refugees as per the international refugee law.

Howard Adelman in his chapter entitled “The Law of Return and the Right of Return” argues that a tailored advantage is given to a specific group through the Law of Return and the Right of Return. This credit is allotted on the basis of their ethnic affiliation. He notes that the Law of Return is different from the Right of Return in five ways. The people under the Right of Return are not willing to acquire the citizenship of the state to which they are returning, exactly opposite to the Law of Return. The Right of Return is not a legal principle. The Law of Return gives special consideration to ethnic minorities on the other hand, the Right of Return gives privileges to those who are a majority outside the state where they want to return. This is claimed as a matter of universal right rather than a preferential claim where a special privilege is given on the basis of ethnicity. The special privilege applied to Palestinians in 1948 in Israel. He states that few states implement the Law of Return. The Right of Return is applicable in two circumstances: the ethnic minority in Yugoslavia and the Palestinians. The Right of Return has been ineffective despite much financial investment. It is specific in nature and not universal but it has failed dramatically in terms of implementation.

Thanos Zartaloudis in his chapter entitled “Asylum, Refugee and Immigration Law Studies: A Critical Supplement” states that rules which were introduced earlier on the basis of care for the humans and the relations of the country produced restrictions in such a way that the difficulties of the humanitarian need, the tragedy of the major portions
and the problems faced by the refugees seeking shelter became an emergency situation because of the laws. The Western states which are more powerful become more signified by the refugee management through their governments, comforts and markets. He argues that people turn out to be refugees when state formation occurs, because of politics and government, and/or economic and geopolitical policies. The vast majority of refugees reside in the poorest areas or urban slums of the world. The author notes that, in capitalist societies, the freedom of movement of goods is higher than the freedom of movement of people. Examination of refugee and immigration law is also done with regard to capitalism.

Archana Parashar in her chapter entitled “Human Rights of Refugees” notes that international law has set some basic rights for refugees. These rights have been extracted from the 1951 Refugee Convention which itself has been improved by some UN human rights documents and from regional agreements made over time. She analyses the given information based upon human rights law, in order to determine whether human rights are in a position to restrain state power regarding refugees. She takes the position that threats take place while distinguishing between the rights of asylum seekers and refugees, as this means that more needy people may be deprived of their human rights. Other than this, more advancement has to be considered in order to protect the rights of migrants and internally displaced persons who may or may not be counted among the refugees. Only after that it can be realistically hoped that international actors will focus on the problem of discrimination that have taken place against some segments of refugees.

Avinash Govindjee and Elijah Adewale Taiwo in their chapter entitled “The Protection of Women Refugees under the International Refugee Convention” note that gender discrimination among refugees have not developed due to tradition. Before the 1951 Refugee Convention came into being, women's rights were under-represented with no great success in advancement seen. But with time the rights of women also gained some importance on both national and global levels, including the granting of refugee status. They then argue that some hindrance is still present which restricts the advancement of women's rights. It is necessary to encourage countries to ratify certain instruments including the 1951 Refugee Convention. They need to be proactive in their approach to develop their own local laws with regard to the issue of refugees and their rights in accordance with the key principles contained in the instruments. Some
promotion of women's rights from the judicial side can improve the standards of the women rights by involving the government and society as well.

Thoko Kaime in his chapter entitled “The Normative Framework for Children's Rights in Refugee Situations” states that children require the most care in refugee camps because they are young and immature. The 1951 Refugee Convention and its Protocol have not taken into account certain issues such as the assignment of asylum, resettlement or indeed lasting solutions for vulnerable groups, including women and children. International laws pertaining to children were advanced and improved in UN mandated organisations like the UNHCR. However, large changes had begun by the implementation of the 1989 Convention on the Rights of the Child (CRC). The CRC covers everyone under the age of 18 and therefore includes refugee children as well. State obligations under the CRC regarding refugee children are examined by the author. He states that the responsibilities and duties attached to the state obligations regarding refugee children express the tedious work it demands. The monetary funds that are demanded by the rights are so heavy that the states may be burdened with this financial constraint. Numerous states have intentionally stopped helping their refugee children because of this dilemma and now rely on international funds for the purpose. He argues that, in terms of child refugees, the states are under an obligation to ensure that proper security measures are implemented but these measures are restricted to the national level. Even though the issue of child refugees is obvious and elegant rules are contained in the CRC, refugee children are still not fully protected. As a result, international non-governmental organisations come into play, especially on the African continent. However, the governments have not stepped back in their assistance for this cause, ensuring that they are willing to provide this protection to children.

Emerging Theme and Final Words

International law pertaining to refugee protection is at the cross-roads. Refugee protection has brought into disrepute by its abuses and deteriorated by unwarranted restrictions. Three fast emerging matters, namely human rights, climate change, and economic injustice are likely to dominate and pose formidable challenges to debates over refugee protection in the foreseeable future. The marginalised plight of refugees is inextricably
linked to not only human rights but cascades down to the broader issues of international peace, collective security, stability of the world order, and development as one of the cherished millennium goals. A balanced and holistic refugee protection regime based on human rights and humanitarian principles has the possibility of maximising these goals.

Climate change and its adverse effects on human habitat are increasingly emerging beyond doubt, which will eventually challenge the wisdom inherent in the conventional sources of refugees. The adaptability of the Convention to be extended to cover climate refugees is a distinct possibility and the increasing involvement of UNHCR in their protection is a foregone conclusion. Finally, the lopsided distribution of wealth and resources devoid of any distributive justice will continue be a cause of refugee flows. These grey and unresolved issues of refugee protection merit further research and scholarly attention with a view to render the 1951 Refugee Convention resilient and adaptable to emerging exigencies and to find ways to strike a balance between the competing national interests of states and refugee protection as a legal right. To this end this book has presented the view that the 1951 Refugee Convention, if construed widely and in good faith with its proclaimed purposes in mind, is capable of protecting a wider range of refugees than is often recognised.

The features of refugee problem and protection have undergone sea change over the past 60 years since the Refugee Convention in 1951. The discernible change is the irony that refugee protection is promoted mostly in rhetoric and ignored most in the practice of states. States need to go beyond their rhetoric and show a great deal of goodwill and political commitment to develop a durable refugee protection regime with new approaches to the refugee problems, its systemic values, and standard of protection. There is no palatable alternative to a depoliticised and legalistic framework of refugee protection. The frequency of refugee flows and gravity of the problem are increasingly becoming alarming in the absence of credible and lasting solution. And this challenge is not going to go away any time soon and it cannot be met in isolation from the overall forced and involuntary human migration and displacement worldwide. Therefore the option is not to shy away from it but to understand it and face it within the broader framework of international law.

Very recently, the UNHCR Director of International Protection has explained the inherent virtues of refugee protection and its socio-political and moral imperatives as follows:

[A]ttitudes toward international refugee protection serve as a kind of litmus test of the health of our democratic societies. The institution of asylum
is itself a reflection of values such as justice, fairness and equality – its existence an indicator of the importance of these values in society as a whole.¹

Every human being, regardless of status, is born with the right to have right, which is denied to refugees in most instances. This book reiterates the underlying values of refugee protection and reinforces the right of the refugees to a lawful and dignified humane existence within the international community.

THE ORIGIN AND EVOLUTION OF INTERNATIONAL REFUGEE LAW

Rafiqul Islam*

1. INTRODUCTION

Historically, the right of people to move across the boundaries of their body politic or political entity is regarded as one of the most ancient exercises of human freedom. The legal delimitation of the length and breadth of this freedom remained largely beyond the control of those moved or displaced and contingent upon the national interest of the refuge. Pursuant to this right to cross-border freedom of movement, when a person is forced to flee his/her state of origin or nationality as a victim of circumstances caused by certain extraneous factors and seeks sanctuary in a foreign country, he/she is considered as an involuntary migrant or asylum-seeker who does not currently receive the legal protection of any state. Such a person has always been in a vulnerable position warranting support and protection. Customary international law that prevailed prior to the First World War afforded protection to individual only by the state to which they belong as national. It imposed no obligation on states to protect the nationals of other states, even when in the territory of the former. Their protection was at the mercy of the foreign state of refuge, which could expel them at will and any time. Individuals fleeing their own state to escape intolerable or life-threatening circumstances ‘found themselves totally bereft of protection at international law’.1

The forcible cross-border movement of people took a dramatic turn at the aftermath of the First World War. Their marginalised and inhumane plight came to the forefront of the post-war international community, which underscored the urgency of devising a protection regime specifically to face the prevailing refugee crisis. This was the beginning of the subsequent evolution of international refugee law as a means of institutionalising societal concern for the well-being and protection of refugees.

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The purpose was to safeguarding the otherwise powerless vulnerable individuals, who should be entitled to adequate protection beyond the whims of their state of refuge. This quest for international legal protection notwithstanding and regardless of their state of refuge, refugees over the history has always been confronting insurmountable practical and extra-legal barriers in receiving the intended protection. This gulf between theory and practice is attributable partly to the out-dated notion of refugee retained in the regime and partly due to the failure of states to live up to their commitments and legal obligations toward refugees. As a result, the intended protection capability of the regime remains underutilised and subservient to political expediencies.

This chapter traces the genesis and evolution of international refugee law since its institutionalisation at the end of the First and Second World Wars through to its current paradigm till to date. It highlights and comments upon the driving-force, legislative imperatives, and politics of cooperation behind various phases of development. Its evolution and application since inception has consistently been dominated by national interests of states and their politico-economic expediencies. Consequently, refugees have always been facing unwelcoming, if not hostile, environment everywhere and inordinate difficulties accessing protection by virtue of law. As it stands now, international refugee law is grossly inadequate to deal with the complexities and diversities of modern refugees problems and cover wide-ranging refugee-producing circumstances, which underscores the need for further evolution.

2. Genesis and Evolution in the Inter-War Period

Refugees only began to receive some measure of protection at international law when millions of people became stateless because of the devastation of war and the disintegration of multi-ethnic empires. As these displaced people scattered throughout Europe in search of homes, European states were confronted with the emergence of large refugee populations that threatened regional security and stretched their scarce resources to the limit. Therefore the focus of the international legal protection regime for refugee, from its very inception, was Euro-centric. Predominantly European states designed international legal standards

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relating to the displaced people to be afforded international legal protection and the ways in which such protection was to be accorded. This European influence was further strengthened by the rise of political and economic nationalism throughout the western world. Western states fiercely guarded their territorial sovereignty and right to decide who could or could not enter into their territory. The determination of who was to be afforded protection as refugees retained by states to be exercised in accordance with their perceived national interests. The consideration of tight fiscal conditions and high unemployment in these states prevailed over that of refugee plight and economic policy benefits that could accrue from accepting the flow of displaced persons, many of whom were skilled, in the economy. Given their own war devastation and economic hardship, these states failed to conceive that an extensive role in protecting refugees could improve their own economic position. Hence political and economic expediencies conjoined to severely restrict their response to refugee crises and compromise the scope of protection.

States prioritised their mutual respect for each other's sovereignty over their citizens and were reluctant to offend this value by offering an open invitation to displaced persons. This situation was somewhat mitigated by refugee crises of the time involving distinguishable groups of people, often without nationality of their state of origin. As a result, the act of refugee receiving did not offend the sovereignty of refugee producing states. There was a series of refugee crises, each involving a specific group of people. States concluded a series of multilateral treaties concerning the protection of specific groups of refugees as they emerged. The diversity of these refugee groups changed the conceptualisation of who should be protected and by what means. The first major refugee crisis occurred following the Russian revolution in 1917 when one and a half million Kulaks from Russia, the Armenian, Assyrian, and other European people moved cross-border to escape persecution in their state of origin. The vast majority did not have travel documents and consequently could not move from states of their first reception to start new lives in third states. The League of Nations (LN) appointed Nansen as the High Commissioner for Russian Refugees in

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1921 and formulated the Arrangement Concerning the Issue of Certificates of Identity to Russian Refugees in a Conference in Geneva in 1922 for the issuance of international travel documents. As legal conditions to qualify for the refugee-status, claimants needed to have been outside, and without the protection of, their state of origin. The international community of states protected those displaced persons as refugees who were denied 

16 de jure protection by their state of origin.

The preoccupation with the lack of 

de jure protection soon extended to incorporate the lack of 

de facto protection in response to the desire to protect those who suffered under, and escaped from, the Nazi rule in Germany in the 1930s. The Nazis denial of German nationality to the Jews and their systematic repression forced many Jews to flee. This event led the international community to develop a Convention Regarding the Status of Refugees Coming from Germany in 1938. By virtue of its Article 1, the Convention extended protection to those persons who possessed or used to possess German nationality and who had been deprived of, in law or in fact, the protection of the German government. This departure from the narrow national interest driven protection represented an orientation of international legal regime to respond to the social phenomenon of refugee-hood. It encompassed groups adversely affected by a particular social or political event, not just those united by a common status. The Nazism triggered initiatives to define refugees in terms that judged the government of the refugee-producing state. This development of refugee identification was followed by an emerging trend since 1938 to conceive refugee as an individual person with their own incompatibility with the government, rather than as a member of a group that was denied protection. An Inter-Governmental Committee of Refugees was established to facilitate the involuntary migration of German-stateless persons residing within Germany, who were also accorded the refugee status. The refugee status was evaluated in relation to the personalised criteria of political opinion, religious beliefs, and racial origin that precipitated the claim for the status. This was yet another change in the conceptualisation of who would be protected in the international legal regime for refugees.

This is how the institutionalised international legal protection regime for refugee originated through multilateral treaties and their associated
instruments created since the 1920s under the auspices of the LN to deal with the refugee crisis arose particularly in Europe (and the Middle East to an extent) during and after the First World War. Initially the scope of these protection mechanisms was entirely dependent on the preoccupations of states conceiving and conceding this protection to the extent necessary to advance their national interests. The pursuance of national interests led states to be selective and reluctant to becoming involved in dealing with refugee crises and treatment. The protection regime was worked out predominantly by western states acting in response to European refugee crises. This cultural bias and understanding in the conceptualisation of refugees and their status determination precluded protection for involuntary cross-border displaced persons in different contexts. The encompass of the conceptualisation of the refugee status in response to Nazi atrocities need not be exaggerated in the international context as it remained largely national-interest oriented and operated within a more “select focus” with limited national role in refugee protection.\(^8\) The LN treaties provided only ad hoc protection, which proved ineffective and unsatisfactory. Instead of developing a general definition and the articulation of refugee status and its standardised measure of protection, these treaties directed at case-specific refugee situations, which varied substantially. Consequently, a coherent body of refugee protection principles and normative standard did not emerge during the inter-war era.

3. Evolution in the Post Second World War Era

The protection framework of the current international legal regime for refugees emerged as a reaction to a particular set of events occurred at a discrete time and in a specific place. These events during the Second World War resulted in the massive displacement of millions of Europeans. An estimated eleven million displaced persons of non-German origin were in the occupied areas of Austria, Germany, and Italy in 1945, and another four and a half million in the areas under the control of the former Soviet Union.\(^9\) Initially, this refugee crisis was treated as an

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emergency situation and the response of the international community of states followed the previous practice of adopting temporary measures and least initiatives that served their national interests during the inter-war period. To this end, the UN Relief and Rehabilitation Administration (UNRRA) established in 1944 administered refugee camps and catered for the needs of refugees. UNRRA undertook a large-scale repatriation program whereby some eight million refugees were returned to their state of origin.10 UNRRA was not a refugee organisation in any meaningful sense as it was not mandated and resourced to arrange for the resettlement of displaced persons to third countries. It served the interest of the international community of states more than refugees in alleviating the prevailing refugee crisis without committing to a universal and long term structure of refugee protection.

The international community of states soon realised that provisional and piece-meal measures adopted on an incident-by-incident basis were not resolving the refugee problem effectively. The failure of voluntary and humanitarian refugee resettlement policies underscored the urgency of developing enduring normative standards and obligations to deal with the unprecedented refugee resettlement task after the Second World War. To facilitate resettlements, the UN General Assembly established the International Refugee Organization (IRO) in 1947. The IRO also followed the earlier practice of identifying certain groups and categories of people to be protected and assisted, notably the victims of Nazi persecution and certain persons of Jewish origin, which crystallised the idea of a definition of refugee around the existence of persecution. The IRO went a step ahead to recognise that individuals might have valid objections to returning to their state of origin for the continued fear of persecution because of their attributes of race, religion, nationality, or political opinions. It organised and administered the resettlement and repatriation of over one million Europeans who fell within this hybrid definition based on group identity and persecution.11 Nonetheless, the refugee crisis aggravated further. As a way out, the international community of states changed again, within a period of about five years, its definition of refugee status from group-based determination to precise and legalistic criteria oriented approach.

However, the IRO became victim of the restrictive refugee policy of influential countries which favoured the establishment of yet another UN

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10 Carlin, n 9.
11 Carlin, n 9 at 6.
refugee agency called UN High Commission for Refugees (UNHCR) on 14 December 1950, initially for three years, with the mandate to protect and support refugees, assist voluntary repatriation, local integration, or resettlement in safe third countries.\textsuperscript{12} This interim mandate has subsequently been renewed and broadened successively by numerous resolutions of the UN General Assembly and Economic and Social Council. UNHCR is presently mandated to provide, on a non-political and humanitarian basis, international protection to refugees and to seek permanent solutions for them. This mandate formally injected the element of apolitical and humanitarian considerations in the development of international refugee protection law and practice.

3.1. Conceptualising the Refugee Status

The continued pursuance of national interests soon brought about retardation in the progression of the conceptualisation of refugee status and a refugee protection paradigm. Several states spearheaded by the US maintained that it was essential to identify specific refugees who were in need of international protection and opposed the adoption of a broad approach to refugee status and protection in the post-IRO period. These states argued in favour of their sovereign right to determine the refugee-hood of a person and were only willing to assume precise and restricted duties regarding the protection of refugees. The embodiment of this posture was the Convention Relating to the Status of Refugees 1951 (Refugee Convention)\textsuperscript{13} which entrenched the notion of persecution pertaining to refugees, already exhibited by the IRO, in the international legal regime. This notion of refugee had a time limitation. According to Article 1A, the term “refugee” shall apply to any person who:

\begin{enumerate}
\item Has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization.
\item As a result of events occurring before 1 January 1951 and 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/her nationality and is unable or, owing to such fear, is unwilling to avail himself/herself of the protection of that
\end{enumerate}

\textsuperscript{12} UN GA resolution 319(IV) of 1949; UNHCR Statute is annexed to UNGA resolution 428(V) of 1950.

\textsuperscript{13} Adopted on 28 July 1951, 189 UN Treaty Series 137.
country; or who, not having a nationality and being outside the country of his/her former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

Events that led to this well-founded fear of persecution were to have occurred “in Europe or elsewhere before 1 January 1951” (Art. 1A). The traveaux preparatories (drafting or legislative history) of the Refugee Convention reveals that the vast majority of the signatory states were concerned to limit their obligations towards those refugees who had already been accepted into their territories. It was precisely because of this reason the definition of refugee in the Convention originally included a “1951-deadline”. In the case of a person who had more than one nationality, the term “the country of his/her nationality” referred to each of the countries of which he/she was a national, and a person was not considered to be lacking the protection of the country of his/her nationality if, without any valid reason based on well-founded fear, he/she did not avail him/herself of the protection of one of the countries of which he/she was a national (Art. 1A). These given interpretive conditions in the definition of refugee is a clear indication that the contracting states were determined to limit their obligations to those refugees who feared persecution as a result of events occurring prior to 1951 and had no protection whatsoever from any of his/her country of nationality.

Refugee-hood was to be conceived of as a particular individual experience. The reference to a “person” in the definition of refugee suggests that individual determination is required before any refugee status is granted. This condition obviously precludes the mass-influx of refugees from the ambit of the Refugee Convention, which is grossly unrealistic in the modern era when people are forced to leave their countries en masse. Indeed, a “well-founded fear of persecution” requires both subjective and objective tests. Subjectively, the claimant must prove that he/she has a real fear of persecution; and objectively, it must be reasonable to inculcate such a fear. These conditions narrow down the obligation of states to accept refugees and provide protection. The determination of “well-founded fear

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of persecution" involves a prediction-based decision to be made as to what might happen to the claimant if he/she returns to his/her state of origin. This decision-making accords a great deal of discretion to the decision-making state in collecting and evaluating evidence and forming the hypothesis. The Refugee Convention does not contain any provision for the creation of a neutral third body to make an impartial determination. The contracting states made it certain in 1951 that their sovereign right was absolutely safeguarded by virtue of which they would decide who could migrate into their territory. Further, they also exonerated themselves from any possible future obligations binding them to accept all refugees arriving at their borders by rejecting the incorporation of a right of asylum in the Refugee Convention.

A broad obligation to grant asylum in the sense of granting admission and protection of refugees from states where they fear persecution has been placed on other states. Providing such refuge against the jurisdiction of persecuting states would not have diminished refugee-receiving states' sovereign rights to determine who could, and who could no, enter their territory. The Refugee Convention represents the decision of the contracting states to take direct control of the process of refugee determination and establish a legal framework that permitted the screening of applicants for protection on a variety of national-interest grounds. State parties purposefully opted for a cautious and pragmatic Convention designed to solve past problems, not to create a “blank cheque” for future refugee migrations. When viewed in its context where notions of state sovereignty directed the actions of states, the Convention can be appreciated as constituting a “finely tuned” instrument reflecting all that was possible at the time and it could not have been expected to be an “ideal text”. It was not meant to be including all forcibly displaced people in need of protection. It was indeed the creation of a process of negotiations and compromises between participating states in which the notion of state sovereignty and national self-interests dominated the agenda and guided the outcome.

The significance of the Refugee Convention is that it is the first ever attempt at creating a comprehensive international legal structure for the
protection of refugees. Its fundamental premise and the core principle is that refugees should be protected by an international legal regime as long as the fear of persecution persists. This persecution-driven protection necessitated the inclusion of the customary international law principle of *non refoulement* in Article 33 of the Convention.\(^{21}\) It provides that no contracting state shall expel a refugee to the frontiers of territories where his/her life would be threatened on account of his/her race, religion, nationality, membership of a particular social group or political opinion. The principle of *non refoulement* was recognised in the Convention for the benefit of refugees, which seems to reflect an unequivocal expression of intension by the state parties to provide protection to refugees under an international legal regime. However, *non refoulement* can only accrue to a limited number of displaced persons who are encompassed by the 1951 definitional criteria. It appears that contracting states agreed to accept the duty of *non-refoulement* only after they succeeded in restricting its potential scope of application.

The conceptualisation of refugee status expressed in the definition constitutes, to a large extent, the basis of the framework of an international legal protection regime. This conceptual definition of refugee, being a construction of state parties and their dynamic national interests, over the years has proved to be malleable in terms of its contents and application. Bloc politics and cold war rivalries afforded a fertile ground for its manipulative twists. In the pretext of the subjective and objective determination of “well-founded fear of persecution”, the refugee-receiving states openly commented upon the internal affairs of refugee-producing states notwithstanding their commitment to respect each other’s sovereignty and domestic jurisdiction. Western countries, motivated by anti-communist convictions, accorded refugee status to people who fled from communist states and publicly discredited and condemned communist regimes as the persecutors of their own nationals. New refugee designations, such as “defector” and “escapee”, emerged to classify those displaced individuals from communist states who fled allegedly because of their pro-western political values. In accepting these people as refugees, western states effectively declared that communist regimes were illegal, which was thought to be a political advantage over communist states in the cold war era.\(^{22}\)


Some western states, notably the US, considered the national security implications of the acceptance of refugees from communist states and directed their collective attention and focus on these refugees. Obviously the scope of refugee protection was enhanced by affording these people from communist states refugee status and their resettlement. But the underlying value and motivation of this protection was not humanitarian but political impetus. The international legal regime for refugee protection was evolved amidst the domination of national self-interests during the inter-war and post Second World War periods, and the political interests of western states in the cold war era.

The articulation of refugee status under the Refugee Convention also catered for the geopolitical interests of western states which interpreted and applied the definition of refugee with the end in view to exclude particular problems and types of displaced people from its purview to once again limit their responsibility. The prescribed grounds of persecution were closely linked to the Eurocentric perception and concern for the denial of civil and political rights, but not for the denial of economic, social, and cultural rights advocated by communist and third world states. Western states interpreted the violation of civil and political rights in a very Eurocentric way and readily embraced as refugee persons who were disenfranchised by communist governments on the basis of race, religion, nationality, but not those who were denied basic rights such as food, shelter, health care, and education.

This Eurocentric perception of refugee paved the way for the creation of a two–tiered refugee protection scheme that allowed western states to accord protection to European claimants and yet shield against most third world asylum-seekers. The process of decolonisation pursuant to the UN decolonisation declaration 1960 proliferated refugee crises seriously in Africa and Asia as a result of the retreat of European colonialism. The Eurocentric conceptualisation of refugees and their protection under the Convention served as an effective means of restricting the involvement of European colonial powers and the international community in decolonisation-induced refugees. Fleeing a civil war of independence, economic crisis, famine, or natural disaster was regarded as sources that merely resulted in situations of common insecurity, not specific enough to generate individual fears of persecution.

The African events pertaining to decolonisation in the 1960s particularly exposed the insurmountable difficulties posed by time limitation and geography (occurring before 1951 in Europe) in protecting the African refugees. This development placed the issue of the extension of the Refugee Convention on the international spotlight that resulted in the
adoption of the Protocol Relating to the Status of Refugee 1967. Its amended definition identifies a refugee being a person who satisfies the definition of refugee in Article 1A(2) of the Refugee Convention without its time and geographic limitation. This removal of temporal and geographical restrictions was intended to render the Refugee Convention an instrument of continuing application to wide-ranging refugee-producing circumstances. However, this amended definition was timeless and placeless only in a formal, not material, sense. It merely changed the scope of the application, not the substantive provisions, of the Refugee Convention. It only deleted the requirement of events occurring in Europe before 1 January 1951 (Protocol Art. 1:2–3) and the contracting states undertook “to apply articles 2 to 34 inclusive of the Convention” (Protocol Art. 1:1). It duly preserved the Eurocentric definition of refugee who feared persecution as a result of the events similar to those occurred in Europe in the 1940s as the accepted international standard for refugee protection.

The conceptualisation of refugee remains too narrow and limited to those who can substantiate the stated requirements of persecution. Hence, the Protocol continues to tacitly recognise and uphold the priority of European refugee claimants to the guarantee of protection and fail to protect people who are unable to stay in their home countries because of civil wars, famines, or environmental catastrophes. This is precisely the reason why involuntarily displaced persons from the third world encounter so much hurdles even today in acquiring their refugee status and protection under international refugee law based on the 1951 Convention.

3.2. Discretionary Refugee Protection

The narrow yet flexible conceptualisation of refugee status has created immense state discretion in accepting individuals as refugees and ensuring their protection. While there is a right to seek and receive refugee status and protection, it cannot be claimed as a matter of right. States are not required to admit refugees and provide protection as a matter of absolute positive duty. Nonetheless, the definitional narrowness and lacklustre protection did not present serious problem in reality during the cold war era partly due to bloc politics and partly due to western economic expansion creating shortages of and demands for skills and labourers. These factors contributed to the refugee-welcoming attitude of western states, which changed with their rise in unemployment in the post cold war

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period and the escalation of refugee numbers from poor countries. This eventually led to a surge in refugee xenophobia in western states, which unilaterally thought that they have been too compassionate and humanitarian to refugees, reached their refugee-intake saturation point, and consequently now suffering from a refugee fatigue.

States are now too preoccupied with the cost of refugee protection and its social disruption, political instability, threats to unity, and welfare of their own population rather than the humanitarian consideration of refugees. Refugee problems are often viewed as immigration problems falling squarely within the sovereign jurisdiction of states and refugees as economic migrants merely trying to seize an opportunity of handout not otherwise entitled to. In response, states have adopted more guarded approaches to refugee immigration matters and strengthened border control measures to prevent refugee arrivals. This politicisation of refugee protection has denied, indeed reversed, the basic procedural right of refugees to decide their country of protection. This reversal of right causes grave detriments, inordinate difficulties, and sufferings for refugees in receiving protection. However, refugees can have a relatively easy access to a country which is not on good terms with their country of origin/nationality, focussing not on the merit of the refugee situations but on the political relationship between refugee outflow and inflow countries. In such a situation, refugee inflowing countries use refugees as their foreign policy tool. Australia for example admitted 6,300 East Timorese refugees in 1989 in consideration of their sufferings under the Indonesian rule, not in consideration of the definition of refugee under the Refugee Convention.

The steadily growing refugee pressures and their marginalised plight led the international community of states to develop a series of international conventions, protocols, humanitarian refugee agency, and UN General Assembly declarations specifying the conducts of states toward

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All these initiatives were launched to develop a legal framework for international conducts toward refugees and their necessary protection. But they failed to ameliorate the continuing uncertainty in determining refugee status and needs for protection due to the excessive control of contracting states, which could and still can formulate their own individual refugee eligibility criteria and determination process. Hence, despite the broadening of the scope of application of refugee definition in the Protocol, determining criteria remained the same and highly politicised as before. The process of the development of any coherent international legal norms and protection standard for refugees continued to be stultified by the self-serving interpretation and practice of refugee-receiving states and at the mercy of their discretionary prerogatives, supervening priorities of national interests, and politics of cooperation.

3.3. Judicial Role in Regulating Discretionary Determination

International and national judicial bodies have been playing a minimalist role, not proactive enough to arrest the rampant politicised interpretation of provisions of the Refugee Convention. The International Court of Justice has jurisdiction over the refugee determination process under Article 38 of the Refugee Convention, which remains unutilised to date, for a prospective refugee cannot directly invoke its review jurisdiction for want of any Convention state intervening on behalf of refugee. Pursuant to Article 16 of the Convention, refugees also have free access to the court of any Convention state. The definition of refugee and its persecution aspect received most judicial scrutiny in national courts, which has been mixed and imprecise, adding further to their susceptibility to diverse understanding and application. The fear of persecution must be based on an individualistic and objectively specific risk. This means that the fear must be “something more than plausible” and demonstrable, as “the object of the Convention is not to relieve fears that are all in the mind”.

The US Supreme Court held an expansive view and found that “one can certainly have a well-founded fear of an event happening when there is...
less than a 50% chance of the occurrence taking place”.30 But a mere general fear of persecution in a civil war is inadequate to constitute persecution and an asylum-seeker must single him/her out to prove that he/she is “more at risk” than a member of the general population in order to receive refugee protection.31 The Australian Federal Court however did not require the “singling out” test and held that the “fear of persecution” of asylum-seekers on any one of the Convention ground was enough for receiving protection.32 In marked contrast though, the High Court of Australia held that an asylum-seeker’s fear of forced sterilisation under the Chinese one child policy did not constitute persecution for membership of a social group for want of sharing certain immutable characteristics beyond the common experience of persecution.33 But the forced sterilisation of Chinese women was judged as a “fundamental violation of human rights” leading to the recognition of refugee status in Canada.34 These inconsistent judicial decisions seem to equip states, persecuting and asylum-seeking alike, to construe Convention provisions narrowly with a view to limit their legal obligations.

4. REGIONAL CONTRIBUTIONS

Mounting and successive regional refugee crises led various regional political organisations to revisit and reorient the international refugee protection regime. The pioneering first initiative came from the Organisation of African Unity (OAU, now called African Union) in appreciation of specific problems faced by displaced persons within its own regional sphere. The OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (1969)35 expanded the definition of refugee in Article 1(2) to include persons who were compelled to leave their place of residence not only because of fears of persecution but also

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

Similarly the Central American countries, together with Mexico and Panama, adopted the Cartagena Declaration on Refugees in 1984 that added yet another additional refugee-producing event – massive violation of human rights – to the definition of refugee.36 The disruption of public order can be stretched to include large scale fleeing caused by war, civil strife, climate change, famine conditions, and violent abuses of human rights. But this expanded definition affords only limited and temporary, not adequate and lasting, protection to cross-border refugees.37

These regional definitions encompass both individual and group refugees by explicitly recognising the general conditions in a country as well as the individually focused origin of the “well-founded fear of persecution” in the narrow conventional definition. This hybrid approach has the positive effect of overcoming individual country’s convenient reliance on the negative no-duty norms. It purports to emphasise the humanitarian aspect of refugee protection and relief, focus on the plight of refugees and not on the burdens on countries, and address short-term needs of refugees through regional cooperation and arrangement. These regional initiatives aimed at expanding the ambit of refugee protection to those whom were found to be in genuine need of protection but outside the reach of the Refugee Convention.

Refugee regionalism by itself may work apparently better than any other narrow approaches due to the geographical contiguity of, and the innately bonded interest of regional countries to solve, the problem. But regional mass influxes are fraught with the risk of exacerbating regional financial/resource depletion and consequential famine. Regional conditions necessary for cooperation may not necessarily be present and applicable in many countries. Moreover, there is no international consensus on the expansion of the conventional definition. The growing apprehension of massive floods of refugees makes many regional refugee-receiving countries today increasingly restrictive, rather than expansive, in their

36 Adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico, and Panama, 22 November 1984.
interpretation of the definition of refugee.\textsuperscript{38} As a result, there appears to be no palatable alternative to a universal conceptualisation of refugee status and uniform criteria for refugee protection to be developed under international refugee law.

5. Contemporary Trend of Expanding International Refugee Protection Practice

International refugee law has been static since the 1967 Protocol but refugee-producing events since 1967 have altered radically. There are ample instances of forced exodus of people fleeing their own country for fears of minority oppression, depopulation (ethnic cleansing), repopulation (transplanting) as abominable tactics of territorial claims and occupations. They often live in cross-border camps in legal limbo with the constant fear of expulsion, without rights, and with almost no hope of return to their state of nationality/origin. These new types of refugee problems have exponentially increased in their frequency and complexity not anticipated in 1951 or 1967. The large scale outflows of Vietnamese and Cambodian refugees in the 1970s and 1980s and millions fleeing the Balkan wars in the 1990s forced the international community and its forum the UN to deal with these refugee crises, the scale and complexity of which were beyond the comprehension of the legal paradigm developed through the Refugee Convention and its Protocol. These events necessitated an expansion of the reach of international refugee law, which has since been undergoing \textit{de facto} transformation for its very survival and to remain relevant to refugee crises in the contemporary context.

The expanded regional definition of refugee and persecutory grounds are now increasingly being used by the UN to enhance refugee protection. The involvement of UN agencies in armed conflicts ridden Sudanese refugee camps in Darfur in 2004–2010, Somali famine-stricken refugees in neighbouring countries (Kenya and Ethiopia) in 2010–2011; and South Sudanese refugees in Kenyan camps in 2012, Syrian refugees in Turkish camps in 2012, and refugees from the Democratic Republic of Congo in Rwandan camps in 2012 are contemporary examples of expanded persecutory grounds including famine, hunger, and armed conflicts. Article 35(1) of the Refugee Convention also provides some form of collective refugee arrangements and burden sharing in relation to the mass-influx

of refugees under the auspices of UNHCR or any other UN agency. An example of its application was the Comprehensive Plan of Action adopted by the South-East Asian countries to provide first-asylum to 199000 Vietnamese refugees in 1979 in return for international funding administered and supervised by UNHCR.39

In recent years, UN members, through their actions in the UN General Assembly, have authorised the extension of the mandate of UNHCR for refugee protection. Throughout its history, UNHCR has concerned itself with protecting those people who have lost the protection of their country of origin and crossed their national border. It has been focusing on actively assisting refugees in camps and negotiating with host governments for support, based on the presumption that refugees would return to their country of nationality. However, crises concerning displaced persons have changed and the predominant victims in these crises are those people who have been displaced within their own state. Crises of internal dislocation have escalated in number and magnitude in recent years, especially following the end of the cold war. The end of superpower control has rekindled ethnic, racial, religious, and tribal hatreds, wars, ethnic cleansing, and internal genocide in many countries and contributed to refugee flight around the world. These conflicts are often exacerbated by problems of poverty, famine, population pressure, environmental degradation, and global warming.40 The ugly faces of inter-communal violence, shifting and redrawing borders, and civil unrests and uprising in many countries have forcibly uprooted millions. In response, the UN General Assembly and Secretary-General have tasked UNHCR with the responsibility of protecting and assisting these persons displaced both internally and cross-borders – a protective role to avert crises of displacement within countries.41

An estimated over two and a half million were internally displaced people (IDPs) within the former Yugoslavia due to the ravages of its genocidal civil war, the largest refugee crisis in Europe since the Second World War.42 In November 1991, the UN Secretary General (Perez de Cellar) asked UNHCR to assist displaced persons within the former Yugoslavia.

41 Fontaine, n 20 at 141–43.
UNHCR led humanitarian operations in the area of Bosnia Herzegovina, distributed relief among the 1.6 million IDPs, and provided assistance to the population of besieged cities such as Sarajevo and Gorzade as well as those in regional areas.\textsuperscript{43} In the Yugoslav crisis of forced human displacement as in similar other crises like the Rwandan genocide and Sudanese Darfur forced displacement,\textsuperscript{44} UN member states continue to determine the levels of protection afforded by the international community and the nature of such protection through their financing of UNHCR operations.

The widening scope of refugee protection by UNHCR is dependent on contributions by UN member states. If the massive funding undertakings of refugee protection in the recent years are any guide, states seem to be willing to support the expansion of the conceptualisation of refugee protection to embrace new involuntary displacement-generating circumstances such as IDPs which have outnumbered the cross-border refugees. Reflecting on this changed situation in refugee protection, Sadako Ogata, UN High Commissioner for Refugees, said that the problems of refugees have not changed but the refugee problem has and that the international community is beginning to appreciate this and to widen the scope of protection offered by the legal regime for refugees.\textsuperscript{45}

The involvement and operation of UNCHR in the Cambodian refugees and Yugoslavia mass-influx of refugees and IDPs is a reflection of the extent to which the international community and the UN are willing to expand the refugee protection apparatus. Both refugees and IDPs are almost equally vulnerable and have increasingly been attracting international protection and support. The World Summit Outcome 2005 Resolution of the UN General Assembly has unequivocally reiterated the commitment and resolve of UN members to uphold their responsibility in resolving the plight of refugees and IDPs by increasing their protection, addressing their causes of movement, finding durable solutions, and burden-sharing to support them and their host communities and governments.\textsuperscript{46} In these initiatives, the protectionist spirit, principle, and goal of the Refugee Convention have been used as a basis upon which further

\textsuperscript{43} Richard Plender, “The Legal Basis of International Jurisdiction to Act with Regard to the Internally Displaced,” In Gowlland-Debbas ed. n 40 at 125.


\textsuperscript{45} Sadako Ogata, n 40 at xix.

\textsuperscript{46} UNGA Res. A/RES/60/1 (05-48760), Sixtieth session, Agenda items 46 and 120, October 24, 2005.
international cooperative arrangements are built to protect those refugees and IDPs, whom UNHCR had no opportunity to recognise and protect previously. This evolutionary process is steadily blurring the distinction between refugees and IDPs as well as between their causes of forced displacement. This trend seemingly highlights the emerging direction of the international refugee protection regime to be applied and practiced in a wide spectrum of refugee-producing circumstances and events.

6. Future Directions of Evolution: A Reformist Pursuit

Originating through multilateral treaties, the international legal regime for the protection of refugees has been evolving and developing in accordance with the self-perceived national interests and political concerns of states, which tilt more towards the preservation of state sovereignty than the protection of refugees. The conceptualisation of refugee since its first institutionalised inception at the aftermath of the First World War and in its subsequent evolution in the Refugee Convention and its Protocol has persistently been dominated by the interests of geopolitics and bloc rivalries. There has been a clear emphasis on the right of states to decide, rather than the right of aliens to claim to be entitled to admission as refugees.47 The history of the ontogenesis of international refugee law is predominantly one of limitation set by states to minimise their role and involvement in refugee protection and maximise their political expediencies that has not only diluted the legal conceptualisation of refugee-hood but also severely compromised their legal protection regime. The malleability of the concept of refugee and its susceptibility to an arbitrarily narrow and manipulative understanding of what causes refugees to flee has given states too much discretion and opportunities to ignore their international obligations under international refugee law.

The historic dependency of the development of international refugee law on the actions of states has inhibited the growth of a coherent policy framework for a comprehensive and universal conceptualisation of refugee status. As a result, international refugee law has marginal utility at its best and become anachronistic at its worst in addressing the plight and protection needs of the overwhelming majority of contemporary refugees, who are victims of national and international communal violence.

In view of this change in the complexion of refugee problems today, there are discernible recent trend and instances of extending refugee protection to new circumstances, however insufficient and politicised. The legal nature of this expanding refugee protection and its scope of application remain largely ad hoc in nature, inadequate, and inefficient in dealing with new and emerging crises of forced human displacement. Further evolutional pursuit towards reform is imperative and indeed in order to revisit the underlying causes of modern persecution. The direction of further development is likely to take a cross-cultural route to push for:

(a) a definition of refugee that accommodates new forms of covert persecution due to multifarious violence, armed resistances/insurrections, economic strangulation, political oppression, and environmental degradations as new refugee-producing circumstances;

(b) a close link between international refugee protection and human rights law in order to ensure that, as human beings, refugees are entitled to and can enjoy fundamental human rights which other individuals take for granted;

(c) a new category of “climate refugees”, both cross-border and IDPs; and

(d) a strict regulatory mechanism for the international oversight and control of state discretion pertaining to procedural matters for the admission of refugees and substantive provisions of protection embodied in the Refugee Convention and its Protocol to prevent political and strategic considerations from overriding the humanitarian aspect of refugees in the process of determination and protection.

These necessary adjustments are distinctly possible in the dynamic and living international refugee law to serve its intended goals, which has, to some extent, already achieved in regional initiatives and recent UNHCR practice. The Executive Committee of UNHCR and UN reports noted with concern that large numbers of refugees and asylum-seekers have been detained arbitrarily in many Convention countries. Organised popular resistance to this detention practice is likely to be louder and formidable enough to influence the course of international refugee law in the future.

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There is inseparable and direct link between international refugee law and human rights repeatedly recognised in the preamble of the Refugee Convention, which must be adhered to in ensuring the human values, worth, and dignity of refugees. Indeed, the Refugee Convention was the first ever human rights convention of the UN and a revolutionary step moved by the consideration of human rights and justice, rather than international order. A human right orientation of international refugee law will go a long way in addressing its chronic problem of pure political discretion and power politics and introducing a basis upon which states can be called upon to account for their refugee-related conducts.

The history of the genesis and evolution of international refugee law has been a history of conflicts of interests between law and politics. In order for its successful operation, the future refugee protection paradigm must pursue a policy of depoliticising the role of states by relying less on its political evolution and more on legal conviction. This is not to assert that politics has no role to play in refugee crises. Given the desperate bid of states to preserve their autonomy, it may be unrealistic to rule out the role of politics altogether in addressing contemporary refugee crises. What is needed is to make the role of politics supportive, not exclusive, to that of the law. The preventative role of politics should be relied upon to prevent the causes of refugee flight from arising in the first place, as prevention is better than cure. The curative role of international refugee law must be applied to protect those who are already refugees.

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REFUGEE STATUS DETERMINATION: ANALYSIS AND APPLICATION

Jahid Hossain Bhuiyan*

INTRODUCTION

The procedures for determining the requirements of refugee status were not set by the 1951 Convention relating to the Status of Refugees (1951 Refugee Convention).\(^1\) It was assumed that such procedures would be set by the contracting states after considering the legal traditions and constitutional and administrative arrangements that are in place in their respective countries.\(^2\) The determination of refugee status is a process that generally involves human beings in great distress. It does not have to be legalistic and technical. It may be a simple answer to determine whether or not a person is a refugee. Recognition as a refugee is very important as it will provide a person ‘international refugee protection,’ a special regime that should entitle them to certain benefits, assistance and protection, as well would remind them of their obligations to the host state.\(^3\) The most notable and significant of these is the protection under the principle of non-refoulement, as explicitly provided for in Article 33(1) of the 1951 Refugee Convention.\(^4\) In addition to protection against refoulement, recognised refugees are also entitled to a number of rights and benefits including protection against threats to the refugees’ physical security, unrestricted access to the courts in the host country, support to meet fundamental and material needs, freedom of movement, access to adequate education at

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\(^{1}\) The United Nations Convention relating to the Status of Refugees, opened for signature 28 July 1951, 189 UNTS 137, reprinted in 19 UST 6259, TIAS No. 6577.


\(^{4}\) Article 33(1) of the 1951 Refugee Convention deals with the principle of non-refoulement. It states that no state shall ‘expel or return (refouler) a refugee in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion.’
least at primary level, reunification with close family members in the host country as soon as practicable, and special measures for the protection of refugees who are particularly vulnerable. Recognised refugees are also entitled to get assistance in finding a permanent solution (durable solution) to their situations in order to have normal lives.

The core function of the United Nations High Commissioner for Refugees (UNHCR) is to provide protection to refugees. The Office may, for the purpose of exercising its mandate responsibilities, need to determine whether an individual is a refugee within its competence. Refugee status determination is normally conducted by the UNHCR to identify whether an individual should be protected, assisted or, sometimes, resettled to another country, or to give governments advice relative to his refugee status application.

Under the 1951 Refugee Convention, a person is considered a refugee the moment he meets the criteria or conditions set in the refugee definition. These criteria shall establish his refugee status and shall provide a declaration of that fact.

The purpose of this chapter is to analyse and apply refugee status determination. For this purpose, it examines the concept of a refugee under the 1951 Refugee Convention, discusses the responsibility for conducting refugee status determination and the mechanisms by which refugee status determination takes place. Finally, it puts forward the requirements for procedures to determine eligibility for refugee status.

### WHO IS A REFUGEE?

Hathaway claims that it is clear from the analysis of the international legal agreements regarding refugees who entered between 1920 and 1950 that
the definition of refugee has three distinct trends. These trends – juridical, social, and individualist – was overwhelming under during the specific time of refugee law.\textsuperscript{9}

The refugees were described mostly in juridical terms from 1920 to 1935, something which clearly showed that the refugees were treated as refugees because of their membership in a group that was not formally protected at any level by the government of its state of origin.\textsuperscript{10} Moreover, the formation of definitions at that time were intended to comprise the range of assistance needed by persons who found themselves outside of their country and were not being protected by \textit{de jure} national protection; involuntary migrants who were taking advantage from the official legal protection of their own country of origin – whether or not the state truly was sure of protection and assistance – were ineligible for global assistance.\textsuperscript{11}

A social approach was taken on during 1938 and 1939 in the agreements regarding refugee definition. Refugees, if observed through a social viewpoint, are the victims of political or social events which have taken away from them their home and society. For global assistance, the eligibility criteria included the groups unfavourably subjected through a specific political or social occurrence, not just those united by a general status vis-à-vis the international legal system. This second definition is the gist of the approach that assistance could go on to the person beyond official national legal protection, but to assist as well as the sufferers of political and social occurrences, which resulted in a \textit{de facto}, if not a \textit{de jure}, loss of state protection.\textsuperscript{12}

In the development of definition of the international refugee, the third stage is highlighted by its move away from concern with group

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\textsuperscript{10} Ibid, 350–61.

\textsuperscript{11} Ibid, 367. The instruments that were adopted during these periods include: The Arrangement with regard to the Issue of Certificates of Identity to Russian Refugees: 5 July 1922, Plan for the Issue of a Certificate of Identity to Armenian Refugees: 31 May 1924, Arrangement relating to the Issue of Identity Certificates to Russian and Armenian Refugees: 12 May 1926, Arrangement concerning the Extension to Other Categories of Refugees of Certain Measures taken in favour of Russian and Armenian Refugees: 30 June 1928, and Convention relating to the International Status of Refugees: 28 October 1933.

\textsuperscript{12} Ibid, 361–67. The instruments that were adopted during these periods include: Plan for the Issue of a Certificate of Identity to Refugees from the Saar: 24 May 1935, Provisional Arrangement concerning the Status of Refugees coming from Germany: 4 July 1936, Convention concerning the Status of Refugees coming from Germany: 10 February 1938, Council Resolution on Refugees from Sudetenland: 17 January 1939, and Additional Protocol to the Provisional Arrangement and to the Convention concerning the Status of Refugees coming from Germany: 14 September 1939.
disenfranchisement, even if de jure or de facto, and moving to regarding the relationship between a specific individual and his state. Firstly, the determination process influenced by this individualist approach, then the criteria to decide whether the person was a refugee was not made strictly on the basis of political and social classifications. Thus, the instant post-war period’s agreements provided a scrutiny of the merits of the case of every applicant.13

On 14 December 1950 the United Nations General Assembly (UNGA) adopted the Statute of the Office of the United Nations High Commissioner for Refugees (Statute of the UNHCR).14 The Statute of the UNHCR provides, inter alia, that the UNHCR, acting under the authority of the UNGA, shall assume the function of providing international protection, under the auspices of the United Nations (UN), to refugees falling within the competence of the UNHCR. The Statute of the UNHCR includes definitions of those persons to whom the competence of the UNHCR extends. Such definitions, though not identical with, are very close to the refugee definition of the 1951 Refugee Convention.

The main document that remains the basis of international refugee law for determining whether a person is a refugee or not is the 1951 Refugee Convention, particularly its provision on refugee definition.15 Article 1A(2) of the 1951 Refugee Convention defines a refugee as any person who:

As a result of events occurring before 1 January 1951 and 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 [or her] nationality and is unable, or owing to such fear, is unwilling to avail him [or her]self of the protection of that country; or who, not having a nationality and being outside the country of his [or her] former habitual residence as a result of such events, is unable, or owing to such fear, is unwilling to return to it.

The limitations set forth in the 1951 Refugee Convention as to time and geographical area for refugees affected by the events in Europe have been officially lifted as of the 1967 Refugee Protocol or have been otherwise withdrawn by most of the states which are parties to the two instruments.

14 A/RES/428(V).
15 UNHCR, Refugee Status Determination, op.cit., 4.
This lifting has given the 1951 *Refugee Convention*’s provisions a universal substance and application.\(^{16}\)

It is noted that a person who fulfils the criteria of the *Statute of the UNHCR* is qualified for the protection of the UN provided by the UNHCR. It is immaterial whether or not he is in a country that is party to the 1951 *Refugee Convention* or the 1967 *Refugee Protocol* or whether or not his host country recognised him as a refugee under any of these instruments. Such refugees, being within the UNHCR’s mandate, are usually known as ‘mandate refugees’.

Divergence between mandate and Convention status also takes place due to the difference in views between the UNHCR and the contracting states, especially when states refuse to determine refugee status for any reason or when applicants move elsewhere despite their claims are well-founded under a regional regime.\(^{17}\)

Notwithstanding, there exist several provisions that defeat the status of the refugee, on the contrary they are qualified individuals under Article 1A(2) of the 1951 *Refugee Convention*.

After an individual has qualified to refugee status under Article 1A(2) of the 1951 *Refugee Convention*, he may still lose his refugee status if he falls into the cessation clauses (Article 1C) of the 1951 *Refugee Convention*. The clauses have two components: the first covers the first four clauses in Article 1C that relate to changes in the personal circumstances of the refugee occasioned by his own actions and resulting in his obtaining national protection that makes international protection unnecessary. The second covers the last two clauses in Article 1C relating to changes in a refugee’s objective circumstances that makes international protection no longer justified. Under Article 1C, refugee status ceases when a refugee voluntarily re-availed himself of the protection of his nationality,\(^{18}\) or having


\(^{18}\) Article 1C(1). Notwithstanding that, if a refugee against his will follows the instruction or advice of an authority that may be understood as a re-availment of this country’s protection to him (for example, getting a national passport) the refugee will not cease to be a refugee even if he performs such an instruction. UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, (UNHCR Handbook) HCR/1P/4/ENG/REV. 3, reissued 2011, para 120.
lost his nationality, he has voluntarily re-acquired it,\(^{19}\) or has acquired a new nationality, and enjoys the protection of the country of his new nationality,\(^{20}\) or he has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution.\(^{21}\)

If cessation occurs because of changes in his personal circumstances as contained in Article 1C(1–4), the elements to be assessed are to what extent the actions were voluntary, intent, and effective protection, which should not be applied in a formalistic manner. Refugee status may also cease if he can no longer, because the circumstances he cited that justified his application have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality,\(^{22}\) or if he is stateless, he is, because the circumstances he cited that justified his application have ceased to exist, able to return to his country where he used to live.\(^{23}\) The 1951 *Refugee Convention* stated that the latter two clauses shall not apply to a refugee who falls under Article 1A(1). Worster states that, in spite of the express terms of the 1951 *Refugee Convention*, there is a practice by states to extend exemption from cessation protection to Convention refugees, such as ‘compelling reasons arising out of previous persecution’.\(^{24}\)

\(^{19}\) Article 1C(2). When a person is granted a nationality by operation of law or by decree, it does not mean that he is reacquiring it voluntarily unless he accepts the nationality expressly or implicitly. UNHCR *Handbook*, ibid, para 128.

\(^{20}\) Article 1C(3). This clause pertains to a situation where a refugee acquires the protection of another country, whereas the first two clauses pertain to situations where a refugee re-acquires the protection of his home country. Refugee & Humanitarian Division Department of Immigration & Multicultural Affairs Canberra, Australia, *The Cessation Clauses (Article 1C): An Australian Perspective*, 13, available at http://www.immi.gov.au/media/publications/refugee/convention2002/04_cessation.pdf (accessed 1 November 2012). The nationality that a refugee acquires is usually from the country where he resides. There are some cases where a refugee lives in one country but his nationality is acquired from another. In this instance, his refugee status will cease unless the new nationality also carries the protection of the country concerned. UNHCR *Handbook*, ibid, para 130.

\(^{21}\) Article 1C(4). ‘Voluntary re-establishment’ is the process of going back to the country of nationality or former residence with the intention of residing there permanently. UNHCR *Handbook*, ibid, para 134.


In the UNHCR 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 (the “ceased circumstances” Clauses), it is provided that use of the “compelling reasons” exception shall be interpreted to reflect a general humanitarian principle which is now being observed in state practices. Where refugee status ceases under the cessation clauses of Article 1C, the person then shall be governed by the ordinary laws for the residence of foreign nationals. There has been extensive debate in Canada on the application of the cessation clause during the refugee status determination hearings. While some judges favour application of the clause only after formal recognition, many approve that the clause should be applied even before the recognition of the application of the cessation clause. In both situations, the applicant may earn disqualification from refugee status but it entitles him to certain humanitarian initiatives under the cessation clause.

Articles 1D, 1E and 1F of the 1951 Refugee Convention, usually known as the exclusion clauses of the 1951 Refugee Convention, pertain to persons who might have been refugees but are excluded from refugee status for specific reasons. The purpose of these clauses was to protect the state sovereignty, uphold humanitarian obligations and bolster international morality. Article 1D exclusion pertains to persons who are currently receiving assistance or protection from organs or agencies of the UN outside of the UNHCR. Article 1E exclusion pertains to persons who are

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25 HCR/GIP/03/03, 10 February 2003.
27 Refugee & Humanitarian Division Department of Immigration & Multicultural Affairs Canberra, Australia, The Cessation Clauses (Article 1C): An Australian Perspective, op.cit., para 142.
29 Matthew Zagor, “Persecutor or Persecuted: Exclusion under Article 1F(A) and (B) of the Refugees Convention,” University of New South Wales Law Journal 23 (2000): 164.
30 This assistance used to be given by the United Nations Korean Reconstruction Agency (UNKRA) but is presently dispensed by the United Nations Relief and Works Agency for Palestine Refugees In the Near East (UNRWA). UNHCR Handbook, op.cit., para 142.
offically recognised by the country in which he has taken residence as entitled to the rights and obligations of recognised nationals of that country.\footnote{This provision is related to persons who might otherwise qualify for refugee status and who have been accepted by a country and granted most of the rights of nationals, but not formal citizenship. They are often termed as ‘national refugees’. UNHCR \textit{Handbook}, op.cit., para 144.} Article 1F exclusion pertains to persons for whom there are serious reasons for considering that he has committed a crime against peace,\footnote{According to the 1945 Charter of the International Military Tribunal (1945 London Charter), a crime against peace involves the ‘planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements, or assurances, or participation in a common plan of conspiracy for the accomplishment of the foregoing.’} a war crime,\footnote{The definitions contained in the four Geneva Conventions of 1949 (the 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; the 1949 Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea; the 1949 Geneva Convention Relative to the Treatment of Prisoners of War; and the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War) and Additional Protocol thereto of 1977 (Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts; and Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflict), and Article 8 of the 1998 Rome Statute of the International Criminal Court (1998 Statute of the ICC). To know more about crimes against humanity, see International Law Services, \textit{International Criminal Law & Practice Training Materials – Crimes against Humanity}, available at http://wcjp.unicri.it/deliverables/docs/Module_7_Crimes_against_humanity.pdf (accessed 20 November 2012).} or crime against humanity,\footnote{Crimes against humanity are inhuman acts including genocide, murder, rape and torture, when committed as part of a systematic or widespread attack against a civilian population. It may be committed during an armed conflict or in peacetime. It can be committed by any person, if his acts meet the above criteria. The proper definition of crimes against humanity can be derived from several international instruments, particularly the 1945 London Charter, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, the 1984 Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, the Statutes of the International Criminal Tribunals for the former Yugoslavia and for Rwanda, and the 1998 Rome Statute of the International Criminal Court (1998 Statute of the ICC). To know more about crimes against humanity, see International Law Services, \textit{International Criminal Law & Practice Training Materials – Crimes against Humanity}, available at http://wcjp.unicri.it/deliverables/docs/Module_7_Crimes_against_humanity.pdf (accessed 20 November 2012).} or he has committed a serious non-political crime\footnote{When determining a ‘serious crime’ for the purpose of exclusion analysis, decision-makers need to evaluate the seriousness of the crime against international standards. The factors that will help determine if a crime is ‘non-political’ or not include the motive} outside the country of refuge prior to admission to

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\footnote{31}
that country as a refugee, or he has been guilty of acts contrary to the purposes and principles of the UN.36 Most serious crimes as mentioned in paragraphs (a) to (c) do not grant a refugee applicant from receiving international protection under the 1951 *Refugee Convention* and the refugee protection regime should not provide shelter to serious criminals from justice, according to the rationality of Article 1F. The perpetrators should not benefit from refugee protection as the commission of such crimes may themselves amount to acts of persecution. The exclusion also aims to protect and preserve the integrity of the international system of protection of refugees and to strengthen the main purpose of international refugee law, namely the protection of those refugees fleeing persecution.37 An exception to Article 1F would be child soldiers.38 Exclusion of an applicant does not necessarily exclude the members of the family or dependants. The determination of their situation must be on an individual basis.39 Also, exclusion does not disqualify an applicant from all forms of protection under national or international law; the excluded person may still get assistance available under relevant municipal or international instruments, such as the protection against *refoulement* provided by Article 7 of the 1966 *International Covenant on Civil and Political Rights* (1966 ICCPR).
Another available resource or support would be applicable state laws governing due process and alien rights. It has been observed that, since 11 September 2001, determination of refugee status has become a more restrictive, implying a liberalisation in the application of the exclusion clauses, particularly Article 1F. Due to the serious implications of exclusion, the procedure for exclusion determination must be strictly safeguarded. Decisions on exclusions should not be accelerated, should come only after a full evaluation of the facts of the case and should follow the same principle as in the refugee status determination.\(^{40}\)

A number of regional legal instruments relating to refugees have been adopted following the Statute of the UNHCR, the 1951 Refugee Convention and the 1967 Refugee Protocol in order to provide protection to refugees. For instance, as a result of the work of an Ad-Hoc Committee of Legal Experts of the Commission on Refugees of the Organization of African Unity (OAU) in 1969 adopted a Convention Governing the Specific Aspects of Refugee Problems in Africa (1969 OAU Refugee Convention).\(^{41}\) This Convention’s refugee definition consists of two parts: the first part is same to the definition that contains in the 1967 Refugee Protocol (i.e., the definition in the 1951 Refugee Convention without the temporal or geographical limitation to refugees). The second para states that the term “refugee” is applicable 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.

Due to the general peace and order problems generated by wars, civil conflicts, violence and political upheaval in a number of states, especially in Central America, at the turn of the decade of the 1980s, many persons were displaced in mass that led to the adoption of the recommendation in Article III(3) of the 1984 Cartagena Declaration on Refugees that “the refugee definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Refugee Convention and the 1967 Refugee Protocol.”

\(^{40}\) UNHCR, Refugee Status Determination, op.cit., 82
\(^{41}\) Convention Governing the Specific Aspects of Refugee Problems in Africa, 10 September 1969, 1001 UNTS 45.
Responsibility for Conducting Refugee Status Determination

The country in which persons have sought asylum is the one mainly responsible for determining if they legally qualify as refugees. This is to make sure that the refugee gets the rights to which he is entitled as a refugee and thus truly enjoy the guaranteed benefit of international protection.42

Protecting refugees is not just a matter of convenience for the country concerned. The 1951 Refugee Convention/1967 Refugee Protocol and the 1969 OAU Refugee Convention obliges the contracting states to provide protection thereon to all applicants who qualify under the relevant refugee definition.43

There are a number of ways that the UNHCR helps governments in determining an application for refugee status. First, the UNHCR can provide assistance in drafting laws on asylum. Second, it can help in registering asylum-seekers. Third, it can assist in providing legal training. Fourth, it can join the deliberations to arrive at a decision. Fifth, it can conduct refugee status determination for countries which are not contracting states of the 1951 Refugee Convention or the 1967 Refugee Protocol or those which have not enacted laws on refugees or for countries with existing refugee status determination procedures but which have not been recognised for meeting the minimum levels of fairness and efficiency. The UNHCR can also help some countries in conducting refugee status determination on refugees with a need for resettlement.44

How Does Refugee Status Determination Take Place?

The determination of refugees may take place either as a group (prima facie) or as individually. An individual may be determined as a refugee following an in-depth examination of the individual circumstances of the applicant’s case. Most applicants are accepted as prima facie group refugees, which mean that their recognition as refugees is determined through an evaluation of the situation in their country of origin that led them to

leave the country.\textsuperscript{45} Jacobsen writes that, out of the 9.7 million refugees worldwide, some 64\% were given their status using the group or \textit{prima facie} determination procedure while 24\% were given their status by individual determination.\textsuperscript{46} Recognition of refugee status for groups is important especially with in the case of mass influx, a situation where persons seeking international protection come in such large numbers and at such frequency that individual refugee status determination is very impractical. When this happens, states as well as the UNHCR often provide refugee status, usually to members of a particular social group, on a group or \textit{prima facie} basis.\textsuperscript{47} However, the \textit{prima facie} is not mentioned in any international instruments that deal with refugees, nor been used by the UNHCR Executive Committee, which is charged with giving non-binding guidance on the 1951 \textit{Refugee Convention}, in its conclusion. The term has not also been relevantly mentioned in the \textit{travaux préparatoires}.\textsuperscript{48}

\section*{The Contents of Refugee Definition}

\textbf{Outside the Country of Nationality or Habitual Residence}

A person can only qualify as a refugee if he is outside his country of nationality, or for those who are stateless, their country of habitual residence.\textsuperscript{49} Hence, “nationality” denotes “citizenship”.\textsuperscript{50} When a person is a national or a citizen of a country, it means he has a special kind of relationship with that country which a stateless person does not possess.\textsuperscript{51} For persons who officially have nationalities but are in a similar situation as stateless persons, their status is often termed as \textit{de facto} statelessness. There is, however, no definition of this term which is recognised worldwide.

\begin{thebibliography}{99}
\bibitem{Article1A2} Article 1A(2), para 1, the 1951 Refugee Convention.
\end{thebibliography}
Traditionally, the term was referred to a person who, outside the country of his nationality, is not guaranteed any sort of diplomatic and consular protection or assistance from the country to which he belongs to. This takes place when the person is refused to return to his country of nationality by that country, even if he is still formally recognised as a national of that country. The person may also fall in the category of a refugee in such a situation.\footnote{http://www.unhcr.org/pages/49c3646c158.html (accessed 17 October 2012).


54 UNHCR, \textit{Refugee Status Determination}, op.cit., 29.}

It is stated in the second paragraph of Article 1A(2) of the 1951 \textit{Refugee Convention} that:

\begin{quote}
In the case of person who has more than one nationality, the term ‘the country of his nationality’ shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.
\end{quote}

A person may be entitled to refugee status and/or asylum in another country if he can establish a well-founded fear of persecution, but such well-founded fear must be relative to each of the states of which he claims to be a national. This is the effect of the second paragraph of Article 1A(2) of the 1951 \textit{Refugee Convention}. The basis for requiring that such a well-founded fear exists with regard to each of the states of which that person is a national is that, even if an individual has a well-founded fear of persecution relative to one of their countries of nationality, if that person has the citizenship of another country it means that other country is, normally, obliged to give him entry.\footnote{Ryszard Piotrowicz, “Refugee Status and Multiple Nationality in the Indonesian Archipelago: Is there a Timor Gap?” \textit{International Journal of Refugee Law} 8 (1996): 320.


In this context, the UNHCR states that applicants having more than one nationality are required to establish a well-founded fear of persecution in regard to each of the countries concerned in order to qualify for being a refugee. It further states that such requirement is only applicable if the second nationality actually carries with it the full range of rights enjoyed by citizens of the country concerned.\footnote{UNHCR, \textit{Refugee Status Determination}, op.cit., 29.}

It is not necessary under the 1951 \textit{Refugee Convention} that the applicant was a refugee at the time when he left his country of origin or habitual residence. He does not also need to demonstrate that he left that country because of a well-founded fear of persecution. Grounds for persecution as a refugee may arise when the individual concerned in such situations is
already outside of the country, the person may become a refugee while being in the receiving country.\textsuperscript{55}

\textit{Well-Founded Fear}

The UNHCR \textit{Handbook} states that, since fear is subjective, the definition of refugee involves a subjective element in the person applying for being recognised as a refugee. Therefore, in the determination of a person's status as a refugee, judgment on his application for recognition as a refugee must be based on an evaluation of his statements and not just on what is happening in his country of origin.\textsuperscript{56} That is the primary reason the term ‘well-founded’ is added as a qualification to the element of fear; a state of mind and a subjective condition. This implies that determination of refugee status requires not only the frame of mind of the person concerned but also this frame of mind must be supported by an objective situation. Therefore, the term ‘well-founded fear’ comprises a subjective and objective element. Both elements must be considered in determining the existence of well-founded fear.\textsuperscript{57} The applicant, as per the objective element, is required to demonstrate a significant, actual risk of being persecuted. The applicant, as per the subjective element, is required to demonstrate an emotional state of fear in regard to that risk.\textsuperscript{58}

The well-founded fear standard of the UNHCR has been adopted as a standard by leading courts with some slight modification. An example is the High Court of Australia, which noted that both subjective and objective elements are present in the well-founded fear standard, which effectively takes into account the mental and emotional state of the individual, as well as, also the objective facts concerning the conditions in his country of nationality.\textsuperscript{59}

Hathaway and Hicks observe that there is growing sentiment that the subjective-objective bipartite approach to evaluating refugee status could

\begin{itemize}
\item \textsuperscript{55} Ibid.
\item \textsuperscript{56} UNHCR \textit{Handbook}, op.cit., para 37.
\item \textsuperscript{57} Ibid, 38.
\end{itemize}
pose some protection risks that are not aligned with the object and purpose of the 1951 Refugee Convention. A denial of refugee status to at-risk applicants who either are not fearful, or whose trepidation is not identified as such by decision-makers can take place under the bipartite approach. They take the position that ‘well-founded fear’ does not contain a subjective element.

To determine that the fear (in the sense of forward-looking expectation of risk) claimed by an applicant for refugee status is well-founded or not will require, according to Hathaway and Hicks, the presentation of evidence. It means that the state party evaluating the application should be able to determine whether there is a significant risk of persecution of the applicant. As the mere chance or remote possibility of being persecuted is not sufficient to establish a well-founded fear, the applicant in such a case needs to demonstrate only a ‘real chance’ or ‘reasonable possibility’ of being persecuted. He does not, however, need to demonstrate that there is a ‘clear probability’ that he will be persecuted.

**Persecution**

In regard to refugees, the concept of persecution was never used in any of the international agreements before World War II as it appeared for the first time only in the draft Constitution of the International Refugee Organization (IRO). It was never clarified why the concept was used by the IRO but subsequent definitions of refugee status by the Statute of the UNHCR and the 1951 Refugee Convention adopted the term.

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60 Hathaway and Hicks, “Is There Subjective Element in the Refugee Convention’s Requirement of ‘Well-founded Fear’?” op.cit., 511–12. They argue that “this concern arises most obviously in the assessment of refugee claims made by children and mentally disabled persons, who may be unable to experience or to articulate the requisite emotional state.” Ibid, 512.

61 For details see Ibid, 319–46.


The definition of the term ‘persecution’ is not contained in the 1951 Refugee Convention, even for the purpose of determining refugee status.\textsuperscript{65} It is the feeling of Grahl-Madsen that the omission of the definition was intentional. It was probably the intention of the drafters to just introduce a concept that was flexible enough to be applicable and interpretable as circumstances might arise in the future. It was as if the drafters were deferring to the creativity of people to think up methods of persecution.\textsuperscript{66} An inference from Article 33 of the 1951 Refugee Convention indicates that any threat to human life or personal freedom for reasons of race, religion, nationality, membership of a particular social group or political opinion is always deemed as persecution. Other forms of persecution include serious violations of non-derogable human rights such as the right to life,\textsuperscript{67} the right to be free from being tortured or cruel, inhuman or degrading treatment or punishment,\textsuperscript{68} the right to be free from slavery of servitude,\textsuperscript{69} the right not be subjected to retroactive criminal penalties,\textsuperscript{70} the right to be recognised before the law,\textsuperscript{71} the right to freedom of thought, conscience and religion.\textsuperscript{72} Article 9 of the EU Qualification Directive says that, for the acts to be considered a serious violation of human rights, especially non-derogable rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights),\textsuperscript{73} they must be sufficiently serious in their nature or must accumulate enough to provide equivalent severity. In this context, Hathaway takes the position that persecution is made by violation of any of the rights of the 1966 ICCPR and 1966 ICESCR. Maiani has argued that Hathaway believes that any violation of non-derogable civil and political rights is \textit{per se} sufficiently severe to be brought under the term persecution. Examples of such rights include the right to life, the prohibition of torture, and the right to legal personality. Any ostensible violation of non-derogable civil and political rights would lead


\textsuperscript{67} Article 6, the 1966 ICCPR.

\textsuperscript{68} Article 7, the 1966 ICCPR.

\textsuperscript{69} Article 8, the 1966 ICCPR.

\textsuperscript{70} Article 15, the 1966 ICCPR.

\textsuperscript{71} Article 16, the 1966 ICCPR.

\textsuperscript{72} Article 18, the 1966 ICCPR. UNHCR \textit{Handbook}, op.cit., para 51; UNHCR, \textit{Refugee Status Determination}, 31–32.

\textsuperscript{73} European Convention on Human Rights opened for signature 4 November 1950, 213 UNTS 221, Europ. TS No. 5 and entered into force 3 September 1953.
to persecution, except if the conditions of the derogation are met. These rights include freedom of expression, and personal freedom, *inter alia*. The denial of economic, social, and cultural rights lead to persecution, when their denial is discriminatory in itself or when the concerned state cannot be said to have taken appropriate steps to realise those rights because of the so complete denial.\(^{74}\) Thus Hathaway and the UNHCR do not agree.

**Prosecution**

Persecution is the anchor point of the refugee law. It can be serious enough to render harm to the applicant or to put him up as a subject for systematic and discriminatory conduct. Persecution also indicates an aspect of motivation. The motivation factor does not, however, mean that the persecutor will have an antipathy towards the victim.\(^{75}\)

The UNHCR *Handbook* notes that prosecution must distinguish itself from punishments for common law offence, stressing that persons who are running away from such punishments are not refugees and therefore do not meet the definition as embodied in the 1951 *Refugee Convention*. The *Handbook* states that a refugee is himself a victim or a potential victim of injustice and not a fugitive from justice.\(^{76}\) Hathaway agrees with the UN on the subject that refugee claims based on persecution are outside the range of the 1951 *Refugee Convention* due to the risk faced by the claimant is only that the possible criminal liability of every citizen, and is therefore not attached to any form of civil or political status specified in the definition of refugee.\(^{77}\)

However, if a person facing persecution or punishment for an offence that is criminal in nature purports that he is indeed fleeing persecution, it is important and necessary to investigate his circumstances to find out if the authorities are using criminal law and/or criminal procedures as a persecution tool.\(^{78}\)

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\(^{76}\) UNHCR *Handbook*, op.cit., para 56.


\(^{78}\) UNHCR, *Refugee Status Determination*, op.cit., 33.
Agents of Persecution

The idea of persecution is attributed normally to the authorities of the country of origin of applicant. The state is seen as the source or “agent of persecution”, if the persecutory measures are being conducted by the state's own organs like security forces, law enforcers or civilian administrative personnel. According to Goodwin-Gill and McAdam, neither the 1951 Refugee Convention nor the travaux préparatoires say much about the agent of persecution feared by the refugees, and it is not formally necessary to have bond between the persecution and government authority. However, the idea that the state is the sole agent of persecution has for a long been time emphasised by state practice.

The UNHCR Handbook states that ‘non-State actors’ can be the ones responsible for the acts of persecution if the acts are tolerated with the knowledge of the authorities or if no offer of protection is made by the authorities. Non-state actors include ‘the local populace’ and ‘sizeable fractions of the population’, inter alia.

Reasons for Persecution

Article 1A(2) of the 1951 Refugee Convention states that a person qualifies for status as a refugee only if his fear of persecution is for reasons of race, religion, nationality, membership of a particular social group or political opinion. To persecute a person on the basis of these grounds is an egregious form of violation of human rights and therefore, in spite of the fact that other people may also be in need, this person should be provided priority assistance.

80 Goodwin-Gill and McAdam, The Refugee in International Law, op. cit., 98.
83 “Sizeable fractions of the population” includes any non-governmental group such as a guerrilla organisation, death squads, anti-as well as pro-government paramilitary groups, etc. It further includes, a fortiori, non-recognised entities exercising de facto authority over a part of the national territory. UNHCR, Agents of Persecution – UNHCR Position, 14 March 1995, para 5.
Race, religion, and political opinion are three grounds among five contain in Article 1 that would need little interpretation. Any considerable overlap that may occur between the five Convention grounds should not be reason for confusion. There are a number of inter-related reasons listed in the 1951 Refugee Convention for persecution. One reason for persecution, for example a person's ethnicity, may fall under both race and nationality. But none of these instances in any way will compromise the connection between the feared persecution and its basis.85

Race

To protect the Jews from falling victim to the Nazis, the terms ‘race’ and ‘religion’ were used earlier in administrative directives designed for the purpose.86 At present, as then, the term ‘race’ does not refer to distinctions on the basis of only major racial groups but is applicable in whatever place a person is persecuted for reason of his ethnic origin.87 According to the UNHCR Refugee Status Determination, ‘race’ is to be broadly understood as any type of distinctive ethnic characteristic, whether existent or perceived.88

In almost all corners of the globe, persecution for reason of race would almost always be the setting for refugee movements. An example is Uganda. Citizens of Uganda who came from Asia were the objects of persecution and expulsion in 1972. Institutionalised discrimination and policies of repression of apartheid South Africa have likewise resulted in a very large number of mass departures.89

Religion

Persecution for reason of religion has often been a reason for refugee flights. One example is the flight of the Huguenots from France after the

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88 UNHCR, Refugee Status Determination, op.cit., 35.
89 Goodwin-Gill and McAdam, The Refugee in International Law, op.cit., 70–71.
Edicts of Nantes was revoked in 1685. In more recent times, Moslems residing in Bosnia have suffered persecution because of their religion.90

Religion-based refugee status claims are considered to be the most complex. As to the application of the term ‘religion’ set forth in the 1951 Refugee Convention and what constitutes ‘persecution’ in this context, decision-makers have not always been consistent.91

Everyone shall have the right to freedom of thought, conscience, and religion. This right shall include having or adopting a religion or a belief of his own choice and manifesting such religion or belief in worship, observance, practice and teaching.92 Article 18 of the 1948 UDHR, Articles 18 and 27 of the 1966 ICCPR, the 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, the 1992 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, Human Rights Committee’s General Comments and the body of reports of the Special Rapporteur on Religious Intolerance are useful in dealing with determination of religion-based claims.93

The impact of gender on refugee claims based on religion should be adequately considered, as persecution for men and women may take place in different ways. Relevant examples of such variations are clothing requirements, movement restrictions, harmful traditional practices, unequal treatment and being subjected to laws and/or punishment that are discriminatory.94

A number of religions or sects within specific religions would have as central tenet in their beliefs the abstention from military service. Some of these claimants are seeking protection for their refusal to undergo military service.95 In some instances, the motivation of raising objection to serve in the military may be by reason of conscience, ethics, morals, or be

91 UNHCR, Guidelines on International Protection: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees (UNHCR, Religion-Based Claims under Article 1A(2)), HCR/GIP/04/06, 28 April 2004, para 1.
92 Article 18, the 1966 ICCPR; Article 18, the 1948 UDHR, Articles 18 and 27 of the 1966 ICCPR, the 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, the 1992 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, Human Rights Committee’s General Comments and the body of reports of the Special Rapporteur on Religious Intolerance are useful in dealing with determination of religion-based claims.93
93 UNHCR, Religion-Based Claims under Article 1A(2), op.cit., para 2.
94 Ibid, para 24. See also 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 (UNHCR, Gender-Related Persecution within the context of Article 1A(2)), HCR/GIP/02/01, 7 May 2002.
humanitarian or philosophical in nature.96 Some countries require compulsory military service, and where that is the case, the basic issues in determining the entitlement to protection by an applicant on the basis of objection to military service are sincerity of the convictions which puts him in conflict to their government and the danger of action amounting to persecution, because of such objection. A fully enquiry involving the cause and motive is therefore required.97

**Nationality**

Nationality is a description that usually includes citizenship, as well as membership in specific ethnic, religious, cultural or linguistic groups.98 Those persecuted do not even have to be a minority in their own country, for oligarchies traditionally tend to have recourse to oppression.99

**Membership of a Particular Social Group**

The vaguest ground mentioned in the Convention is membership of a particular social group.100 The ambiguity of the term has caused a number of variations in the way it is understood. Justice McHugh in *Applicant A Anor v MIEA & Anor*101 notes that courts as well as jurists have interpreted the term ‘membership of a particular social group’ in various different ways, resulting in the courts and tribunals rendering decisions which are irreconcilable.102

Grahl-Madsen observes that the concept of social group is wider than race, religion, and ethnic origin. He further asserts that the idea of a social group was added in the 1951 conference to provide protection against persecution on yet unforeseen reasons. Grahl-Madsen argues that the five bases of persecution according to the 1951 Refugee Convention are divided into two groups; one in which those individuals have qualities that are not under their own control and the other group has control over those qualities. He categorizes the first one on the basis of the membership in a particular social group, along with race, nationality, and religious heritage.

97 Ibid, 104–05.
100 UNHCR, *Summary Conclusions: Membership of a Particular Social Group* (San Remo, September 2001), para 1.
102 Ibid, 266.
and the second one on the basis of political opinion and religious observance.103

Goodwin-Gill and McAdam argue, contrary to the view of Grahl-Madsen, that one important element in describing a social group is in the way matters of choice may be combined with other matters over which members of the group do not have control.104 Thus, in determining if a particular group constitutes a ‘social group’, reference should be made to the linkages and unifying factors like ethnicity, culture, linguistic origin, education, family or other background, economic activity, shared values, outlook, and aspirations.105 They also state that highly relevant are the attitudes to the putative social group of other groups in the same society and, particularly, state authorities’ treatment of it.106

In the UNHCR Handbook, it is stated that a ‘particular social group’ is normally comprised of persons of the same background, habits or social status.107

In the UNHCR Guidelines, it is stated that a ‘particular social group’ is a group of persons who exhibit a common characteristic outside of their risk of persecution and who are perceived by society as a group. Such a characteristic should be innate, unchangeable, or otherwise basic to their identity, conscience or the exercise of their human rights.108

The definition mentioned above integrates the two dominant approaches relative to membership of a particular social group.109 The first, the ‘protected characteristics’ approach, which is sometimes called the ‘im mutability’ approach or ‘ejusdem generis’ approach, analyses whether or not a group is held together by an immutable characteristic or

104 Goodwin-Gill and McAdam, The Refugee in International Law, op.cit., 75.
105 Ibid.
106 Ibid.
108 UNHCR, Guidelines on International Protection: “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 (UNHCR, “membership of a particular social group” within the context of Article 1A(2)), HCR/GIP/02/02 7 May 2002, para 11.
attribute or one that is so basic to a person’s dignity that he should not be forced to forsake. Such a characteristic may be innate such as sex or ethnicity or some feature that may not be changed such as a historical fact of a past association, occupation or status. Moreover, norms governing human rights may be used to pinpoint characteristics that are very basic to human dignity. This approach would enable a decision-maker to determine if the asserted group is defined by an innate, unchangeable characteristic, or a past temporary or voluntary status that is unchangeable because of its historical permanence or a characteristic or association that is so basic to human dignity that the group members ought not to be forced to give up.\footnote{110} The second approach, known as the ‘social perception approach’, examines whether a group shares a common characteristic that makes them a cognizable group or sets them separate from society at large.\footnote{111}

A member of a particular social group may be constituted, for instance, by women,\footnote{112} family,\footnote{113} children born in violation of the one-child policy of China,\footnote{114} occupational groups,\footnote{115} conscientious objectors,\footnote{116} homosexuals,\footnote{117} draft evaders and deserters,\footnote{118} sick people,\footnote{119} people with or without wealth,\footnote{110} and former employees who are terrorized for being privy to the ruthless, criminal activities of their mayor.\footnote{121}

**Political Opinion**

‘Political opinion’, as stated in the 1951 *Refugee Convention*, should broadly incorporate, within substantive limitations currently developing generally in the human rights arena, any opinion on any issue where the machinery of state, government, and policy may be involved.\footnote{122}
For claimed persecution to be accepted as political persecution, an alien must show that his opinions differ from that of the government and that he is in fear of persecution for such differing opinions.\textsuperscript{123} Political opinions may be wrongly or rightly attributed to an applicant for refugee status, whether expressed or not. If expressed, and the applicant or others similarly placed have suffered or have experienced repression, then the fear is well-founded.\textsuperscript{124} The UNHCR \textit{Handbook} states that, in determining whether a person is fleeing past or potential persecution for political opinion, it is important to take into consideration the general situation of the country of origin of the victim,\textsuperscript{125} and whether a causal link exists between past, or threats of future, persecution and the perceived political opinion.\textsuperscript{126}

Goodwin-Gill and McAdam argue that it is reasonable to assume, in principle, that a well-founded fear may be based on activity after the departure. If the core issue of risk of relevant harm is considered, there is no need to distinguish between a person whose opinions and activities in the country of refuge are a continuation of his opinions and activities in the country of origin, and another person who is just beginning his political engagement after he has left his homeland.\textsuperscript{127}

\textbf{Refugee Status Determination Procedures}

As mentioned earlier, international refugee instruments do not specifically regulate procedures with regard to refugee status determination. It is not mentioned in the international refugee instruments whether such procedures must, essentially, be administrative or judicial, adversarial or inquisitional. Whatever procedures may be established for ascertaining refugee status, the adjudicator makes the final decision on the basis of an assessment of the claim submitted by the applicant with a view to establishing whether the individual has established a ‘well-founded fear of persecution’.\textsuperscript{128} In the matter of full and inclusive application of the 1951 \textit{Refugee Convention}, it is generally recognised that fair and efficient procedures are followed in determining individual refugee status.

\textsuperscript{123} UNHCR \textit{Handbook}, op.cit., para 80.
\textsuperscript{124} Goodwin-Gill and McAdam, \textit{The Refugee in International Law}, op.cit., 87.
\textsuperscript{125} UNHCR \textit{Handbook}, op.cit., para 42.
\textsuperscript{126} UNHCR \textit{Handbook}, op.cit., para 81.
\textsuperscript{127} Goodwin-Gill and McAdam, \textit{The Refugee in International Law}, op.cit., 88–89.
Countries would not be able to fulfil their obligations under the international refugee law without any such procedures.\textsuperscript{129} It is the general principle of the law of evidence that a person who makes a claim in his application must submit the evidence to prove that his claims are true. This is called the “burden of proof.” In refugee claims, therefore, the burden of establishing the veracity of his statements and the accuracy of his facts lies with the applicant.\textsuperscript{130} However, in the context of asylum it is necessary to take into account the special situation of applicants. In most cases, an asylum-seeker is not able to provide documentary or other proof, given the circumstances of his departure as well as the nature of the claims made. Thus, the responsibility relating to establishment of the facts is shared between the applicant and the decision-maker.\textsuperscript{131}

It is the duty of the asylum-seeker to give a complete and truthful account of the facts that are material to his application.\textsuperscript{132} Hathaway cautions that “an individual can be untruthful and still be a Convention refugee.”\textsuperscript{133} He cites the case of a claimant who satisfactorily passed the identity test, and who has enough documents to prove that there is a well-founded fear of being persecuted. Under that circumstance, there is no more need to require additional evidence and the refugee claim is recognised. Sometimes, the applicant may fail to testify truthfully or indeed, to testify at all. If this happens, then the decision-maker is left only with the documentary evidence as the basis for the assessing the applicant’s well-foundedness of the claim. But if that documentary evidence is in fact sufficiently demonstrates that there is a real chance or serious possibility of being persecuted, the fact of the false statements of the applicant does not vitiate the reality of the risk faced. In such a case his refugee status should be recognised.\textsuperscript{134}

Gorlick calls the above comment of Hathaway as “seemingly odd.”\textsuperscript{135} He argues that no one is encouraging or suggesting dishonesty.\textsuperscript{136} In this context, the UNHCR \textit{Refugee Status Determination} states that misrepresentations or failure to disclose relevant facts would not automatically mean

\begin{footnotes}
\item[131] UNHCR, \textit{Refugee Status Determination}, op.cit., 112.
\item[132] Ibid, 113.
\item[134] Ibid, 3–4.
\item[135] Ibid, 3.
\item[136] Ibid, 4.
\end{footnotes}
that the applicant does not have a credible claim. Untrue statements could be due to fear or lack of trust, trauma or misinterpretation. These statements may be explained upon further examination, or may be re-evaluated when all the circumstances of the case have been known.137

While the burden of proof lies with the applicant, the duty in relation to ascertaining and evaluating all the relevant facts is shared between the applicant and the examiner. In some cases, the examiner may be required to use all the means at his disposal to produce necessary evidence supporting the application. Even research that is conducted independently may not, however, always be successful and there may also be statements that are insusceptible of proof. In such circumstances, if the applicant’s account appears credible, he should be given the benefit of the doubt, unless there are good reasons to the contrary.138

Although the burden of proof is discharged by the applicant through providing evidence, in the end, what may be available as the only evidence would be the applicant’s own oral testimony. Outside of the applicant’s testimony, other evidence like documents or testimony of witnesses who are experts in the conditions of the relevant country may be taken into consideration as part of refugee status determination.139

The decision-makers are required to assess the reliability of any evidence and the credibility of the statements of the applicant.140 To assess the overall credibility of a claim for refugee status, it is important to examine several factors which include the reasonableness of the facts alleged; the overall consistency and coherence of the applicant’s story, the corroborated evidence adduced by the applicant to support his statements, the consistency with common knowledge or generally known facts, the known situation in the country of origin and the applicant’s demeanour or behaviour.141

Taylor explains the reasons why refugee status claimants presenting the appearance of persons of poor credibility. Firstly, she notes that it is not realistic and reasonable to expect the asylum-seekers to provide information to the decision-makers before they have utmost faith in the asylum-providers. Secondly, there is possibility of failures in a claimant’s

137 UNHCR, Refugee Status Determination, op.cit., 113.
140 UNHCR, Refugee Status Determination, op.cit., 113.
perception and memory. Such failures can explain inconsistencies, inaccuracies and lack of detail in a narrative which is substantially true. Thirdly, a decision-maker cannot reliably assess a refugee status claimant’s credibility if the claimant is suffering from post-traumatic stress disorder, and this condition is not known to the decision-maker. Finally, there can be communication problems between examiners of a refugee status claim and refugee status claimants.142

Requirements for Procedures to Determine the Eligibility of Refugee Status

Specialized Procedure for the Examination of Asylum Claims

Under the international protection principles, all applications for asylum should be examined in accordance with established procedures that are fair, non-discriminatory, and appropriate to the nature of asylum claims. Refugee status claims or other forms of protection should preferably be assessed in a single procedure.143

Specialized Asylum Authority

All requests for asylum and well cases in which there is any indication that an asylum request might be involved, should be performed by qualified personnel who have the necessary skills and knowledge on refugee and asylum matters.144

Access to Determination of Refugee Status

It is the requirement of international refugee protection that, ideally, all applicants who claim asylum at a border should be allowed to enter the territory and be given temporary right to remain there until a final determination has been made on their application. Admissibility should not be denied on grounds that relate to the claim’s substance, nor solely based on the ground that the applicant does not have personal identity or travel documents.145

143 UNHCR, Refugee Status Determination, op.cit., 114.
145 UNHCR, Refugee Status Determination, op.cit., 115–16.
The Use of Translators and Interpreters

Refugee status claimants must secure the assistance of interpreters and translators when they present their claim, both oral and written, before the decision-makers. The competence of the assistance received can have a tremendous impact on the apparent credibility of claims.146

Fair Hearings

In a refugee status determination fair hearings should be applied. Article 14(1) of the 1966 ICCPR states that in the determination of his rights and obligations in a suit at law, everyone shall be given fair and public hearing by a competent, independent and impartial tribunal established by law. The Human Rights Committee (HRC) states that the rights contained in the 1966 ICCPR are applicable to all, without regard to reciprocity, nationality or statelessness.147 However, the HRC has never mentioned whether or not the determination of refugee status is covered by the fair trial provisions of Article 14(1) of the 1966 ICCPR. According to the European Court of Human Rights, a fair hearing requires that a party be permitted to consult relevant evidence available to authorities.148

Access to Legal Services Provided by an Independent Legal Profession

The country to which the refugee approaches should, at all stages of the refugee status determination procedure, provide him independent legal advice and representation. This is necessary because asylum seekers often have no knowledge of the existing relevant law in the country where their asylum application is under consideration. Further they may not be aware of the intricacies of the procedure and issues concerning evidence as well as the burden of proof.149 The UN Basic Principles on the Role of Lawyers state that adequate protection of the human rights and fundamental freedoms to which all persons are entitled requires that all persons have effective access to legal services provided by an independent legal

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147 Human Rights Committee, General Comment No. 15, The position of aliens under the Covenant, UN doc. HRI/GEN/1/Rev.1 at 18 (1994), para 1.
149 European Legal Network on Asylum, Survey on Legal Aid for Asylum Seekers in Europe, October 2010, at 34.
profession.\textsuperscript{150} It further states that governments shall ensure that all persons within their territory and subject to their jurisdictions, without distinction of any kind, are to be provided effective procedures and responsive mechanisms for effective and equal access to lawyers.\textsuperscript{151} It also declares that sufficient funding and other resources for legal services shall be provided by governments to poor people and, as necessary, to other disadvantaged persons. Professional associations of lawyers shall coordinate in organizing and providing services, facilities, and other resources.\textsuperscript{152} In the Council Resolution of the European Union (EU) of 20 June 1995 on \textit{Minimum Guarantees for Asylum Procedures},\textsuperscript{153} it is provided that, in accord with the rules of the member state concerned, a legal adviser or other counsellor may be called to provide assistance during the procedure.\textsuperscript{154}

\textit{Allowing the Presence of Legal or other Counsel}

The UNHCR’s Training Manual on \textit{Interviewing Applicants for Refugee Status (RLD 4)}\textsuperscript{155} states that refugee status determination interviews that are carried out exclusively by the UN personnel in the field would not normally allow legal or other counsel to attend the interview. Nevertheless, representative of the applicant’s or refugee support group’s written or other communications are often received by the UN. Such information often assists the interviewer. In such cases where participation of legal or other counsel is provided to assist an applicant with his claim, it is important that the counsel takes part in the interview. The presence of a legal representative or other counsel who understands refugee criteria as well as local jurisprudence and the applicant’s claim is helpful both to the applicant and the interviewer.\textsuperscript{156}

\textit{Individual Assessment of Each Claim, Including a Personal Interview}

The applicant should be given an opportunity for a thorough examination of his claim in the asylum determination procedure. This should include a

\begin{footnotesize}
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  \item Preamble, UN Basic Principles on the Role of Lawyers. See also Article 14 of the 1966 ICCPR and Article 6 of the 1950 European Convention on Human Rights (1950 ECHR).
  \item Principle 2, UN Basic Principles on the Role of Lawyers.
  \item Ibid, principle 3.
  \item Para 13, EU’s Resolution on Minimum Guarantees for Asylum Procedures.
  \item Ibid.
\end{itemize}
\end{footnotesize}
personal interview with the decision-makers and explanation of his case, submission of evidence regarding his personal circumstances and the situation in the country of origin.\footnote{157 UNHCR, \textit{Refugee Status Determination}, op.cit., 117.}

\textit{Confidentiality}

The applicant must receive the assurance that no information that is revealed to the authorities during the asylum procedure will be passed on to the authorities of the country of origin, or to any other third party without his express consent.\footnote{158 UNHCR’s Training Manual on \textit{Interviewing Applicants for Refugee Status (RLD 4)}, op.cit.}

\textit{Giving Written Reasons if the Application is Rejected}

The reasons for rejection of asylum application must be communicated to the asylum-seeker. In this context EU’s Resolution on \textit{Minimum Guarantees for Asylum Procedures} states that the decision that has been made on the asylum application must be given to the asylum-seekers in black and white. Should the application be rejected, the asylum-seeker deserves to be informed of the reasons for rejection and the possibility for the decision to be reviewed. As much as national law provides, the asylum-seeker must be able to acquaint himself with or be informed of the main purport of the decision in such language that he understands.\footnote{159 Para 15, EU’s Resolution on \textit{Minimum Guarantees for Asylum Procedures}, op.cit.}

\textit{Appeal or Review}

The UN \textit{Handbook} states that the applicant should be given a reasonable time to appeal if his application is not recognised. The appeal can be made, according to the prevailing system, to the same or to a different authority, whether administrative or judicial.\footnote{160 UNHCR \textit{Handbook}, op.cit., para 192.} According to the UNHCR \textit{Refugee Status Determination}, all asylum applicants whose claims are declared inadmissible or rejected on their merits are entitled to one full appeal or at the least a review, by an independent body having first-instance decision-making authority, and the right to remain in the country while the appeal proceedings are heard.\footnote{161 UNHCR, \textit{Refugee Status Determination}, op.cit., 118.} The asylum-seeker must be granted an adequate time within which to appeal and to prepare his case.
when requesting review of the decision. These periods of time limits shall be communicated to the asylum-seeker within good time. The asylum-seeker may remain in the territory of the state concerned until a decision has been made on his appeal.

**Manifestly Unfounded Applications**

The UNHCR holds that national procedures for refugee status determination may usefully provide for dealing in an accelerated procedure with manifestly unfounded applications for refugee status or asylum. The same applies to manifestly well-founded claims and ‘clearly fraudulent claims’ which could reasonably cover situations where the applicant deliberately attempts to deceive the authorities determining refugee status in seeking approval of his application.

**Conclusion**

The absence of a procedural provision on the refugee status determination in the 1951 *Refugee Convention* is not convincing. It leads to problems where different states employ different approaches in the refugee status determination. Because of these differences in approaches, some refugee applications remain pending, resulting in some refugees not being able to receive protection as guaranteed by international law. However, though there is no guideline in the 1951 *Refugee Convention* on refugee status determination, the refugee definition of the 1951 *Refugee Convention* and guidelines of the UNHCR on the procedure for conducting refugee status determination are helpful to determine the refugee status.

Under the present set up, refugees may be recognised as an individual or as a group. The UNHCR and the countries conduct refugee status

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162 EU’s Resolution on *Minimum Guarantees for Asylum Procedures*, op.cit., para 16.
163 Ibid, para 17.
164 UNHCR, *UNHCR’s Position on Manifestly Unfounded Application for Asylum*, Preamble, 1 December 1992, 3 European Series 2, 397. In this context Mullally said: “The use of accelerated procedures for manifestly unfounded asylum claims has become a common feature in Western Europe. Similar procedures can be found in Canada, the US and elsewhere. In each, the erosion of procedural safeguards has been justified by appeal to the growing backlog of asylum applications and the need for greater efficiency and control in asylum determination systems.” Siobhán Mullally, “Manifestly Unfounded’ Asylum Claims in Ireland and the Right to Fair Procedures,” *European Public Law* 8 (2002): 539.
165 UNHCR, *UNHCR’s Position on Manifestly Unfounded Application for Asylum*, ibid, para 1.
determination. It is important for them to remember that, under the Convention's definition, an applicant may be accorded the status of refugee the moment he meets the criteria. In view of the pressing conditions of refugees around the world, countries as well as the UNHCR must adhere to the characteristic fairness and efficiency of the procedures they follow when they consider applications. Since the vast majority of refugees are subject to the situations of civil wars, military takeovers, wars between states, natural disasters, gross human rights violations, economic dislocations and so on, such persons should be given refugee status on a group basis.

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LOSS AND DENIAL OF REFUGEE STATUS

Vanessa Bettinson*

INTRODUCTION

During the drafting process of many international human rights instruments states have long shown an interest in ensuring certain limitations on the obligations created by them in order to protect state security. The attitude of states during the drafting of the 1951 Convention relating to the Status of Refugees was consistent in this regard and reasons to exclude a person from refugee status were added by Article 1F. Two objectives for the inclusion of these exclusion clauses can be identified in the travaux préparatoires. Firstly it was deemed necessary to protect refugee status itself from being granted to individuals considered to be undeserving of refugee protection. Those falling under the auspices of undeserving cases would have behaved in a manner that created refugee flows. A further aim of adding exclusion clauses was the states’ view that individuals responsible for serious crimes did not escape prosecution. With the advent of international responses to terrorism these objectives remain particularly pertinent and have led to greater interest in the exclusion clauses by states’ governments. This chapter will introduce the reader to these exclusion clauses and their historic and contemporary application in some national jurisdictions. In addition this chapter will provide a preliminary exploration of Article 1(C) of the 1951 Refugee Convention, the

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provision that allows a state to remove refugee status, providing an understanding of when an individual can lose or be denied refugee status.

LOSS OF REFUGEE STATUS

There are circumstances where an individual will lose their refugee status and these are prescribed under Article 1(C) of the 1951 Convention relating to the status of refugees and its 1967 Protocol. These ‘cessation clauses’ as they have become known were included in recognition of the intended temporary nature of refugee status.6 This provision states that a person will cease to have refugee status where:

1. He has voluntarily re-availed himself of the protection of the country of his nationality; or
2. Having lost his nationality, he has voluntarily re-acquired it; or
3. He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or
4. He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or
5. ... the circumstances in connexion with which he has been recognized as a refugee have ceased to exist.7

This provision represents two distinct ways in which refugee status can be lost. Firstly, the status can be lost through the personal circumstances and decisions of the refugee themselves. Alternatively, refugee status may be lost as a result of a change in circumstances in their state of origin.

VOLUNTARY REPATRIATION

Fitzpatrick notes that the inclusion of a repatriation policy reflects a dominant view that repatriation is “the optimal solution to refugee crises in the post-Cold War era.”8 However, repatriation is hampered by the realities of

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political change in non-democratic countries with regimes that frequently subject its citizens to human rights violations. Zakaria highlights that many regimes are democratically elected but deprive their citizens of basic human rights by routinely ignoring the constitutional limits on their power.

“For Peru to Palestinian Authority, from Sierra Leone to Slovakia, from Pakistan to the Philippines, we see the rise of a disturbing phenomenon in international life- illiberal democracy.” (Italics added).9

It is a concern for the rise of illiberal democracy that causes Fitzpatrick to argue that optimistic repatriation policies should apply caution, avoiding any form of involuntarily repatriation. Such policies run the risk of damaging other more “classic durable solutions for refugees, local integration and resettlement.”10

Nevertheless Article 1(C) does allow an individual to voluntarily relinquish their refugee status. This can occur either through voluntarily re-availing oneself of the state of origin’s protection, regaining nationality of the state of origin or gaining a new nationality. The United Nations High Commissioner for Refugees (UNHCR) Handbook emphasises the need for these events to be voluntary in a real, rather than illusory sense.11 For this the refugee must intend and actually obtain protection from the state of origin. Such evidence for this may take the form of a renewal application for a passport. An application for nationality may also demonstrate a refugee’s willingness to re-avail themselves of their state’s protection. Consequently the categories for voluntary cessation of refugee status may overlap. In the event that the refugee seeks a new nationality, refugee status will only cease once that new nationality is effective in the protection it provides to the individual. For example, nationals need to be able to move freely within their state and to enter and reside in their state of nationality.12

Under Article 1(C)(4) voluntary re-establishment can cause a refugee to lose their status. The Handbook interprets this provision to apply in circumstances where the refugee has returned to their state of origin ‘with a view to permanently residing there.’13

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10 See Fitzpatrick above at n. 8.
CHANGE OF CIRCUMSTANCES

Cessation or loss of refugee status will also occur where the circumstances that gave rise to the individual's recognition as a refugee under Article 1(A) (2) no longer remain and the individual can once again avail themselves of the protection of their state of origin.\textsuperscript{14} The Handbook acknowledges that the change must be fundamental in the state of origin, not merely transitory, to the extent that the basis for the fear of persecution is removed.\textsuperscript{15} It is also important that the cessation clause is not permitted to subject a refugee to frequent review of their status, as this would undermine the principle of security to the individual that refugee status is intended to provide.\textsuperscript{16}

Initially the cessation clauses were employed quite rarely. However, the UNHCR recognised an increased interest in these clauses, prompting a Discussion Note to assist in the interpretation and application of the clauses in 1991.\textsuperscript{17} The impetus behind the awakening interest in the cessation clauses was described as “recent political developments in certain parts of the world.” Such political developments represented what Zakaria argues as the rise of illiberal democracy.\textsuperscript{18} Fitzpatrick and Bonoan endorse this view but indicate additional factors that have contributed to the raised profile of the cessation clauses internationally. States are interested in preventing asylum ‘becoming a backdoor to immigration’ and are frustrated with ‘protracted refugee emergencies’ and other dilemmas posed by return to situations of danger and instability.\textsuperscript{19} The UNHCR confirms that

\begin{itemize}
\item \textsuperscript{14} Goodwin-Gill and McAdam, \textit{The Refugee in International Law}, 3rd ed. (Oxford: Oxford University Press, 2007), emphasise that each cessation determination must be based on an assessment of the individual’s specific circumstances.
\item \textsuperscript{15} ‘The Handbook’ at para 135.
\item \textsuperscript{17} Executive Committee of the High Commissioner’s Programme, Sub-Committee of the issues on International Protection, ‘Discussion Note on the Application of the “ceased circumstances” Cessation Clauses in the 1951 Convention’ EC/SCP/1992/CRP.1, 20 December 1991; See also 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 http://www.unhcr.org/3e6374202.html.
\end{itemize}
illiberal democracy is a root concern in the application of the cessation clauses stating that the circumstances in question will generally relate to the ‘political and basic human rights conditions in the state of origin.’ In determining whether fundamental changes to the political and human rights landscape have changed permanently and cease to present the basis of a well-founded fear of persecution, the UNHCR’s Discussion Note gives special weight to certain factors. These factors include the level of democratic development in the country, presumably meaning the liberal development of democracy. Adherence to the international human rights treaties and levels of access permitted to relevant human rights monitoring organisations to supervise respect for human rights are also key determinants in assessing the safety of the state of origin. Such developments should “result in a complete political transformation of a country of origin.” Evidence that a fundamental change of circumstances has occurred would be where legal protections and guarantees preventing the recurrence of discriminating practices that caused refugee flows have been re-established. States are warned that the use of cessation clauses to remove refugee status from an individual should not be premature. Regime change is a slow process with many obstacles to overcome in securing fundamental change and states should allow time to ensure that changes are permanent. The UNHCR’s Discussion Note recommends that a minimum period of 12 to 18 months should be adopted when determining whether state stability is reliable. As no universal rule has been established, it remains, however, the domain of the host state to determine for itself whether the state of origin’s circumstances have fundamentally changed.

Exclusion Clauses

The exclusion clauses provide states with the ability to deny refugee status within certain parameters, however, states also have an interest in the removal of a person’s refugee status on the basis of the individual’s conduct within the state of refuge. Stripping a person of this privileged status

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21 Ibid., at para. 11.
may operate in the context of a state's security interests especially if the person is considered to be dangerous. In addition a state may also consider that a large number of refugees pose a threat to its security. States are further permitted to remove a refugee under Article 33(2) of the 1951 Convention. This provision allows the state to expel or return a refugee on the basis of their conduct after entry to the state or after prior conduct has come to light. As the current international climate continues to link the idea of terrorism with the refugee it is these provisions that states are interpreting very broadly to expand their use. However, as Gilbert emphasises any limitations on a humanitarian provision such as the granting of refugee status needs to be interpreted restrictively. The 1951 Refugee Convention operates within the framework of international human rights law. In respect of the loss and denial of refugee status, the refugee convention and its provisions are interpreted more restrictively than other human rights instruments. However, these human rights instruments do not work in isolation. Where a refugee is denied access to this status by virtue of the exclusion clauses contained in Article 1F, lesser protection of a temporary nature may be afforded to the individual by virtue of rights and obligations contained within human rights treaties, such as the regional human rights treaty the European Convention on Human Rights. These human rights instruments operate to prevent the excesses of an unsuccessful refugee determination.

Article 1F provides the following:

The provisions of this convention shall not apply to any person with respect to whom there are serious reasons for considering that: (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

In accordance with this provision it is mandatory for an individual to be denied refugee status and the protection that status invokes where the exclusion criteria is met. The question of whether an individual is excluded

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from refugee status is usually determined during the initial refugee determination procedure.\textsuperscript{25}

The trend in restrictive policies in respect of those seeking asylum particularly in Western Europe and North America runs parallel with the international response to the threat of terrorism.\textsuperscript{26} Alongside this increased emphasis on States’ ability to protect its citizens and ensure its own national security, an association with those seeking asylum as terrorist threats has gathered momentum in the collective, political conscious.\textsuperscript{27} States have responded to these attitudes with ever restrictive immigration and asylum policies, strengthening the image of the criminal immigrant.\textsuperscript{28} This is not merely a nationalistic reaction but can be evidenced in the international community’s attitude as represented by the Security Council and General Assembly.\textsuperscript{29} As Goodwin-Gill argues this attitude lacks a coherent basis given that those of a criminal or terrorist character are unlikely to follow legal avenues involved in seeking asylum considering that the asylum process often involves finger printing, photographing and other detailed procedures. In contrast it has proven rare for a recognised refugee to have been found guilty of terrorist related activity.\textsuperscript{30} This development reflects the fact that refugee law does not operate in isolation of other international instruments. Balancing national security interests in light of international human rights obligations has proven challenging but the importance of maintaining the balance has been pursued by the United Nations.\textsuperscript{31} Other areas of international law must also play a part in respect of the challenges faced by the threat of terrorism and the moving world population as recognised by the 2001 UNHCR Global Consultations on International Protection which acknowledged the necessity of interpreting the exclusion clauses with reference to ‘developments in other

\textsuperscript{25} ‘The Handbook’ at para 141.
\textsuperscript{29} 1994 Declaration on Measures to Eliminate International terrorism, para 5(f), annexed to UNGA res 49/60 (9 December 1994); UNSC Res 1269 (19 October 1999) para 4.
areas of international law since 1951, in particular international criminal law and extradition law as well as international human rights and international humanitarian law.\(^\text{32}\)

It is with this background that the Convention’s exclusion clauses have gained renewed government attention with arguably an overreaching remit than originally envisaged by the drafters of the Convention and the current stance of the UNHCR.\(^\text{33}\)

**Article 1F(a) – Crimes against Peace, War Crimes and Crimes against Humanity**

To fall within this category there must be ‘serious reasons for considering’ that the person committed either a crime against peace, war crime or crime against humanity. Clearly some criminal activities will fall within all of these categories, however, each term needs to be defined for the purpose of understanding their application by decision-makers.

Early in the drafting process of the Refugee Convention states were generally keen to ensure that war criminals should not benefit from refugee status. Ideas for drafting the relevant exclusion clause for this purpose derived from the wording under Article 14(2) Universal Declaration of Human Rights 1948 and Article 6 of the London Charter of the International Military Tribunal\(^\text{34}\) although specific reference to either was omitted from the finalised Article. In spite of this omission Goodwin-Gill and McAdam have argued that the States did see these instruments as ‘appropriate and relevant sources(s) of international law.’\(^\text{35}\) As a result the interpretation of the terms applied in Article 1F(a) are fluid and a range of international instruments serve as contemporary aids to interpretation.\(^\text{36}\)

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\(^{33}\) ‘The Handbook’ at para 80, the exclusion clauses should be construed restrictively because they deprive a person of refugee status who would otherwise qualify.

\(^{34}\) Economic and Social Council and the Third Committee see UN docs. E/1814; 1682. Text available at http://www.unhcr.org/refworld/docid/3ae66b39614.html.


Particularly relevant at present are provisions in the UN Convention on the Protection and Punishment of Genocide (1948) and the other four 1949 Geneva Conventions for the Protection of Victims of War, the Rome Statute of the International Criminal Court 1998 (ICC) and the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) (1993).  

**CRIMES AGAINST PEACE**

Under the London Charter International Military Tribunal crimes against peace are defined as including ‘planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements, or assurances or participation in a common plan or conspiracy for any of the foregoing.’ In Brownlie’s view a crime against peace was thought to involve only those in a position of authority or decision making in respect of an act of aggression. Leaders rather than soldiers and civilians following orders were intended to be excluded from refugee protection. However, Gilbert has argued that a consistent application of the 1974 General Assembly resolution on the Definition of Aggression would include leaders of rebel groups in non-international armed conflicts which seek secession and leaders of state. 

**WAR CRIMES**

The London Charter describes war crimes as ‘violations of the laws and customs of war’ and under the Rome Statute of the International Criminal Court 1998 war crimes include acts such as ‘wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering, or serious injury to body or health, extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly, compelling a prisoner of war or other

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38 Article 6 London Charter of the International Military Tribunal see note 34.
protected person to serve in the forces of a hostile power, wilfully depriv-
ing a prisoner of war or other protected person of the rights of fair and regular trial, unlawful deportation or transfer or unlawful confinement and the taking of hostages.\textsuperscript{41}

**Crimes against Humanity**

These crimes differ to war crimes on account of their larger scale. Such an example of a crime against humanity is genocide that has been defined and remains unchanged by the 1948 Genocide Convention. Other examples are listed under Article 7 of the Rome Statute of the International Criminal Court as ‘extermination, enslavement, deportation persecution against any identifiable group or collectivity.’ These crimes also differ to war crimes in that they can occur during peace time. Under Article 7(2)(a) of the Rome Statute crimes against humanity have a systematic and widespread quality about them and can be aimed against any civilian population and can be carried out in either the furtherance of a state policy or an ‘organizational policy’ illustrating the possibility of applying this exclusion clause in cases involving terrorist activity.

Individuals are seen as responsible for their own actions in respect of the crimes under Article 1F(a) and Article 27 of the Rome Statute strengthens this approach stating that ‘official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute.’

**Article 1F(b): Serious Non-Political Crimes**

This clause applies where there are serious reasons for considering that the potential refugee has committed a serious non-political crime outside the country of refuge and prior to their admission to that country as a refugee. The UNHCR’s Handbook explains that the objective of this exclusion clause is to enable receiving states to ensure the security of its population by denying an asylum seeker refugee status where they have committed a common law crime prior to entering the receiving state.\textsuperscript{42} A person who

\textsuperscript{41} Rome Statute of the International Criminal Court 1998, Article 8.

\textsuperscript{42} ‘The Handbook’ at para. 151.
would qualify as a refugee during their determination process will be denied the status on account of their prior conduct. This contrasts with the other two exclusion clauses that do not include the same reference to conduct occurring prior to entering the host state. States will continue to be concerned with the security of its population where a person with refugee status commits a serious crime having entered the state of refuge. These instances ought to fall outside the ambit of Article 1F(b) and alternatively any criminality committed within the receiving state should fall within the expulsion provisions governed by Article 32 and 33 of the 1951 Refugee Convention. However, in line with a more enthusiastic approach to using the exclusion clauses states are beginning to extend the remit of Article 1F(b). Article 12(2) of the European Union Qualification Directive defines the phrase ‘prior to his admission to that country as a refugee’ to mean prior to the time of a residence permit, ‘based on the granting of refugee status.’ It is not clear why the Directive has chosen this wording, given that the relevant crime needs to occur outside the state of refuge. It also suggests that Article 12(2)(b) may operate following the successful determination of refugee status. This could create a potential overlap with the operation of articles 32 and 33.

What Amounts to a Serious Crime?

The UNHCR Handbook states that a serious crime for the purpose of Article 1F(b) ‘must be a capital crime or a very grave punishable act.’ The UNHCR 2003 Guidelines identify specific examples of serious crimes including murder, rape and armed robbery. Certain offences are excluded for example theft even when there is evidence that the individual is a recidivist in respect of theft. A difficulty with interpreting what constitutes a serious crime arises by the fact that different states have their own distinct understandings of the term crime within their domestic criminal

46 Recidivist commission of minor crimes ought not to be excludable Brzezinski v Canada (minister of Citizenship and Immigration) federal Court of Canada (Trial Division), [1998] 4 FC 525.
justice systems. Looking at the degree of punishment available in the state in respect of the suspected criminal activity of the asylum seeker can offer a degree of guidance on the matter.

However, some crimes may give rise to a particularly complex set of considerations when assessing its seriousness. Drug related offences are a good illustration of this. Such offences involve a wide range of criminal activities in the cultivation, preparation and commercialisation of illegal substances. This is a particularly relevant problem in respect of refugee status and excluding undeserving applicants, as the production and trafficking of illegal drugs are linked to forced displacement and oppression of civilian populations. Gottwald explains that a few states are responsible for the majority of the drug trade where the drug business is linked to civil war and forced displacement. Guerilla and paramilitary groups, non-state actors, fight for territorial and population control, funding their activities by drug cultivation. Individuals are forced to assist in the preparation of drugs fearing massacres or collective killings. Civilians are targeted by groups if they are perceived to be providing low level or indirect assistance to the insurgents’ enemies. In this way civilians become involved in drug related activity and targets for counter-insurgency, giving rise to forced displacement.

Economic factors serve as an additional reason for individuals in these drug producing states to engage in illegal drug production. Colombia is the world’s largest producer of coca leaf, needed for the production of cocaine. The reason for this level of production can be explained when it is taken into account that one in four Colombians live in extreme poverty. In these ways many individuals can be drawn into criminal drug related activity. Gottwald asks the question whether all drug offences are serious for the purposes of Article 1F(b), in light of the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988 that describes all forms of supply related drug offences to be ‘serious criminal offences’ regardless of individual responsibility. His discussion can be extended to a general examination of determining the appropriate threshold of seriousness for an Article 1F(b) offence.

Gottwald identifies three approaches to this question. The first of these approaches is thought appropriate by those who advocate that the

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49 Ibid., 83.
exclusion clauses under Article 1F ought to be linked to the principles of extradition law. This approach takes the position that all drug offences are *per se* ‘serious’. This is reflected under many domestic jurisdictions through the harsh penalties endorsed by their penal codes.

This approach, that could be one interpretation of the exclusion clause read in conjunction with a strict interpretation of the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988 seems to be unduly severe and would include many who ought not be classed as ‘undeserving of refugee protection’. As highlighted above the exclusion clauses need to be interpreted narrowly and within the international human rights framework. Too wide an interpretation of serious crimes would have the impact of making Article 1F(b) not in line with the *ejusdem generis* principle adopted within the application of the Convention grounds in Article 1A(2). This wide application of Article 1F(b) and the low seriousness threshold in respect of drug offences would allow states to deny refugee protection to those lacking criminal responsibility and whose conduct was too remote from the ‘undeserving’ activity of creating refugee flows. This would not be in line with the application of either of the other exclusion clauses. Gottwald argues that criminal responsibility associated with drug offences varies considerably and ought to be reflected in the seriousness threshold for Article 1F(b). A valid comparison can be demonstrated between a peasant living in a remote rural area of a drugs producing state who resorts to the cultivation of illicit crops to avoid the destitution of his family and the leader of a violent drugs cartel whose wealth is generated through his role in exporting the illegal drug. A leader of an organised criminal drugs cartel has similar qualities to those who fall within the other exclusion categories. Whereas the peasant’s position appears to resonate with the civilians or soldiers following orders that Brownlie argues were not intended to be excluded from refugee protection. For these reasons it is submitted that this approach would be inappropriate for determining whether an offence is sufficiently serious.

The second approach identified by Gottwald encourages the use of rebuttable presumptions when assessing whether an offence is ‘serious’ within Article 1F(b). It follows a method adopted by the UNHCR’s policy regarding an influx of Cuban asylum seekers to the United States in 1980.

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Many of the thousands of applicants for refugee status had criminal back-
grounds that raised the question of exclusion under Article 1F(b). To deal 
with the number of applicants and to promote consistent decisions the 
UNHCR, there on request by the United States authorities, proposed 
the use of presumptions of serious crimes in respect of any evidence that 
the applicant had committed a criminal offence. This worked by categoris-
ing offences, the first category involving those offences that are presumed 
serious unless mitigating factors serve to rebut the severity of the offence. 
Another category of offences may be classed as serious only when accom-
panied by aggravating factors. A final category only included offences that 
were not capable of reaching the threshold of seriousness for Article 1F(b). 
Goodwin-Gill and McAdam describe this approach to the exclusion 
clauses as useful “bearing in mind the objective of such provisions to 
obtain a humanitarian balance between a potential threat to the commu-
nity of refuge and the interests of the individual who has a well-founded 
fear of persecution.”

A final alternative approach to determining whether the level of seri-
ousness of a drug offence specifically, or a general criminal offence, meets 
the seriousness threshold required by Article 1F(b) is the view that all drug 
ofences are not serious crimes per se. The seriousness of the offence 
would therefore need to be evaluated on a case by case assessment with 
regard to all relevant circumstances, with certain aggravating features 
allowing the crime to meet the seriousness threshold. This method of eval-
uation appears to overlap with the second approach, but is less appealing 
when applied to all crimes. Arguably it is preferable to classify certain 
ofences as inherently serious such as murder or rape. For clarity and to 
aid decision-makers who need to apply the exclusion clauses, it is sug-
gested that the same approach should apply to all offences including drug-
related offences.

Proportionality

UNHCR advocates that Article 1F exclusion clauses and especially 
Article 1F(b) should incorporate a balancing test. In the context of 1F(b) 
this requires the decision-maker to weigh the seriousness of the crime 
against the level of persecution faced by the applicant if excluded from 
refugee status. This is also supported by the travaux préparatoires.

52 Ibid., at page 180; Gottwald notes that the 2003 Background Note on the Exclusion 
Clauses endorses this approach.
However, this test remains controversial and has failed to gain universal support. The EU Qualification Directive chose to be silent on this point confirming that states are reluctant to incorporate this approach.

**What Amounts to a Non-Political Crime?**

Under Article 1A(2) of the Refugee Convention, refugee status is defined as, ‘owing to a well-founded fear of persecution for reasons of race, religion, nationality, political opinion or membership to a particular social group’ the person is unable to afford state protection. Inherent, therefore, within the Refugee Convention is the notion that states should provide political asylum for individuals fleeing despotic government regimes. Such protection will only be provided where the commission of a political offence, or an imputed political opinion is accompanied by forms of punishment that amount to persecution. The individual’s commission of a political offence would demonstrate that the persecution was a consequence of the individual’s political opinion. Where the despotic state criminalises inherently political behaviour through the suppression of civil and political rights such as freedom of expression, religion for example, any punishment would amount to persecution. As has been argued, “mere commission of a political offence is not sufficient to qualify a person for refugee status, which arises only where the anticipated punishment shades into persecution. Alternatively, it may be that certain offences are inherently political, that their commission reflects the failure of a state to protect a greater and more valued interest, so that any punishment would be equivalent to persecution.”

In the aftermath of the Second World War the political criminal was considered to use violence where it was the only means to defeat oppressive regimes. However, it has been said that political criminality, or crimes in the name of politics have changed fundamentally in method and character to the extent the exclusion clause under Article 1F(b) is out dated. Lord Mustill comments that,

> those who use violence and fear to struggle against oppression may themselves be oppressors, causing as much suffering to the defenceless as those

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whom they seek to displace...the motives and means of destructive violence have become so greatly enlarged.\textsuperscript{55}

The events of terrorist attacks in the United States and elsewhere serve as a poignant testament to Lord Mustill’s view. Further they demonstrate that in contemporary times the methods employed by those seeking to further their political ends have become more extreme and more indiscriminate in nature. Where the crime has involved the fear and suffering of defenceless civilians, the result is oppression and the UNHCR Handbook acknowledges that such crimes may be ‘of such an atrocious nature the political basis will be difficult to accept.’\textsuperscript{56} Certainly it is easy to see that certain criminal offences may share similar traits as those crimes falling within the other two exclusion clauses. A person who indiscriminately bombs a civilian location in the name of furthering a political end will be as undeserving of refugee status as the war criminal under Article 1F(a).

It has become the practice of states to use this category of exclusion more and states have sought in particular to apply it to those it deems to be ‘terrorist’. In itself this is problematic, as although difficult to define, terrorism involves criminal activity to further a political objective. The notion that one person’s terrorist is another person’s freedom fighter highlights the difficulty in simply labelling all terrorist activity as non-political.\textsuperscript{57} Essential for decision-makers is the need to define when a political crime is so heinous it can no longer be said to be political, and as a result the offender is undeserving of refugee status. The UK courts have explored this legal issue of when a crime is no longer of a political nature in \textit{T v Secretary of State for the Home Department} [1996] 2 All ER 865. The authorities sought to return T to Algeria on the grounds that he fell within the exclusion clause Article 1F(b) for his prior conduct before entering the UK illegally. T was a member of an illegal organisation in Algeria that used violent means with the objective of seizing power from the ruling party. The special adjudicator found that he had been involved in a bomb attack on an Algerian airport that killed ten civilians. The appellant argued that the purpose of the bomb attack was to damage the state economy as opposed to causing death. He was also found to have been involved in the planning of an attack on army barracks to seize weapons, which resulted in one death. The House of Lords dismissed the appellant’s appeal.

\textsuperscript{55} \textit{T v Secretary of State for the Home Department} [1996] 2 All ER 865.
\textsuperscript{56} ‘The Handbook’ at para. 152.
agreeing with the state authorities that his conduct did fall within the meaning of Article 1F(b). Following the view of Lord Mustill, the court concluded that an attack resulting in the indiscriminate killing of innocent citizens could only be termed a terrorist attack, far removed from the political objectives it sought to achieve. It could not therefore be described as a political crime. From the court’s perspective a political crime would need to demonstrate a direct relationship between the ideas of the perpetrator and those of the victims. Such attacks would therefore be directed at military or government targets rather than civilian institutions.

This decision is perhaps in accordance with Goodwin-Gill and McAdam, who conclude that an offence is non-political “if it is remote, in the sense that there is no sufficient ‘close and direct causal link between the crime committed and its alleged political purpose’; and if it is disproportionate in relation to the political aims.”

Gilbert’s view of the decision in T is that it illustrates the “symbiotic relationship between extradition law and Article 1 F(b) political offence cases are so rare that judges cannot let the law ossify when a refugee case presents an ideal opportunity to refine legal understanding.” It is Gilbert’s contention that the court in T took the predominance test used in the main by the Swiss and the UK towards the political offence exemption contained within extradition law and applied it sensibly in its application of Article 1F(b).

Given the current climate in respect of the international effort to counter terrorism it is unsurprising that an individual who claims to have committed an act that resulted in the death of many civilians for political ends cannot hope to avoid exclusion under Article 1F(b).

**Article 1F(c) – Acts Contrary to the Purposes and Principles of the United Nations**

This final exclusion clause under Article 1F was rarely used to exclude individuals from Refugee Status, but its appearance has recently increased significantly in the jurisprudence of the states. It clearly overlaps with the other grounds as actions that amount to crimes against peace, humanity and war crimes or are serious, non-political crimes will inevitably also

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amount to acts contrary to the purposes and principles of the United Nations. This position is acknowledged by the UNHCR Handbook which makes it clear that it is takes the view that the final clause does overlap with the other clauses ‘without introducing any specific new element.’

During negotiations of the Refugee Convention the inclusion of the words ‘acts contrary to the purposes and principles of the Charter of the United Nations’ created considerable debate in the Social Committee of the Economic and Social Council. Those who did not support the inclusion of the phrase argued that the vagueness and therefore potentially broad meaning of it would undermine the primary purpose of the Convention, allowing states to reject individuals who were deserving of protection. The French delegate, however, strongly advocated that the phrase was necessary to ensure that exclusion could apply where acts of atrocity were committed during peace times. Although not authoritative, this highlights that the drafters were influenced by the French delegate and believed it necessary to create a distinct category to ensure that acts committed during times of conflict would also fall within Article 1F(c) when carried out in times of peace.

The principle of exclusion by reasons of acts contrary to the purposes and principles of the United Nations also appears in the International Refugee Organisation’s Constitution. The intention was to exclude individuals who had participated in any organisation seeking the overthrow of a government of a UN member state following the Second World War. The benefits of the Organisation should ‘not be exploited in order to encourage subversive or hostile activities directed against the Government of any of the United Nations.’ This is in line with the overall purpose of the exclusion clauses discussed above. As the travaux préparatoires made clear, those responsible for creating refugee flows ought not to benefit from the protection afforded by refugee status. The extension of this principle to include individuals responsible for seeking the overthrow of democratic regimes did not meet with universal approval, as it was seen to conflict with the right of self-determination. This perhaps explains the

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view taken in the UNHCR Handbook that Article 1F(c) does not create ‘any specific new element’ to the exclusion clauses.64

The purpose and principles of the United Nations are contained in the treaty creating the United Nations, the United Nations Charter 1945.65 Article 1 defines the purpose and principles of the United Nations as the maintenance of international peace and security by taking ‘effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.’

Although the principles and purposes stated within the Charter reflect an organisational character, many of the principles have been developed within later treaties and have evolved through customary law. An important example of this is in the area of international human rights law, where the principles of human rights have developed from initially promotional and desirable aims to established customary norms since the adoption of the Universal Declaration of Human Rights 1948.66 The UNHCR’s Background warns against an approach that deems any action as contrary to the principles and purposes of the United Nations as reflected within the United Nation’s multilateral conventions. Such an approach, it argues, would be ‘inconsistent with the object and purpose of’ this exclusion clause.67 The Background Note contends that the travaux préparatoires imply that the intention of Article 1F(c) was to cover actions that although amounted to human rights violations, fell short of being crimes against humanity. Integral to the application of this clause is that it should only be used in exceptional circumstances and where the human rights violation or other action ‘offends the principles and purposes of the United Nations in a fundamental manner’. On the UNHCR’s interpretation, ‘crimes capable of affecting international peace, security and peaceful

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64 ‘the Handbook’ at paras 162–163.
relations between States would fall within this clause, as would serious and sustained violations of human rights. There is, however, evidence to suggest that states are interpreting this phrase more widely than envisaged by the UNHCR. For example, the Canadian Supreme Court in *Pushpanathan* characterises the terms in Article 1F(c) “to exclude those individuals responsible for serious, sustained or systematic violations of fundamental human rights which amount to persecution in a non-war setting.” This removes the requirement that such acts should impact upon states’ relations with other states. Given the vagueness of this clause, it is unsurprising that the UNHCR takes the view that this clause should only arise rarely and in exceptional cases. As stated above the majority of cases will involve clauses 1F(a) and 1F(b) as preferred options for exclusion.

Once the question of what the principles and purposes of the United Nations are, the next consideration is who should fall within the ambit of exclusion clause 1F(c). The UNHCR Handbook states that ‘only those in a position of power in a member state [and were] instrumental to his State’s infringing these principles’ can be excluded under this clause. Unlike clause 1F(b) the implication is that only state leaders or officials are excludable under 1F(c). Goodwin-Gill and McAdam indicate that this view is shared by many commentators confirming that this clause should be limited in its application to exceptional circumstances. Pretzell suggests that the drafters of the Convention had in mind ‘those operating on a state level and perpetrating crimes of national or international significance.’

It is advocated by the UNHCR’s Background Note that extending the application to activities involving drug smuggling or people trafficking would be misguided. As explained above such conduct would fall within exclusion clause 1F(b).

Despite this strong stance advocated by the UNHCR that 1F(c) should be narrowly construed in regards to what actions are contrary to the
principles and purposes of the United Nations and who is responsible for such actions, the jurisprudence of member states have begun to take a different approach. In *Pushpanathan v Canada* [1998] 1 SCR 982 the Canadian Supreme Court explored the issue of whether or not Article 1F(c) could be interpreted to exclude from refugee status an individual guilty of a serious drug offence. Pushpanathan was granted a permanent residence status in Canada under an administrative programme, before his initial claim for refugee status was considered. It seems that the initial claim was then abandoned. Later he was arrested in Canada charged with conspiring to traffic heroin along with other members of a criminal group. The group was discovered to be in possession of heroin worth $10 million. He was found guilty and sentenced to eight years imprisonment. The Canadian authorities sought to deport Pushpanathan using domestic legislation that allowed deportation for individuals without refugee status. Pushpanathan sought a renewed claim for refugee status where the tribunal and subsequent appeal courts considered whether the authorities could exclude him under Article 1F(c). The Supreme Court suggested that Article 1F(c) could be interpreted to include within its ambit individuals who were non-state actors who had committed crimes that the international community had declared to be contraventions of the principles and purposes of the United Nations,

> Although it may be more difficult for a non-state actor to perpetrate human rights violations on a scale amounting to persecution without the state thereby implicitly adopting those acts, the possibility should not be excluded *a priori*...the Court must take into consideration that some crimes that have specifically been declared to contravene the purposes and principles of the United Nations are not restricted to state actors.\(^{74}\)

Examining the application of Article 1F(c) to non-state actors involved in drug trafficking offences the court noted that the international community had developed treaties on the matter. However, there had been no explicit declaration in these treaties stating that acts of drug trafficking amounted to “serious, sustained and systematic violations of fundamental human rights, constituting persecution”.\(^{75}\)

Were the international community to make such a declaration, it will be difficult to reconcile the relationship between Article 1F(b) and 1F(c). The Canadian court itself recognised that to allow drug trafficking to fall

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\(^{75}\) Ibid., at para 69.
within the meaning of the phrase ‘acts contrary to the purposes and principles of the UN’ would create a clear overlap with Article 1F(b). As argued above drug trafficking offences may fall within Article 1F(b) when committed prior to entering the host state of refuge. The presence of Article 1F(b) provides for an “unavoidable inference ...that serious non-political crimes are not included in the general, unqualified language of Article 1F(c).” An argument supporting the premise that Article 1F(c) should include drug trafficking offences on account of the prior entry restriction in Article 1F(b) fails to respect the effect of Article 33(2) of the Convention that permits *refoulement* of a refugee.

The Canadian Supreme Court ultimately decided that Pushpanathan could not be excluded from refugee status under exclusion clause 1F(c), not because he was a non-state actor, but because his acts did not fall within the meaning of the phrase ‘acts contrary to the purposes and principles of the United Nations’.

The United Kingdom has since developed a line of jurisprudence that expands the application of this exclusion clause, in particular when dealing with acts of terrorism. In *Al-Sirri v Secretary of State for the Home Department* [2009] EWCA Civ 222 the appellant was refused refugee status under Article 1F(c). As a committed Islamist, the Egyptian national was arrested and tortured by the police authorities during the 1980s. He left Egypt for Yemen, but was found guilty in his absence of participating in an attempted assassination on the Egyptian prime minister by the Egyptian Supreme Military Court. He was sentenced to death. He fled to the United Kingdom with his family and sought asylum under the 1951 Convention relating to the Status of Refugees. The Egyptian Supreme Military Court then convicted the appellant of belonging to a terrorist organisation. These convictions served as the basis for the Home Office to exclude the appellant from refugee status under Article 1F(c).

In 2001, General Masoud, the Afghan vice-president, was assassinated by two Taliban bombers posing as journalists. The assassins had gained access to General Masoud using fake credentials thought to have been either knowingly or inadvertently supplied by the appellant. A criminal case against the appellant in the national criminal court was discontinued on the basis of insufficient evidence against him. However, he was rearrested after the United States authorities requested his extradition to pursue an indictment there for supplying material in support of a terrorist

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76 Ibid., at paragraph 73.
organisation. As the authorities failed to provide any evidence for the charges, extradition was denied and the appellant was released. Finally in 2007 the appellant appealed against his exclusion from refugee status but was unsuccessful. The Asylum and Immigration Tribunal held that that there were serious reasons for considering that he had been guilty of acts contrary to the purposes and principles of the United Nations under article 1F(c). It reached this conclusion despite attaching minimal weight to the Egyptian Supreme Military Court’s decisions, deeming them to be unfair and likely to be based on evidence obtained by torture.

The Tribunal’s decision was overturned by the court of appeal for several reasons. Denying the appellant refugee status under article 1F(c) was clearly problematic when the evidence produced was incapable of establishing serious reasons for considering that he had committed acts contrary to the purposes and principles of the United Nations. Exclusion proceedings do involve a presumption of innocence, and the reasons for exclusion must be evidenced. Although the appellant was successful, the court of appeal emphasised that this exclusion clause can be used to exclude individuals committing private acts of terrorism without the backing of the state.77 Lord Justice Sedley stated,

There is no present need for an elaborate definition (which may, I accept, be needed in other contexts): terrorism here means the use for political ends of fear induced by violence. This is not materially different, I think, from the second limb of Security Council resolution 1566 (2004) which the UNHCR, with the support of the General Rapporteur, commends:

acts … committed with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organisation to do or abstain from doing any act.78

With this decision Article 1F(c) has become the widest and most common exclusion clause to be used to deny individuals refugee status. The only remaining limitation not addressed in this case is the suggestion that for conduct to fall within this exclusion clause it must occur prior to entering the host state. Indeed this would not be particularly detrimental to the border controls of host states as a remedy would be available under Article 33(2) where the conduct complained of occurred post entry to the

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77 This confirmed the earlier decision of KK v Secretary of State for the Home Department [2004] UKIAT 101.
host state. Nevertheless, both the jurisprudence and legislation in the United Kingdom has taken the approach that Article 1F(c) applies to conduct occurring both prior and after the individual’s entry to the host state.79

Section 54 Immigration, Asylum and Nationality Act 2006 illustrates this approach, stating that:

In the construction and application of Article 1F(c) of the Refugee Convention the reference to acts contrary to the purposes and principles of the United Nations shall be taken as including, in particular-

a) Acts of committing, preparing or instigating terrorism (whether or not the acts amount to an actual or inchoate offence), and
b) Acts of encouraging or inducing others to commit, prepare or instigate terrorism (whether or not the acts amount to an actual or inchoate offence).

It is Clayton’s view that as a result of this provision it now appears that in English and Welsh law an individual can be denied refugee status for a less serious crime under the exclusion clause under 1F(c) than 1F(b) despite the fact that the wording of the clauses suggests the intention of the drafters was the opposite position.80 The result of the approach taken by the United Kingdom is to encroach on the intended protection of the 1951 Convention to protect persons with a well-founded fear of persecution for reasons of political opinion. States, for example, should not deny individuals from the protection afforded under this convention for mere membership to organisations ‘proscribed’ as terrorist organisations.81

**Conclusion**

The interpretation of the exclusion clauses has evolved within the jurisprudence and legislative frameworks expansively. This evolution represents the current climate where national security is considered more threatened by terrorism than in previous eras. This is despite the fact that terrorism is not a new monster of contemporary times. Although, it's character and nature has developed to become more oppressive and dangerous to citizens of targeted states. The methods used are more

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79 *KK (Article 1F(c)), Turkey [2004] UKIAT 00101; AA (Palestine) [2005] UKIAT 00104.*
80 At page 531.
81 This was avoided in *MH (Syria): DS (Afghanistan) v Secretary of the State for the Home Department* [2009] EWCA Civ 226.
indiscriminate and far reaching now, with more in common with the repressive regimes that participants of terrorist activities claim to resent. Whilst refugee law allows states to narrow their human rights obligations, those subject to exclusion clauses, although denied refugee status may rely on other international or regional human rights instruments to resist removal to countries where they face a real risk of serious human rights violations. This is a reminder that the Refugee Convention is but part of a tapestry of human rights protection available to those forcefully displaced by their own governments.

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PROTECTION OF REFUGEES THROUGH THE PRINCIPLE OF NON-REFOULEMENT

Jahid Hossain Bhuiyan*

INTRODUCTION

Globalisation has been blamed for giving a new life to many concerns that were once thought to have faded into the background of domestic policy. In fact, they now solicit international attention. The challenges facing a particular state have become the same challenges with which other states are continuously contending. With regard to refugees, issues that concern the movement of persons across borders demand collective action in response to movements of persons fleeing civil wars, military takeovers, wars between states, natural disasters, gross human rights violations, economic dislocations and so on. The current time does not favour stagnant domestic solutions.1 As reported by the United Nations High Commissioner for Refugees (UNHCR) in 2011, around 43.7 million people fled back to their homes.2 Of these 43.7 million, the 1951 Convention relating to the Status of Refugees (1951 Refugee Convention)3 provides protection to a small number of people who went away from their homes because of particularised and well-founded fears of persecution for reasons of race, religion, nationality, membership of a particular social group, or political opinion.

The 1951 Refugee Convention as well as its 1967 additional Protocol Relating to the Status of Refugees (1967 Refugee Protocol)4 recognise and

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Article 1A(2) of the 1951 Refugee Convention defines a ‘refugee’ as any person:

As a result of events occurring before 1 January 1951 and 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.


This chapter examines (a) the general law relating to the principle of non-refoulement, including its scope and nature as well as its exceptions; (b) the status of non-refoulement as a norm of customary international law; and (c) whether the principle of non-refoulement is applicable to mass influx situations, extraterritorial and extradition cases.

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5 Article 1A(2) of the 1951 Refugee Convention defines a ‘refugee’ as any person who:

As a result of events occurring before 1 January 1951 and 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.


8 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA res. 39/46, UN GAOR, 39th sess. at 197, UN Doc. A/39/51 (1984).

9 UNHCR Executive Committee, General Conclusion on International Protection, Conclusion No. 81, 1997.
LEGAL FRAMEWORK OF THE PRINCIPLE OF NON-REFOULEMENT

To drive back or to repel an enemy who is unable to breach one’s defences is the literal meaning of the French word *refouler*, has been the root word for the term *non-refoulement*. *Refoulement* is also used colloquially with regard to those who have entered the gallery without any official permission.10

The principle of *non-refoulement* emerged for the first time on the international level in Article 3 of the 1933 *Convention Relating to the International Status of Refugees*.11 The contracting parties to that Convention undertaken ‘not to return refugees across the frontiers of their country of origin.’12 The principle again found use in the 1936 *Provisional Arrangement Concerning the Status of Refugees Coming from Germany*.13 Unfortunately these agreements did not receive wide recognition, being signed by only eight and seven states respectively.

By the close of World War II, it is said that *non-refoulement* has been observed to have gained significant acceptance in different states. After the war, a large populace was spread throughout most areas of Europe, especially in the western regions.14 The United Nations (UN) in February 1946 expressly accepted that refugees or displaced persons who had expressed their valid objections to going back to their country of origin should not be forced to do so.15 In the same year, the International Refugee Organization (IRO) was set up with the responsibility of providing solutions to displaced people who had to undergo this problem after the war was over.16

The UN in 1949 appointed the *Ad hoc* Committee on Refugees and Stateless Persons which in 1950 proposed:

No contracting State shall expel or return a refugee in any manner whatever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality or political opinion.17

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11 Convention Relating to the International Status of Refugees, 28 October 1933, 159 LNTS 199, 205.
12 Article 3, the 1933 Convention Relating to the International Status of Refugees.
13 Provisional Arrangement Concerning the Status of Refugees Coming from Germany, 4 July 1936, Article 4, 171 LNTS 75, 79.
15 UNGA res. 8(1), 12 February 1946, para (c)(ii).
17 UN doc. E/1850, para 30.
Article 45 of the 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War\(^{18}\) states that ‘[i]n no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs.’\(^{19}\)

Article 3 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) also incorporates the principle of non-refoulement.\(^{20}\)

The United Nations General Assembly (UNGA) in 1950 established the UNHCR.\(^{21}\) The mandate of the UNHCR included overseeing protection activities; for example, the UNHCR was responsible for ensuring that no refugee is returned to a country in which he will be in danger.

The principle of non-refoulement was also used in the 1951 Refugee Convention. It states:

1. No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontier 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.
2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.


\(^{19}\) ‘Protected persons’ are ‘those who, at a given moment and in any manner whatsoever, find themselves, in a case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not national.’ Article 4, the 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War.

Although in humanitarian law, there is no definition of the term ‘persecution’, it means as a minimum, grave infringement of human rights (right to life, freedom, security) on such grounds as ethnicity, nationality, religion or political opinion. See Article 1, the 1951 Refugee Convention; UNHCR Handbook on Procedures and Criteria for determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (UNHCR Handbook), HCR/IP/4/Eng/REV.1, re-edited January 1992, paras 51–53.

\(^{20}\) European Convention for the Protection of Human Rights and Fundamental Freedoms opened for signature 4 November 1950, 213 UNTS 221, Europ. TS No. 5 and entered into force 3 September 1953. The European Court of Human Rights in Soering v United Kingdom, expressed the view that, “the decision to [return] a person may give rise to an issue under Article 3 ... where substantial grounds have been shown for believing that the person concerned ... faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment.” 161 ECtHR (ser. A), para 91.

\(^{21}\) GA res. 428(v), annex, 1–2, UN doc. A/1775 (14 December 1950).
The 1951 Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, held at Geneva, also addressed the principle of non-refoulement. The Final Act of the Conference which adopted the 1954 Convention relating to the Status of Stateless Persons inter alia contained the following words:

_The Conference_

*Being of the opinion* that Article 33 of the Convention relating to the Status of Refugees of 1951 is an expression of the generally accepted principle that no state should expel or return a person 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,

*Has not found it necessary* to include in the Convention relating to the Status of Stateless Persons an article equivalent to Article 33 of the Convention relating to the Status of Refugees of 1951.22

It has been interpreted that Article 7 of the 1966 *International Covenant on Civil and Political Rights* (ICCPR), which states that ‘[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment’, contains an implied prohibition on refoulement.23

The Asian-African Legal Consultative Committee at its eighth session in Bangkok in 1966 adopted the *Principles concerning Treatment of Refugees*, which contains provision for non-refoulement.24 Article III(3) of the *Principles concerning Treatment of Refugees* states:

No one seeking asylum in accordance with these Principles should, except for overriding reasons of national security or safeguarding the populations, be subjected to measures such as rejection at the frontier, return or expulsion which would result in compelling him to return to or remain in a territory if there is a well-founded fear of persecution endangering his life, physical integrity or liberty in that territory.

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22 360 UNTS 122, 124.
23 Human Rights Committee, General Comment No. 31 (2004), para 12. The Human Rights Committee is of the opinion that under Article 7 of the ICCPR ‘States Parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion, or refoulement.’ Human Rights Committee, General Comment 20/44 of 3 April 1992 [Prohibition of Torture], para 9.
The essential terms embodied in the 1951 *Refugee Convention*, including the meaning of the term *non-refoulement*, are revisited by the 1967 *Refugee Protocol*. The 1967 United Nations *Declaration on Territorial Asylum* also contains the principle of *non-refoulement*. It declares that no person entitled to seek asylum ‘shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any state where he may be subjected to persecution.’ The Tehran Conference on Human Rights held in May, 1968 affirmed the importance of observance of the principle of *non-refoulement*.

As a result of the work of an Ad-Hoc Committee of Legal Experts of the Commission on Refugees of the Organization of African Unity, Members of the Organization for African Unity (OAU) in 1969 adopted a *Convention Governing the Specific Aspects of Refugee Problems in Africa* (OAU Refugee Convention). The Convention states that ‘[n]o person shall be subjected by a Member State to measures such as … expulsion, which would compel him to return … in a territory [where the forces that drive him away might once again threaten] his life, physical integrity or liberty.’

Article 22(8) of the 1969 *American Convention on Human Rights* (ACHR) also embodies the principle of *non-refoulement*. It provides: ‘In no case may an alien be deported or returned to a country, ... if in that country his right to life or personal freedom is in danger of being violated.’

The 1981 *African Charter on Human and Peoples’ Rights* (ACHPR), in its Article 12(3) states: ‘Every individual shall have the right, when prosecuted, to seek and obtain asylum in other countries in accordance with the law of those countries and international conventions.’ The 1984 *Convention against Torture* provides: ‘No State Party shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.'

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25 Article 3, para 1, Declaration on Territorial Asylum, GA res. 2312, 22 UN GAOR Supp. 16, at 81, UN Doc. A/5217.
27 Article II, para 3, the 1969 OAU Refugee Convention.
29 Article 22(8), ACHR.
31 Article 3(1), Convention against Torture.
The Committee of Ministers of the Council of Europe in 1984 restated the principle of non-refoulement.32

Central American States, Panama and Mexico together through the 1984 Cartagena Declaration on Refugees declared that the principle of non-refoulement is a ‘cornerstone of the international protection of refugees’ and further stated that ‘[t]his principle is imperative in regard to refugees and in the present state of international law should be acknowledged as jus cogens’.33 The 1987 Draft Charter on Human and People’s Rights in the Arab World in its Article 40(2) embodies the principle of non-refoulement. It states: ‘No person enjoying asylum or seeking it shall be expelled to an Arab or foreign country where his life would be in danger or where he may be persecuted.’ The UNGA in 1989 endorsed the Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, which provide that ‘no one shall be involuntarily returned or extradited to a country where there are substantial grounds for believing that he or she may become a victim of extra-legal, arbitrary or summary execution in that country.’34 The 1992 Declaration on the Protection of All Persons from Enforced Disappearance in its Article 8(1) embodies the principle of non-refoulement. It says: ‘No State shall expel, return (refouler) or extradite a person to another State where there are substantial grounds to believe that he would be in danger of enforced disappearance.’35 In 1998 the Committee of Ministers of the Council of Europe again restated the principle of non-refoulement.36 Subsequently, an update of the Bangkok Principles was completed, culminating in the adoption of a new document at the 40th session of the Asian-African Legal Consultative Organization which started under the impulsion of the UNHCR in 1966.37

The principle of non-refoulement is also referred to in the two Protocols to the Convention against Transnational Organized Crime.38 In 2001, the

33 Cartagena Declaration on Refugees, OAS Ser. L/V/II. 66, doc. 10, rev. 1 (22 November 1984), at Section III, para 5.
34 UNGA res. 44/162, 15 December 1989, para 5.
38 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, UNGA res. 55/25 (15 November 2000), Article 14(1); Protocol against the
Council of the International Institute of Humanitarian Law, bearing in mind the Institute’s long-term interest and association with the development and codification of international law pertaining to the status of refugees, adopted the *San Remo Declaration on the Principle of Non-Refoulement*. The principle of *non-refoulement* also contains in the 2001 *Declaration of States Parties to the 1951 Convention and or its 1967 Protocol relating to the Status of Refugees*. The International Law Association in 2002 noted that it is ‘the fundamental obligation of States not to return (refouler) a refugee in any manner whatsoever to a country in which his or her life or freedom may be threatened’. It further stated:

5. No one who seeks asylum at the border or in the territory of a State shall be rejected at the frontier, or expelled or returned in any manner whatsoever to any country in which he or she may be tortured or subjected to inhuman, cruel or degrading treatment or punishment, or in which his or her life or freedom may be endangered.

The principle of *non-refoulement* is also stated in the 2004 *Mexico Declaration*, which was adopted on the 20th Anniversary of the 1984 *Cartagena Declaration on Refugees*. The UNGA on 20 December 2006 adopted an *International Convention for the Protection of All Persons from Enforced Disappearances*, which also contains provisions on the principle of *non-refoulement*.

**Nature and Scope of the Principle of Non-Refoulement**

The principle of *non-refoulement*, which is found under Article 33 of the 1951 *Refugee Convention*, can be applied for all individuals determined to be refugees under Article 1 of the 1951 *Refugee Convention*. It also covers the asylum seekers, for at least during an initial period and in proper

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41 Mexico Declaration and Plan of Action to Strengthen the International Protection of Refugees in Latin America (Mexico City, 16 November 2004).

circumstances. Otherwise, effective protection cannot be afforded to them.43 Those with a presumptive or prima facie claim to refugee status are therefore entitled to protection, as the UNHCR highlighted the need for the principle of non-refoulement, notwithstanding if the individual can be recognised formally as a refugee.44 The UNGA affirmed this statement of the UNHCR.45

A refugee is someone who is outside the country of his nationality, and Article 33 applies to them.46 But those who have not yet left their country cannot claim protection under Article 33 of the 1951 Refugee Convention’s non-refoulement provision.47

The application of the principle of non-refoulement is not dependent upon any formal determination of refugee status by a state or an international organisation.48 A state may be considered in violation of its duty of non-refoulement without even considering who is at fault, if it is the officials that omitted to act or have acted erroneously, or if it is the legal and administrative systems that failed to offer a remedy to the refugee, a guarantee of which is necessitated by an applicable international standard.49

State policies of non-entrée are not a breach of its obligation under the principle of non-refoulement. Such policies are in existence, inter alia, in the form of increased visa requirements for nationals coming from refugee-producing countries.50 These policies may also be come in the

43 Goodwin-Gill and McAdam, The Refugee in International Law, op.cit., 232.
44 Executive Committee Conclusion No. 6 (1977), Conclusion on Non-refoulement. See also Executive Committee Conclusion No. 79 (1996), No. 81 (1997) and No. 82 (1997), Conclusion on Safeguarding Asylum. Goodwin-Gill and McAdam, The Refugee in International Law, op.cit., 233.
45 UNGA res. 52/103, 12 December 1997, para 5.
50 Several countries such as the United States, Canada, Australia, New Zealand, member states of the European Union including the United Kingdom have adopted visa requirements policy, the first form of non-entrée. According to Kjaerum, the visa and related policy has caused an almost 50% decrease in the number of refugees seeking help in Europe from 1992 to 1998. Morten Kjaerum, “Refugee Protection Between State Interests and Human Rights: Where is Europe Heading?” Human Rights Quarterly 24 (2002): 515.
form of ‘first country of arrival’ and ‘safe third country’ rules, or in the form of ‘safe country of origin’ rule. The main object of the non-entrée

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51 The ‘first country of arrival’ principle intends to collectivize responsibility so that refugees are protected among a select group of participating countries. Thus the two formal harmonization regimes established – that envisaged by the Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities, 15 June 1990, 30 ILM 425 (1991) (Dublin Convention), in Articles 4–8 and European Council Regulation EC 343/2003, 18 February 2003 (Dublin Regulation) in Europe, and the Agreement between the Government of Canada and the Government of the United States Regarding Asylum Claims Made at Land Borders, 30 August 2002, (2002) 79 (37) Interpreter Releases 1446, in Article 4 – allots protective responsibility to the first party in which a given refugee arrives, as long as there are no problems associated with previous authorisation to travel or family unity. Other state participants are authorised to summarily take the refugee to that single designated state without investigating the refugees’ claims or the merits of the claims. The first country of arrival principle is increasingly observable in a host of domestic laws across the world. James C. Hathaway, The Rights of Refugees under International Law (Cambridge: Cambridge University Press, 2005), 293–94.

52 Taylor states that the principle of safe third country entails, first, establishing whether a proposed third country qualifies as a ‘safe’ for the refugees. The establishment can be achieved through paying close attention to the informal practices undertaken by such country, rather than focusing on the formal practices. Thus, for instance, a country that is known to have undermined the obligation of non-refoulement in the past in dealing with certain categories of persons cannot qualify to be safe for those categories of persons. Secondly, the process of assessing the safety situation of a state should not be done without considering some specific aspects; that is to say, it should not be a generalised assessment. Thus, it is considered proper for an asylum-seeker to be given an opportunity to ascertain the safety situation of a third country. There are procedural requirements, such as the right to appeal an unfavourable decision that are considered appropriate. The UNHCR and some states (e.g., the United Kingdom) take the view that these procedural requirements are part of ‘safe third country principle’. But some states (e.g., Austria) do not hold the same view. Svitri Taylor, “Australia’s ‘Safe Third Country’ Provisions Their Impact on Australia’s Fulfillment of Its Non-Refoulement Obligations,” University of Tasmania Law Review 15 (1996): 207–08. The European Union currently works under the ‘super safe third country’ notion, and therefore, the member countries engage in the practice of sending the refugees without conducting any risk assessment whatsoever to states that are bound by both the 1951 Refugee Convention and the European Convention which are adjudged to adhere to their provisions and which follow formal asylum procedures. Council Directive on minimum standards of procedures in Member States for granting and withdrawing refugee status, Doc. 8771/04, Asile 33 (29 April 2004) (EU Procedures Directive), Art. 35A(2). The UNHCR Executive Committee is of the view that an asylum-seeker and/ or a refugee may only be returned to a third country if the government responsible promises to protect them against refoulement. UNHCR Executive Committee, Conclusion No. 58 (XI), 1989 Problem of Refugees and Asylum-seekers who move in an irregular manner from a country in which they had already found protection, para f(1).

53 A safe country of origin means a state where there is no fear of persecution or flagrant violation of human rights. Available at http://www.migri.fi/asylum_in_finland/applying_for_asylum/processing_the_application/accelerated_process (accessed 22 October 2012).
strategies, according to Hathaway, is to keep refugees at a distance, no matter whatever procedure is used.\textsuperscript{54}

According to the UNHCR, the state should appropriately use such phrases as a ‘safe country of origin’, ‘internal flight alternative’ and ‘safe third country’ so that they do not result in improper denial of access to asylum procedures, denial or breach of the principle of non-refoulement.\textsuperscript{55}

### Exceptions to the Principle of Non-Refoulement

Article 33(2) of the 1951 \textit{Refugee Convention} does not protect a refugee against \textit{refoulement} if there are reasonable grounds for regarding the refugee ‘as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.’

People frequently confuse Article 33(2) and Article 1F. The latter explains that asylum seekers do not qualify as refugees because they have committed particularly serious crimes. Nevertheless, the consideration and application of Article 33(2) is much more than that of Article 1F. Hathaway and Harvey write that a criterion which might be used as evidence for denial in considering such people as refugees, Article 33(2) projects ‘reasonable grounds’\textsuperscript{56} which is much more than what is argued for exclusion under Article 1F(b) as ‘serious reasons for considering’.\textsuperscript{57} The Supreme Court of Canada in \textit{Pushpanathan v Minister of Citizenship and Immigration}\textsuperscript{58} expressed its view regarding the distinction between Article 1F and Article 33(2). It said in Article 1, the definition of refugee has been given, while in Article 1F, the persons who are specifically excluded from that definition have been mentioned separately. Article 33 of the 1951 \textit{Refugee Convention} is seen as a means to provide \textit{refoulement} of a \textit{bona fide}

\begin{itemize}
\item \textsuperscript{54} James C. Hathaway, \textit{Reconceiving International Refugee Law} (The Hague/Boston: Martinus Nijhoff Publishers, 1997), XX.
\item \textsuperscript{55} UNHCR Executive Committee, \textit{Conclusion No. 87 (L) – General (1999)}, para (j).
\item \textsuperscript{56} Madam Justice Glazebrook of the New Zealand Court of Appeal has clearly mentioned the concept of reasonable grounds. She said ‘reasonable grounds’ require “that the State concerned cannot act either arbitrarily or capriciously and that it must specifically address the question of whether there is a future risk and the conclusion on the matter must be supported by evidence.” \textit{Attorney General v Zaoui}, Dec. No. CA20/04 (NZ CA, 30 September 2004), para 133.
\end{itemize}
refugee to his native country, where he poses a danger to the security of the country of refuge, but not as a tool for describing who does qualify and does not qualify to be a refugee. Thus, Article 1F, should not be presupposed as a tool for ensuring protection of the society of refuge from dangerous refugees, because of acts committed either before or after the presentation of a claim for refugee status. Such purpose is documented in Article 33 of the 1951 Refugee Convention.59

Danger to the Security of the Country

The first classes or categories of people who are legitimately subject to *refoulement* are those whom there are reasonable grounds for regarding as a danger to the security of the reception country. As regards ‘security’, Grahl-Madsen has suggested that a person is said to threaten the security of a country if he is engaged in activities that are deemed to facilitate the takeover of a part or the entirety of a country by another state. The same applies if he works for the overthrow the government of his country of residence forcibly or by other illegitimate means (e.g., falsification of election results, coercion of voters, etc.), or engages in activities which are directly against a foreign government, thus posing threats to his country’s government leading to repercussions of a serious nature. Among the activities that are customarily are labelled as threats to national security of the country include espionage, sabotage of a military installations and terrorism.60 Generally speaking, the notion of ‘national security’ or ‘the

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60 Several international instruments have been developed under the auspices of the UN that identify which specific acts are to be considered as ‘terrorist in nature.’ There are also regional instruments which address the issue of terrorism. Though these instruments do not define the term comprehensively, they address specific subjects such as air safety, military navigation and platforms, the protection of persons, the unlawful seizure of aircraft and the taking of hostages, or the suppression of the means by which terrorists acts may be perpetrated or supported. Additionally, these instruments require states to take measures to prevent the occurrence of terrorist acts, including the criminalization of specific offenses, the establishment of jurisdictional criteria and providing legal basis for cooperation on extradition and legal assistance. See Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism, A/HRC/8/13, of 2 June 2008, paras 18–24, available at: http://www.unhcr.org/refworld/docid/484d121a2.html (accessed 12 October 2012) (“Report of the High Commissioner for Human Rights 8/13 (2008)”). Referred by UNHCR Statement on Article 1F of the 1951 Convention: Issued in the context of the preliminary ruling references to the Court of Justice of the European Communities from the German Federal Administrative Court regarding the interpretation of Articles 12(2)(b) and (c) of the Qualification Directive, p 7, footnote 39, available at http://www.unhcr.org/4a5edac09.pdf (accessed 12 October 2012).
security of the country’ is invoked against acts that are of a serious nature jeopardizing the constitution (government) directly or indirectly, undermining territorial integrity, and the independence or the external peace of the country at hand.  

Since Article 33(2) mandates danger to the country of refuge, danger to other states or to the international community is beyond its scope. Bethlehem writes that the 1951 Refugee Convention does not address circumstances in which there is a possibility of danger to the security of other countries or to the international community more generally. While it does not bar or limit a state from adopting measures that would ensure that no activities within its territories or persons subject to its jurisdiction that may pose a danger to the security of other states or of the international community, they cannot do so, in the case of refugees or asylum seekers, by way of refoulement.  

In Suresh v Canada, the Supreme Court of Canada takes the position that since the terrorist attacks of 11 September 2001 ‘courts may now conclude that the support of terrorism abroad raises a possibility of adversary repercussions on Canada’s security’. Notwithstanding danger posed to the security of the country of refuge or its international relations, the text of Article 33(2) of the 1951 Refugee Convention requires that such a danger to the security must be proven and not just assumed. It is not enough, for instance, to claim ‘the possibility of adverse repercussions.’ The danger that is being cited as the basis for invoking refoulement must be proven.

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61 Atle Grahl-Madsen, Commentary on the Refugee Convention 1951, 236. This work was drafted in 1962–63 and UNHCR, Geneva published it in 1997.

62 Elihu Lauterpacht and Daniel Bethlehem, “The Scope and Content of the Principle of Non-refoulement” (2001), Opinion for UNHCR’s Global Consultations, 54. But in Suresh v Canada (2002) 1 SCR 3 (Can SC, 11 January 2002), the Supreme Court of Canada indicates that they have a thorough knowledge of the history of Article 33(2) of the 1951 Refugee Convention by taking into account the fact that there needs to be a danger to Canada. Ibid, para 88. Yet the court believes that this thinking is not valid any more. It further elaborates the fact that the security of a particular state is dependent on the security of other states. Ibid, para 90.


64 Ibid, para 87.

After studying the Article 1F66 exclusion provisions, the commentators have expressed the view that acts of terrorism fall within the scope of Article 1F.67 Article 33(2) is much more intense than Article 1F.68 As regards the application of the exclusion clause, the UNHCR states that there must be a balance in the degree of the persecution cited by the applicant against the gravity of the crime he purportedly has committed. Justification for exclusion from refugee status of a person who fears persecution that would likely endanger his life can apply only when the crime is particularly severe.69

The UNHCR further notes that when taking into consideration exclusion from refugee protection regarding acts of terrorism, Article 1F requires first that the alleged terrorist acts be assessed against the grounds for exclusion, considering the nature of the acts, context and all other circumstances surrounding commission of the acts. The said acts cannot qualify as terrorist acts by simply calling them ‘terrorist acts’. Secondly, the assessment must establish that the person committed a crime covered by Article 1F, or that the acts constitute a criminal offense under international standards.70

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66 Article 1F excludes from refugee status an individual for whom ‘there are serious reasons for considering that:
(a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
(b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
(c) He has been guilty of acts contrary to the purposes and principles of the United Nations.’

67 The Secretary-General, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, para 65, delivered to the General Assembly, UN doc A/62/263 (15 August 2007); European Council on Refugees and Exiles, Position on Exclusion from Refugee Status, para 29, Doc. PP1/03/2004/Ext/CA (March 2004).


70 UNHCR Statement on Article 1F of the 1951 Convention: Issued in the context of the preliminary ruling references to the Court of Justice of the European Communities from the German Federal Administrative Court regarding the interpretation of Articles 12(2)(b) and (c) of the Qualification Directive, op.cit., 7.
Conviction by Court and Danger to the Community

The second part of Article 33(2) of the 1951 Refugee Convention is applicable to a refugee who has been ‘convicted by a final judgment of a particularly serious crime,’ and who is determined to constitute ‘a danger to the community’ of the asylum state.

To justify refoulement of a person who qualifies for refugee status for his ‘particularly’ serious crime, the seriousness of the crime committed must be interpreted after evaluating all mitigating and other related circumstances surrounding commission of the offence, including its nature, why it was committed, the individual's behaviour and the sentence imposed. The Federal Court of Australia in Betkoshabeh v Ministry for Immigration and Multicultural Affairs, stated that Article 33(2) does not characterize a crime as being particularly serious merely by its nature but by considering all circumstances surrounding its commission. This means that the gravity of a crime for the purposes of finding justification for refoulement must be interpreted and accorded rationality based on the crime committed. It means that a crime cannot be considered serious by simply calling it ‘serious’ without justifiable basis.

The Federal Court of Australia in A v Minister for Immigration and Multicultural Affairs, held that while ‘having been committed ... of a particularly serious crime’ is important in appreciating that provision, the consideration must not depart from the real essence of establishing the danger posed on the security of the country or of its community.

For refoulement to be invoked, there must have been a final judgment. “Final judgment” must be construed as meaning a judgment from which there remains no possibility of appeal. It goes without saying that the procedure leading to the conviction must have complied with minimum international standard.

International law requires that the exceptions that are contained in non-refoulement must be interpreted restrictively and must follow due
process of law. Furthermore, any person excluded from *non-refoulement* under refugee law can still seek assistance under international human rights or international humanitarian law. It is noted that the exceptions to *non-refoulement* are being undertaken in good faith.

There are actually very few exceptions to *non-refoulement* in regional instruments, or in some cases, no exceptions at all. For instance, there are no exceptions to the principle of *non-refoulement* in the 1969 *OAU Refugee Convention*, the 1984 *Cartagena Declaration* and the 1969 *ACHR*. According to the *Asian-African Refugee Principles* and the 1967 *Declaration on Territorial Asylum*, the only overriding reasons for exception to *non-refoulement* are national security or safeguarding the population.

From the above discussion it is clear that if there are reasonable grounds to argue that the refugee is a danger to the security of the receiving country or has been convicted through a final judgement, which means that there is no possibility of further appeal, of a particularly serious crime, then for the asylum state he is determined to constitute a danger to the society. In such cases a refugee can be excluded from protection of the principle of *non-refoulement*. For the applications of these exceptions to the principle of *non-refoulement*, due process of law must be adhered to by the authorities. It is important because misapplication of the exceptions to *non-refoulement* will deprive a *bona fide* refugee from the protection of international refugee law. Individuals excluded from the protection of the principle of *non-refoulement* ought not to be divested from the assistance under international human rights or international humanitarian law.

### Non-Refoulement as a Norm of Customary International Law

The principle of *non-refoulement* is widely considered to be an international customary law, which requires states, regardless of their stand on the human rights and/or the refugee conventions and on *non-refoulement*, not to force an individual to return or to extradite any individual to a country where their life or personal security is at stake. There are doubts

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78 Ibid, para 133–34.
whether this view garners enough support in an extensive and uniform state practice coupled with the necessary opinio juris. Notwithstanding the ratification of the 1951 Refugee Convention by a large number of states, a number of states including Eastern Europe have consistently refused to ratify refugee agreements containing provisions on the principle of non-refoulement. Such distancing was observed particularly during the drafting of the United Nations Declaration on Territorial Asylum and during the 1977 Conference on Territorial Asylum where states expressed their reluctance to get involved in agreements that are legally binding. Their reluctance was particularly evident in their refusal to admit large groups of refugees even on a temporary basis.

It is important to note, as Goodwin-Gill says that non-refoulement was heavily documented in non-socialist regions. During the 1970s and the initial years of the 1980s, those regions had frequently put forth reservations with regard to the principle in circumstances of mass emergencies. There is no record of any sort of official or unofficial objections to this principle. On the other hand, returning the refugees to a country where they may face severe persecution on the basis of race, religion, or political opinion has never been claimed by states as a general right.

The Council of the International Institute of Humanitarian Law in September 2001 adopted a Declaration which states: ‘The Principle of non-refoulement of refugees incorporated in Article 33 of the Convention relating to the Status of Refugees of 28 July 1951 is an integral part of Customary International Law.’ In 2001 the principle of non-refoulement, whose applicability is embedded in customary international law, was officially approved by the contracting states to the 1951 Refugee Convention.
Allain is of the opinion that, it is very much evident that the norm prohibiting *refoulement* is part of customary international law. He continues “what remains uncertain is whether that norm has achieved the status of *jus cogens*.”90 Articles 53 and 64 of the 1969 *Vienna Convention on the Law of Treaties* deal with the concept of *jus cogens*. Article 53 of the *Vienna Convention on the Law of Treaties* deals with treaties that conflict with a peremptory norm of general international law (*jus cogens*). It provides:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Article 64 of the *Vienna Convention on the Law of Treaties* deals with emergence of a new peremptory norm of general international law (*jus cogens*). It provides: ‘If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.’

So to establish whether the norm-prohibiting *refoulement* has achieved the normative value of *jus cogens*, there are two requirements: its acceptance by the international community as a whole as well as as a norm from which no derogation is allowed. According to Orakhelashvili, peremptory norms are the type that do not require any judicial pronouncement to establish. On the other hand, he claims that *jus cogens* norms are the type that requires a consensus on categorical and normative levels. He explained that the categorical level primarily emphasises on the fundamental nature of peremptory norms and factors that qualify them as peremptory norms. The normative level, on the other hand, examines whether a norm categorically qualifies as part of *jus cogens* and is so recognised under international law.91 We have already mentioned that norms prohibiting *refoulement* are widely considered to be a part of customary international law. The UNHCR, itself an expression of state practice, adheres to the customary international law nature of the principle of *non-refoulement.*92

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92 Lauterpacht and Bethlehem, “The Scope and Content of the Principle of *Non-refoulement*,” op.cit., para 96.
The possibly of transforming the principle of *non-refoulement* into a customary norm was suggested by the UNHCR Executive Committee in 1982. The UNHCR Executive Committee, in Conclusion No. 25 of 1982, noted that the principle of *non-refoulement* ‘was progressively acquiring the character of a peremptory rule of international law’. Since then, the UNHCR Executive Committee has been representing the principle of *non-refoulement* as a fundamental principle of international refugee protection. While the conclusions of the UNHCR Executive Committee do not create binding obligations, they contribute to form *opinio juris* of states. *Non-refoulement* as a *jus cogens* law is further evident in the state practice in Latin America through the adoption of the 1984 *Cartagena Declaration on Refugees* citing *non-refoulement* as ‘a cornerstone of the international protection of refugees’ that should be acknowledged and observed as a rule of *jus cogens*.

Substantial adherence to the principle of *non-refoulement* may be found in subsequent international agreements, such as the 1984 *Convention against Torture*, which incorporates the principle of *non-refoulement*. Article 3(1) of the 1984 *Convention against Torture* has incorporated the principle of *non-refoulement* and it provides that ‘[n]o State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.’ Crowe argues that, when the 1951 *Refugee Convention* is compared with the 1984 *Convention against Torture*’s use of language; it is clear that there is a need for protection of the persons already present in the country. Seeking to remove them leads to the opinion that *non-refoulement* has been raised to the level of international law.

Even though the UNHCR Executive Committee noted in its conclusion for the year 2001 that it is intensely disturbed by the infringement of internationally recognised rights of the refugees including *refoulement*, and in spite of the fact that the UNHCR itself signed a *refoulement* agreement

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93 UNHCR, Executive Committee Programme, *Conclusion on the International Protection of Refugees*, General Conclusion No. 25 (XXXIII), 1982, para (b).
97 UNHCR Executive Committee Conclusion No. 89, *Conclusion on International Protection*, 2000.
with Tanzania, the peremptory character of refolement, Allain argues, still remains to be strong. Allain cites as support the observation of the International Court of Justice (ICJ) made in the Nicaragua case. ICJ noted:

The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.

Farmer argues that the fundamental nature of non-refoulement gains further support as being a non-derogable part of the 1951 Refugee Convention. When non-derogable is given as a description to any right in the human rights treaty, then it provides evidence that the provided right is a jus cogens norm. It was found by the authors of the 1951 Refugee Convention under the opinion of the states concerned that the principle of non-refoulement is a non-derogable right. The UNHCR Executive Committee in 1996 determined that the 'principle of non-refoulement is not subject to derogation'. At the time of writing, the principle of non-refoulement is recognised and accepted as a peremptory norm of general international law, which means that states and international organisations cannot derogate from the norm.

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100 Case concerning Military and Paramilitary Activities in and Against Nicaragua, ICJ Reports, 1986.
101 Ibid, 98.
102 Article 42 of the 1951 Refugee Convention ('At the time of signature, ratification or accession, any State may make reservations to Articles of the Convention other than to Articles 1, 3, 4, 16(1), 33, 36–46 inclusive'). Farmer, "Non-refoulement and Jus Cogens: Limiting Anti-Terror Measures That Threaten Refugee Convention," op.cit., 25.
105 UNHCR Executive Committee Conclusion No. 79, General Conclusion on International Protection, 1996.
The discussions regarding the principle of *non-refoulement* that resulted in its acceptance as *jus cogens* norm have often included exceptions, particularly those in Article 33(2) of the 1951 *Refugee Convention*. Goodwin-Gill argues that the presence of the exceptions indicates the limits of available options rather than the basic objections to the principle itself. In other words, the mere presence of the exceptions in the Article 33(2) indicates that the states accept the non-derogability of *non-refoulement*. As in the *Nicaragua* case the ICJ said:

> If a State acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.

This opinion, however, is not shared by Hannkainen who argues that *non-refoulement* can never attain *jus cogens* status precisely because of the exceptions which create the room for derogation in it. This position was similarly taken by Schabas who also believes that *non-refoulement* has not achieved *jus cogens* status as the arguments for it are not particularly convincing. But Orakhelashvili states that it is hard to sustain the argument that state practice does not yet support full acceptance of *non-refoulement* taking into consideration the fact that state deviations from the principle of *non-refoulement* permits flagrant violations of other peremptory norms, including many fundamental principles of human rights.

From the above discussion it is clear that even the temporary stay of a large number of refugees or their entrance is not acceptable for some countries; however, the countries never asked for a common right to return refugees to the country of origin where they would possibly face persecution by reasons of their race, religion, nationality, membership of a particular social group or political opinion. Therefore, the principle of

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113 Orakhelashvili, *Peremptory Norms in International Law*, op.cit., 55.
non-refoulement is an international customary law. The UNHCR has stated in its conclusions that the character of a peremptory rule of international law was acquiring to principle of non-refoulement rapidly. The conclusions of the UNHCR make up a contribution to the opinio juris of states though they do not create binding obligations. The principle of non-refoulement has been affirmed as the cornerstone of the international protection of refugees by the 1984 Cartagena Declaration on Refugees; therefore, it ought to be recognised and observed as a rule of jus cogens. Other proofs have been found through state practice that the principle of non-refoulement may be established in the succeeding instruments, including the 1984 Convention against Torture, which particularly mention it.

Clearly, a recognised and accepted principle with peremptory norm of general international law means that states and international organisations cannot deviate from the norm. Therefore, there is no doubt that the articulations of the principle of non-refoulement which caused establishment of the jus cogens norms commonly comprising of exceptions, specifically, in Article 33(2) of the 1951 Refugee Convention. The presence of exceptions in the principle of non-refoulement exhibit the limits against any basic opposition itself to the principle. Therefore, the status of jus cogens regarding non-refoulement cannot be affected by the exceptions which are contained in Article 33(2).

**Non-Refoulement and Mass Influx**

As mentioned earlier, the vast majority of refugees are victims of civil wars, military takeovers, wars between states, natural disasters, gross human rights violations, economic dislocations and so on. This leads to the question of whether governments should allow entry to a ‘mass influx’ of refugees, which was raised during the drafting of the 1951 Refugee Convention.114

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114 ‘[M]ax influx is a phenomenon that has not been defined, but ... for the purposes of this Conclusion, mass influx situations may, inter alia, have some or all of the following characteristics: (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; (iv) individual asylum procedures, where they exist, which are unable to deal with the assessment of such large numbers’: UNHCR Executive Committee Conclusion No, 100, Conclusion on International Protection and Burden and Responsibility Sharing in Mass Influx Situations (2004), para (a). See also UNHCR’s Global Consultations on International Protection of Mechanisms of International Cooperation to Share Responsibilities and Burdens in Mass Influx Situations, UN doc EC/GC/01/7
The Dutch representative presented an elucidation during the Conference of Plenipotentiaries concerning Article 33, stating that it must not put forth any obligation on the states in the probable occurrence of mass migration across the borders. The President of the Conference had stated that this elucidation must be kept on record.\textsuperscript{115} Goodwin-Gill and McAdam argue that this is a very restricted viewpoint and it does not completely comply with the term \textit{refoulement} in the European immigration law or alongside the letter of Article 3 of the 1933 \textit{Convention Relating to the International Status of Refugees}, at least in their individual dimension.\textsuperscript{116}

The 1967 \textit{Declaration on Territorial Asylum} states that ‘exception may be made to the foregoing principle [non-refoulement] only for overriding reasons of national security ... as in the case of mass influx of persons.’\textsuperscript{117}

However, the UNHCR's\textsuperscript{118} Executive Committee Conclusion No. 22 states that even in situations of mass influx, ‘the fundamental principle of \textit{non-refoulement} – including non-rejection at the frontier – must be scrupulously observed.’\textsuperscript{119} A specific principle that accompanies a legal obligation is “scrupulously observing.”\textsuperscript{120} The Conclusion stipulated that, in the spirit of international cooperation, solidarity and burden-sharing, states which admit ‘mass influx’ refugees shall be assisted in all manners possible upon their request.\textsuperscript{121}

After the completion of a year-long assignment of Global Consultations conducted by the UNHCR, representatives of the contracting states to the
1951 *Refugee Convention* were invited by Switzerland and the UNHCR to celebrate the Convention’s culmination in 2001. The parties present went forth and adopted the *Declaration of States Parties to the 1951 Convention*, which was targeted to correspond with the 50th anniversary of the 1951 *Refugee Convention*, and was aimed at revitalizing the international regime of refugee protection. This issue of ‘Protection of Refugees in Mass Influx Situations’ was taken up in the first meeting of the ‘third track’ of the Global Consultations where the centrality and the primacy of the 1951 *Refugee Convention* and its 1967 *Refugee Protocol* in the international refugee protection regime, including mass influx situations, was recognised.

In spite of the grave concerns concerning the economic, environmental, and also societal impact of the arrival of mass refugee influxes on the communities residing in that particular region, most of the states including Iran and Nepal have sustained an open door policy by accepting large numbers of refugees in their region.

The most notable resolution for cases of mass influx has been mass repatriation. In cases where the conditions in home countries are still wanting, the influxes are resolved on an interim basis. Here, the refugees get an opportunity to rebuild their lives, and reinstate their dwindling self sufficiency and self confidence before they finally return to their region of origin. Beyond the scope of their country of origin, refugees in a mass influx may also seek temporary solutions provided by *non-refoulement* and the opportunity to earn a decent living.

**Extraterritorial Application of *Non-Refoulement* Obligation**

Increasingly more states are bound to take actions in areas that supersede their boundaries (including beyond their territorial sea) in order to

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123 “Revitalizing the Refugee Protection Regime: The Road Ahead as the Convention Turns 50”: Statement by Erika Feller (Director UNHCR Department of International Protection) to the 51st Session of the Executive Committee of the High Commissioner’s Programme (October 2000), available at http://www.unhcr.org/refworld/topic,4565c2251d,4565c25f245,3ae6b3354,0,,SPEECH,.html (accessed 15 October 2012).
contain refugees in their country of origin, or at least divert them to other states.\textsuperscript{127} This raises the question of whether such extraterritorial action of states breaches the duty of non-refoulement. In Sale v Haitian Centers Council,\textsuperscript{128} a case in point is the signing of Order 12807\textsuperscript{129} by the United States President George Bush which effectively directed the Coast Guard to intercept vessels unlawfully transporting travelers from Haiti to the United States and send them back to Haiti without even determining whether they qualified to be refugees. This move was prompted by the surging number of people fleeing Haiti by sea after a 1994 military coup that toppled President Aristide. In an 8-1 majority decision, the Supreme Court of the United States held that the non-refoulement provision does not apply outside its territorial boundaries. The Court held that there was no violation of the principle of non-refoulement since the United States was mandated to pursue the non-refoulement of only those people within the jurisdiction of the United States. This decision was much criticized.\textsuperscript{130}

The Inter-American Commission of Human Rights contended that the United States violated Article 33(2) of the 1951 Refugee Convention.\textsuperscript{131} It further said that the practice violated asylum seekers’ right to life, liberty, and security of their persons, and the right to asylum as provided in Article XXVII of the 1948 American Declaration of the Rights and Duties of Man.\textsuperscript{132} As regards the verdict of the Supreme Court of the United States on Sale case, the English Court of Appeal held that the Sale decision was an erroneous decision, which certainly causes offence to somebody’s view of fairness.\textsuperscript{133} Furthermore, it is not permitted to return refugees from the high seas to their country of origin.\textsuperscript{134} In his dissent, Justice Blackburn noted that the ruling would effectively “eviscerate” the treaty’s provisions on

\begin{footnotes}
\item[127] Hathaway, The Rights of Refugees under International law, op.cit., 335.
\item[128] 509 US 155.
\item[129] Executive Order No. 12, 807, 3 CFR 303 (1993).
\item[132] Haitian Centre for Human Rights v United Nations, ibid, paras 163, 171.
\item[133] R (European Roma Rights Centre and Others) v Immigration Officer at Prague Airport (2003) EWCA Civ 666 (Eng. CA, 20 May 2003), para 34.
\item[134] Ibid, para 35.
\end{footnotes}
non-refoulement.\textsuperscript{135} It can therefore be said that the principle of non-refoulement has exterritorial applications.

\textbf{Non-Refoulement and Extradition}

Though the 1951 \textit{Refugee Convention} does not contain provision on extradition\textsuperscript{136} of refugees, some international instruments deal with it and consider extradition as a form of transfer to which the principle of non-refoulement is applicable. For instance, Article 4(5) of the 1957 \textit{European Convention on Extradition} does not permit extradition ‘[w]hen, from the circumstances of the case, it can be inferred that persecution for reasons of race, religion or nationality is involved, or that the position of the person sought may be prejudiced for any of those reasons’.\textsuperscript{137} This provision was the subject of discussions of the Committee of Experts of the Council of Europe when they expanded the definition of refugee. In that meeting, the Committee expressly included the basic elements of the refugee definition, but declined to include ‘membership of a particular social group’ for fear it might be interpreted too freely.\textsuperscript{138}

Likewise, Article 4(5) of the 1981 \textit{Inter-American Convention on Extradition} does not permit extradition when ‘it can be inferred that persecution for reasons of race, religion or nationality is involved, or that the position of the person sought may be prejudiced for any of these reasons.’\textsuperscript{139} Article 3(1) of the \textit{Convention against Torture} states that ‘[n]o State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.’

\begin{itemize}
\item \textsuperscript{135} Sale v Haitian Centers Council, 509 US 155 (1993), 196.
\item \textsuperscript{136} Cherif Bassiouni defines extradition as "the delivery of an individual, usually a fugitive from justice, by one nation-state to another. This process may be based on an explicit agreement between the states in the form of a treaty, or on reciprocity or comity." Quoted by Heather Smith, "International Extradition: A Case Study Between the U.S and Mexico," 66 http://www.urop.uci.edu/journal/journal00/pagemaker_pdf_export/07_heather.pdf (accessed 11 November 2012).
\item \textsuperscript{137} The European Convention on Extradition was concluded on 13 December 1957 and entered into force on 18 April 1960.
\item \textsuperscript{138} See generally \textit{Supplementary Report of the Committee of Experts on Extradition to the Committee of Ministers}, Council of Europe doc. CM(57)52.
\item \textsuperscript{139} The Inter-American Convention on Extradition was adopted at Caracas, Republic of Venezuela, on 25 February 1981 and came into force on 28 March 1992 for the Member States of the Organization of American States.
\end{itemize}
The UNGA in 1989 endorsed the *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, which provide that ‘no one shall be involuntarily returned or extradited to a country where there are substantial grounds for believing that he or she may become a victim of extra-legal, arbitrary or summary execution in that country.’\(^{140}\) In *Soering v United Kingdom*,\(^ {141}\) the European Court of Human Rights expressed the view that the extradition of a person will violate Article 3 of the 1950 *European Convention of Human Rights* (1950 ECHR) where there are substantial grounds for believing that he faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the receiving state.

The UNGA in 1992 adopted the *Declaration on the Protection of All Persons from Enforced Disappearance*, Article 8(1) of which provides that ‘[n]o State shall expel, return (refouler) or extradite a person to another State where there are substantial grounds to believe that he would be in danger of enforced disappearance.’\(^ {142}\) The Human Rights Committee in its General Comment No. 20 of 1992 states that ‘State parties [to the International Covenant on Civil and Political Rights] must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.’\(^ {143}\)

Thus extradition comes within the scope of human rights discourse. There is an argument that some of the treaties, such as the extradition treaties, should be allowed to give room to the more favourable that touches on human rights. As Dugard and Wyngaert said, such a move is better because it recognises the higher status of multilateral human rights norms prompted by the concept of *jus cogens*. The idea also draws its support from the superiority attached to multilateral human rights conventions that are credited with forming part of the *ordre public* of the international community.\(^ {144}\)

\(^{140}\) UNGA res. 44/162, 15 December 1989, para 5.

\(^{141}\) (1989) 11 EHRR 439, para 91.

\(^{142}\) UNGA res. 47/133, 18 December 1992.

\(^{143}\) Human Rights Committee, General Comment No. 20, 44th Session, 1992, para 9. The Human Rights Committee in *Kindler v Canada* held: ‘[i]f a State party extradites a person within its jurisdiction in circumstances such that as a result there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant.’ *Kindler v Canada*, Communication No. 470/1991, Human Rights Committee, UN Doc. CCPR/C/48/D/470/1991, para 13.2 (1993).

The basic character of the principle of non-refoulement was reaffirmed by the UNHCR Executive Committee in 1980, insofar as the protection of refugees against extradition to a country where there is well-founded reasons to fear of their persecution, in line with Article 1A(2) of the 1951 Refugee Convention. Anxious to ensure not only the safeguarding the refugees, but also the prosecution and punishment of serious offences, the Executive Committee put emphasis on the fact that safeguarding concerning the extradition is applicable only for those people who meet the criteria of refugee definition and who must not have been excluded by Article 1F(b) of the 1951 Refugee Convention.

It can be safely said the ambit of human rights discourse is now extended to extradition. According to international human rights law, exposing individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment after returning to another country through extradition is not allowed. Immigrants, who fulfill the criteria of definition of refugee and those who cannot be excluded through Article 1F(b) have the right to be protected against extradition to a country where they can be persecuted and they have well-founded reasons to fear that.

**Conclusion**

The plight of the refugees across the globe does not pertain to a specific state or a group of states. Rather it is spread everywhere in the contemporary world and it should be dealt with by all states collectively as a global issue. The international community adopted the Refugee Convention in 1951 in order to address the plight of refugees. The principle of non-refoulement is one of the most important provisions of the 1951 Refugee Convention. It is considered as the cornerstone of the international legal regime for the protection of refugees.

The principle of non-refoulement is a duty that is negative in nature. It is applicable to mass influx situations, extradition and extraterritorial cases. It has earned the position of the established principle of international law, and is considered a non-derogable fundamental norm. The status of

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145 See UNHCR Executive Committee Conclusion No. 17 (1980), Problems of Extradition Affecting Refugees, para (c).
146 UNHCR Executive Committee Conclusion No. 17 (1980), Problems of Extradition Affecting Refugees, para (g).
**PROTECTION OF REFUGEES**

**jus cogens** of non-refoulement is not affected by exceptions found in Article 33 relating to the principle of non-refoulement. The exceptions contained in Article 33 must be read in a very limited manner and should be ignored when states consider broad anti-terror policies that exclude legitimate refugees, or otherwise damage refugee protection. Instead of this, states should rely on Article 1F of the 1951 Refugee Convention, if they have legitimate concerns for their security. Also, in reference to the existing status of international law, it is necessary to hold on the rigid limits to the exceptions to non-refoulement. This will in turn assist in maintaining the new jus cogens norm, thus preserve the underlying refugee protection regime.148

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The 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
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The 2004 Mexico Declaration and Plan of Action to Strengthen the International Protection of Refugees in Latin America.
THE CONCEPT OF ASYLUM IN INTERNATIONAL LAW

Rebecca M.M. Wallace and Fraser A.W. Janeczko*

INTRODUCTION

Asylum is a term used in every day parlance but notwithstanding the frequency of its use there remains a lack of clarity as to the content of the concept. The word “asylum” is the Latin form of the Greek word “asylon”, which translated into English literally means “freedom from seizure”.¹ At its most basic level, asylum is the protection accorded in a place to a person who seeks it.² The concept of asylum in international law is often conflated with other related, but distinct, concepts—“asylum” and “refuge” and the terms “asylum seeker” and “refugee” are often used interchangeably and treated as synonymous. These concepts are related in the sense that all of them “occupy a space” in international law somewhere between the principles of state sovereignty and humanitarian protection.³ It is however important to make clear the differences between these various terms. In particular, a distinction can be drawn between an asylum seeker and a refugee. In international law a refugee is generally understood as a person seeking or enjoying asylum, but in a stricter legal sense the term can be restricted to someone who fulfils the criteria of the 1951 Convention Relating to the Status of Refugees⁴ or its 1967 Protocol⁵ (together referred to as the ‘1951 Refugee Convention’) and has been recognised as so doing. An asylum seeker and the concept of asylum itself are therefore broader concepts covering all persons who are seeking asylum.

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² Ibid, referring to the definition given by the Institut de Droit International at its Bath session in 1950.
⁴ 189 UNTS 150.
⁵ 606 UNTS 267.
The focus of this chapter is the status of the concept of asylum in contemporary international law. In particular, this chapter will discuss whether a right to asylum is recognised in international law. Before doing this, it is necessary to set the parameters of the analysis by defining, at least in general terms, what is meant by a right to asylum. The term “right to asylum” has been deconstructed by Professor Grahl-Madsen into three component rights: (1) the right of an individual to seek asylum; (2) the right of the state to grant asylum; and (3) the right of an individual to be granted asylum.6

THE HISTORY OF ASYLUM7

The Origins of Territorial Asylum

An assessment of the current position of the concept of asylum and its constituent rights in international law first requires an understanding of its origins and evolution to date. It has been said that “the practice of asylum is as old as humanity itself.”8 Holy places, by virtue of their association with divinity, were the first places of asylum, as they came to be regarded as inviolable by pursuers.9 It has been suggested that such holy places gained this status by one of two ways: through the respect which such places commanded as being the home of God, or a belief that by breaching their inviolability the pursuer would face the wrath of God.10 Accordingly, “[d]ivinity […] protected the unfortunate members of the society from certain primitive and cruel forms of punishment.”11 Asylum afforded to a person in a particular place is generally referred to as territorial asylum.

Many studies show that the concept of territorial asylum and its practice existed in historic Muslim and Judeo-Christian traditions.12 This
concept of asylum was invoked to protect criminals or those accused of committing crimes from the application of the legal process. A form of territorial asylum also existed in ancient Greece, where a number of temples offered asylum to various categories of persons, including *inter alia* convicted criminals, fugitive slaves and foreigners escaping justice from other countries. The Romans allegedly used asylum as a tool to achieve domination over the Greeks and under their rule efforts were made to prevent abuse of the application of asylum.

Sinha states that with the decline of the Roman Empire and the rise of Christian Europe, territorial asylum again evolved into “the practice of intercession by the clergy on behalf of those who took shelter in the church, rather than the inviolability of the church itself. It thus took a personal form.” Over time, ecclesiastical laws on asylum were codified however their influence began to recede with the rise of the nation state and the claim by national authorities of the exclusive right to administer justice on a territorial basis:

No longer were any places admitted beyond the reach of the law. The right of asylum was restrained. Its divine character was denied by the jurists. It was regarded as an institution created by man and, therefore, within the competence of the state for regulation or even abolition.

Holy sites were no longer places of asylum; rather they were replaced by non-religious locations such as cities or even countries. The basis of asylum shifted from the religious sanctity of the place to the sovereignty of the city or state of asylum. In the 17th century, as international opinion converged on the need to suppress criminality, the concept of asylum again developed and the concept of extradition grew in popularity. Extradition is the process whereby a state surrenders to another state, at the latter’s request, a person who is either accused of, or has been convicted of, committing a crime in the requesting state. Extradition is effected by treaties, and in the absence thereof, no duty to extradite exists under international law.

*The emergence of political asylum:* The 18th century saw the rise of political asylum, which could be invoked to provide shelter to those guilty of

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13 Ibid, 8–9.
15 Ibid, 10.
16 Ibid.
17 Ibid, 15.
18 Ibid, 18.
offences termed “political” as opposed to “ordinary.”

What emerged was controversy as to what constitutes a political offence and indeed it is are
difficult to define. As a result, what has happened is that rather than stating what constitutes a political offence, international instruments have defined what is not included. For example, the 1975 Additional Protocol to the 1957 European Convention on Extradition excludes war crimes and crimes against humanity from the category of political offences to which extradition does not apply.

The French Revolution in 1789 saw the transformation of the practice of political asylum into a legal principle. As a corollary to the emergence of political offences and political asylum, a practice emerged whereby such offences were excluded from extradition treaties. For example, Sinha writes that in 1833 the French Government stated its intention to exclude the possibility of extraditing political offenders under the 1828 Franco-Swiss Extradition Treaty. It has been stated that:

[T]he leading country in the field of extradition from the end of the eighteenth to the end of the nineteenth century was France. The important substantive treaty provisions contained in modern extradition treaties were initiated by France ... [and many features of contemporary extradition law such as] the exception of political offenders [found] their beginnings in treaties negotiated by France.

It is generally accepted that there is no obligation under customary international law to extradite persons in the absence of a treaty. In contemporary extradition law, the operation of the principle of political offences can be seen in a number of bilateral and multilateral extradition treaties. In the 1957 European Convention on Extradition, the political offence doctrine is found at Article 3(1), which provides: “Extradition shall not be granted if the offence in respect of which it is requested is regarded

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19 Ibid, 19.
21 Ibid, 19.
22 Ibid, 19.
23 I. Shearer, Extradition in International Law (Manchester: University of Manchester Press, 1971), 17.
24 Sinha, n7, 72–74.
25 For example between the US and India- see Article 4 of the Extradition Treaty between the US and India, TIAS 12873 (concluded 24 June 1997).
26 For example, see Article 4 of the Arab League Extradition Agreement (concluded September 14, 1952); Benelux Treaty on Extradition and Mutual Assistance in Criminal Matters, (concluded June 27, 1962).
27 359 UNTS 273.
by the requested Party as a political offence or as an offence connected with a political offence.”

The political offence exception has been described as “a double edged sword” as it protects individuals from the possibility of an unfair trial or cruel punishment, while at the same time granting immunity to individuals who have committed grave crimes.28 Terrorism is one area in which there has been much contemporary debate as to its inclusion in the political offence category. This is illustrated aptly by the phrase, “one man’s terrorist is another man’s freedom fighter.” Notwithstanding the difficulties in defining the boundaries of “political offence”, the concept of political asylum is reflected in current international law, for example in the 1951 Refugee Convention.

The practice of diplomatic asylum: The rise of the nation state following the Peace of Westphalia in 1648, and the ensuing practice whereby one state would send a diplomat to another state on a permanent basis, witnessed the emergence of another form of asylum, called diplomatic asylum. Territorial and political asylum emerged as a result of state sovereignty, whereas diplomatic asylum emerged as a restraint on a state’s sovereignty, as a consequence of the immunity enjoyed by foreign diplomats at his or her mission or residence. States have often claimed the right to grant asylum in the premises of their overseas diplomatic missions. This demonstrates the conflict at the heart of diplomatic asylum, between the territorial jurisdiction of the host state and the inferred extraterritorial jurisdiction of the sending state.

The practice of diplomatic asylum had been almost abolished in Europe by the early 20th century; however it continued to be invoked, especially in Latin America where it has been suggested the practice remained popular due to the instability and frequent overthrow of governments in that region.29 Many Latin American states sought to make diplomatic asylum the subject of international treaties, such as the 1954 Caracas Convention on Diplomatic Asylum.30 In Europe, a specific example of the invocation of diplomatic asylum occurred during the Spanish Civil War of 1936–1939.

During this period the diplomatic missions of many Latin American, and even some European states, located in Spain granted diplomatic asylum to thousands of Spanish citizens.\(^{31}\)

The Latin American practice of diplomatic asylum has even been the subject of litigation before the International Court of Justice (ICJ) in the *Asylum case*.\(^{32}\) In this case, the Columbian Ambassador in Peru granted asylum to Victor Raul Haya de la Torre, the leader of a Peruvian political party, the American People's Revolutionary Alliance.\(^{33}\) This followed a one-day military rebellion which broke out in Peru and for which proceedings had been raised in Peru against Haya de la Torre for instigating and directing.\(^{34}\) The Columbian Ambassador requested Peru to grant Haya de la Torre safe passage out of the country, however this was refused.\(^{35}\)

Columbia argued before the ICJ that according to the international treaties in force at the time, namely the 1911 Bolivian Agreement on Extradition, the 1928 Havana Convention on Asylum and the 1933 Montevideo Convention on Political Asylum, and based on customary international law applicable in the region – referred to in the judgment as American customary law – Columbia was entitled to decide whether to grant asylum to Haya de la Torre and its decision was binding on Peru.\(^{36}\) Peru on the other hand claimed that Haya de la Torre had committed “ordinary” crimes and was not entitled to the protection of asylum.\(^{37}\) The ICJ rejected the arguments of both parties; it found that the requirements for asylum to be granted in conformity with the relevant treaties were not fulfilled and that Columbia had not proven the existence, either regionally or locally, of a constant and uniform practice of unilateral qualification as a right of the state of refuge and an obligation upon the territorial state.\(^{38}\)

Despite the continued reliance on the concept of diplomatic asylum in Latin America, there is no universal agreement as to the position of diplomatic asylum in contemporary international law and indeed some have

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\(^{31}\) See, Sinha, n7, 29–35 for an in depth discussion. It is apparent that there is no consensus as to the exact number of persons granted asylum; figures range from three to fifteen thousand.

\(^{32}\) *Columbian-Peruvian asylum case (Columbia v Peru)*, judgment of November 20, 1950, *ICJ Reports* 1950, 266.

\(^{33}\) Ibid, 272.

\(^{34}\) Ibid.

\(^{35}\) Ibid, 273.


\(^{38}\) Ibid, 273–278.
expressed the view that “[i]n general ... diplomatic asylum is regarded as a matter of humanitarian practice rather than a legal right.”

Asylum in the Inter-War years

As can be seen from the above, the inter-war years witnessed the adoption of two Latin American conventions on asylum— the 1928 Havana Convention on Asylum and 1933 Montevideo Convention on Political Asylum. However, the first international cooperation relating to asylum was taken by the League of Nations (LN). The Covenant of the LN made no reference to asylum; the work that the LN carried out in the area of asylum and refugees was based on specific appeals and its operations developed on a case-by-case basis. The role of High Commissioner for Refugees (HCR) was established in 1921, with Doctor Fridjtof Nansen appointed to the position. The initial focus of the HCR and his Office, known as the High Commission for Refugees, was to assist the approximately 1.5 million people who had fled the 1917 Russian Revolution and subsequent civil war. However, during the ten year life of the Commission, its mandate was extended to cover other groups of people who sought asylum, including Armenians, Assyrians and Turks.

Following Nansen's death in 1930, the LN established the Nansen International Office for Refugees to continue the work of the High Commissioner, and the High Commission, for Refugees. The 1933 LN Convention Relating to the International Status of Refugees was adopted under the auspices of the Nansen International Office for Refugees. This Convention did not have general application, rather it was limited to

40 Note, the remainder of this chapter will focus on territorial asylum, as opposed to political or diplomatic asylum.
42 In 1922, Doctor Nansen was awarded the Nobel Peace Prize for his work with refugees, including the creation of the Nansen Passport, the first ever passport for refugees which was eventually recognised as a valid international travel document by 52 countries.
44 In 1938, the Nansen International Office for Refugees was awarded the Nobel Peace Prize.
45 159 LNTS 199.
Russian, Armenian, Assyrian, Assyro-Chaldean, assimilated refugees (of Syrian or Kurdish origin) and Turkish Refugees.\textsuperscript{46} Article 3 of the Convention provided:

Each of the Contracting Parties undertakes 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 authorized to reside there regularly, unless the said measures are dictated by reasons of national security or public order. It undertakes in any case not to refuse entry to refugees at the frontiers of their countries of origin.\textsuperscript{47}

Professor Grahl-Madsen submitted that the use of the word “\textit{refouler}” in the authoritative French version of the Convention was not used to mean “refuse entry”; rather it was a prohibition on returning or sending back refugees, an interpretation which is supported by the fact that the Convention only applied to refugees which were already in a state party to the Convention and did not deal with the admission of new asylum seekers.\textsuperscript{47}

The inter-war years also witnessed attempts by the LN to deal with the rising number of asylum seekers leaving Nazi Germany. Due to the severity of the problem, in 1933 the LN established a separate High Commission for Refugees Coming from Germany. The mandate of this Commission was later extended to include asylum seekers from Austria and Sudetenland. International conventions were adopted to deal with those leaving Nazi Germany, including the 1936 Provisional Arrangement concerning the Status of Refugees coming from Germany\textsuperscript{48} and the 1938 Convention concerning the Status of Refugees coming from Germany.\textsuperscript{49} Article 1 of the 1938 Convention provides:

\begin{quote}
(1) For the purposes of the present Convention, the term “refugees coming from Germany” shall be deemed to apply to:

(a) Persons possessing or having possessed German nationality and not possessing any other nationality who are proved not to enjoy, in law or in fact, the protection of the German Government.

(b) Stateless persons not covered by previous Conventions or Agreements who have left German territory after being established therein and who are proved not to enjoy, in law or in fact, the protection of the German Government.
\end{quote}

\textsuperscript{46} Ibid, Article 1.
\textsuperscript{48} 171 LNTS No. 3952.
\textsuperscript{49} 191 LNTS No. 4461.
(2) Persons who leave Germany for reasons of purely personal convenience are not included in this definition.

The 1938 Convention provided that persons who fell within this definition should be “entitled to move about freely, to sojourn, or to reside in the territory [to which the Convention applied].”

As is evident from the international agreements concluded under the auspices of the LN in the inter-war period, asylum was granted on a group basis. According to Professor James Hathaway, the inter-war years can be characterised as demonstrating both a juridical and a social approach to asylum. According to the juridical approach, evident between 1920 and 1935, refugees were defined in terms of groups of people in danger on return to their own country where they would be denied state protection. The social approach, adopted between 1935 and 1939, more evidently recognised the need to assist victims of social and political events which resulted in the loss of protection in their home state. As will be seen below, this differs from the individualist approach adopted under the 1951 Refugee Convention.

At the end of 1938, the Nansen International Office for Refugees and the High Commission for Refugees Coming from Germany were simultaneously dissolved and replaced by the Office of the High Commissioner for Refugees under the Protection of the LN. The onset of the Second World War precipitated a dramatic increase in the number of people seeking asylum in Europe. In 1943, on the initiative of the US, the UN Relief and Rehabilitation Administration (the UNRRA) was established to provide aid to people in areas which had been liberated from the Axis Powers. In particular it played a large role in helping people who had been displaced by the War return to their respective countries. The UNRRA became part of the UN upon the latter's establishment in 1945. In 1946, the UN founded the International Refugee Organization (the IRO). The IRO began operations in 1947, assuming the workload of the UNRRA. The establishment of the IRO represented the UN's recognition that the issues of asylum and refugees were ones which required to be addressed at an international level.

50 Ibid, Article 2.
52 Although the term “United Nations” featured in the organisation’s name, it was established prior to the founding of the UN by an international agreement among 44 allied states.
53 The UN Charter, in the same way as the Covenant of the LN, makes no specific reference to refugees or asylum.
The UN High Commissioner for Refugees (UNHCR) was created in 1950, assuming in large part the responsibilities of the IRO, which concluded operations in 1952. In accordance with its Statute, UNHCR has a mandate to provide international protection to refugees and to seek permanent solutions to their problems. Although UNHCR protects refugees as defined in the 1951 Refugee Convention (see further below), its mandate includes other persons not covered by that Convention, including persons fleeing conflict or serious disturbances of the public order, former refugees (also called returnees), stateless persons and internally displaced persons (IDPs).

The Concept of Asylum in International Law Following the Second World War

The origins of the concept of asylum in contemporary international law can be traced to the 1948 Universal Declaration of Human Rights (UDHR). Article 13(2) UDHR states: “Everyone has the right to leave any country, including his own, and to return to his country.” Article 14(1) UDHR goes on to provide, “[e]veryone has the right to seek and to enjoy in other countries asylum from persecution.” This right is however limited by Article 14(2) which provides “[t]his right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.”

The British jurist Professor Hersch Lauterpacht noted that the wording of Article 14(1) was introduced by the British Delegation and was interpreted to mean “the right of every state to offer refuge and resist all demands for extradition.” Indeed, the original wording of Article 14(1) was “[e]veryone has the right to seek and be granted, in other countries, asylum from persecution.” The amendment to the text of the Declaration therefore removed any obligation upon a state to grant asylum to an individual. As the British Delegate noted before the adoption of the Declaration:

55 See the OAU Convention and Cartagena Declaration definition, below.
57 See above discussion of political offences and extradition.
Thus amended, the text while limiting the obligation of the State, would indicate that there was a right of asylum to which persecuted persons could have recourse, that the exercise of that right could not be penalized, and that States which offered asylum to refugees would not be compelled to extradite them.59

However, not all delegations were in favour of the amended text. The French Delegation stated that “[i]t had been a mistake ... to recognize the individual’s right to seek asylum while neither imposing upon States the obligation to grant it nor invoking the support of the United Nations.”60

In 1947, the UN Commission on Human Rights decided to “examine at an early opportunity the question of the inclusion of the right of asylum of refugees from persecution in the International Bill of Human Rights or in a special convention for the purpose.”61 There followed various attempts to formulate a right of asylum,62 however in 1952 the UN Commission on Human Rights concluded:

Opposition [by states] to the inclusion in the [International Bill of Rights] of an article dealing with the right of asylum was based on a number of grounds. It was stated that there was no fundamental right of the individual to be granted asylum but only a right of the State to extend its protection to him; that it was at once impracticable and undesirable to impose on States the obligation in advance of opening their territory to an unascertainable number of persons who might qualify for asylum under any one of the heads that had been proposed; and that experience in the drafting of the Universal Declaration of Human Rights and of the Final Act of the Conference of Plenipotentiaries on Refugees and Stateless Persons had shown that States were unwilling to surrender their prerogative of deciding in each instance which aliens they would admit to their territory. While many representatives approved the desirability of encouraging the granting of asylum in proper cases and while some considered that it would be fitting to make provision in the Covenant for the right of asylum, many doubted whether the terms in which the right had been formulated in the three proposals before the Commission were acceptable or sufficiently precise.63

61 UN doc. E/600, para. 48. The International Bill of Human Rights is the informal name given to the three documents: the 1948 UDHR, the 1966 International Covenant on Civil and Political Rights (ICCPR) and the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR).
62 For a discussion of this see Goodwin-Gill and McAdam, n3, 361.
Work continued at the UN over the following 15 years and in 1967 the General Assembly adopted the Declaration on Territorial Asylum.\textsuperscript{64} That Declaration provides at Article 1(1): “Asylum granted by a State, \textit{in the exercise of its sovereignty}, to persons entitled to invoke Article 14 of the Universal Declaration of Human Rights, [...] shall be respected by all other States.”\textsuperscript{65} Article 2 goes on to recognise that the situation in which persons referred to in Article 1 find themselves, is of “concern to the international community.”\textsuperscript{66} Article 3 then sets out the principle of \textit{non-refoulement}.\textsuperscript{67} It is noteworthy that the 1967 Declaration emphasised that the grant of asylum is first and foremost a matter of state sovereignty.

In 1977, the first session of the UN Conference on Territorial Asylum was convened with a view to adopting an international treaty on territorial asylum. The International Law Commission notes that draft Articles were provisionally adopted on the granting of asylum; on the definition of categories of persons to whom the Convention should apply; on \textit{non-refoulement}; and on the activities of refugees in the country of asylum. However, the Conference was unable to agree upon a draft Convention in the time allocated and accordingly recommended that the General Assembly consider convening a further session of the Conference.\textsuperscript{68} No such conference was, nor has ever been, convened. This possibly reinforces states resolutely maintaining the granting of asylum is a matter of discretion within their providence.

Notwithstanding the absence on an international treaty on the right to asylum, the issue of asylum continues to be repeatedly raised. For example, the 1993 Vienna Declaration on Human Rights and Programme of Action reaffirmed the right to seek and enjoy asylum;\textsuperscript{69} the 2001 Declaration of States Parties to the 1951 Convention and or its 1967 Protocol relating to the Status of Refugees, reaffirmed the importance of robust asylum systems and the continuing importance of the system established by the 1951 Refugee Convention; and the Final Text of the Asian-African Legal
Consultative Organization’s 1966 Bangkok Principles on Status and Treatment of Refugees, adopted in 2001, provides at Article 2:

(1) Everyone without any distinction of any kind, is entitled to the right to seek and to enjoy in other countries asylum from persecution.

(2) A State has the sovereign right to grant or to refuse asylum in its territory to a refugee in accordance with its international obligations and national legislation.

The UNHCR’s Executive Committee Conclusions, providing operational guidance to states and other relevant organisations have also consistently affirmed the right to seek asylum.70 For example, in 2008, on the 60th anniversary of the UDHR the Executive Committee reiterated:

…the enduring importance of freedom of movement and residence within the borders of each State, of the right to seek and enjoy asylum in other countries from persecution and of the right to a nationality, enshrined in Articles 13, 14 and 15 of the Declaration; and recognizing the importance of the rights in the Declaration to all persons of concern to UNHCR…71

Asylum and the Definition of a Refugee in the 1951 Refugee Convention

The 1951 Refugee Convention does not in itself regulate asylum, rather the initial Convention was designed to address a specific refugee problem which arose in Europe in the wake of the Second World War. The 1967 Protocol represents a separate international agreement which extended the potential beneficiaries of refugee protection by removing the original geographical and temporal constraints found in the 1951 Convention. In accordance with these two international treaties, the states party to them undertake to provide protection – normally by granting asylum – to the following narrow class of persons defined in Article 1A(2) 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

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71 ExComm Conclusion No. 108 (LIX) – 2008.
country of his former habitual residence [...], is unable or, owing to such fear, is unwilling to return to it.

To be a Convention refugee,72 one has to demonstrate a nexus between the alleged persecution (that is the treatment complained of) and any one or combination of the five enumerated grounds provided for within Article 1A(2). In addition, this definition requires that a person be outside his or her country of origin and therefore excludes IDPs. Furthermore, the protective ambit of the 1951 Refugee Convention does not extend to people would find themselves in certain situations, such as natural disasters or generalised, indiscriminate violence – for example wars. Nevertheless, persons who fall outside the strict refugee definition set out in the 1951 Refugee Convention may be afforded some other form of protection at the discretion of the receiving state. As can be seen from the above definition, there is no mention of the word “asylum” in Article 1A(2), much less a general “right to asylum.” Nevertheless, the 1951 Refugee Convention is recognised as being based upon Article 14 of the UDHR. As the Office of UNHCR has made clear, the 1951 Refugee Convention is “the centrepiece of international refugee protection today.”73 An appreciation of the concept of asylum in contemporary international law therefore demands cognisance be given to the key role of the 1951 Refugee Convention.

The 1951 Refugee Convention only uses the word “asylum” in the fourth paragraph of the Preamble which deals with the consequences of the grant of asylum. The relevant section reads:

> Considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation....74

The Preamble of the Convention is, of course, not legally binding but assists in the interpretation of the operative clauses. The original proposal tabled by the French Representative at the drafting conference suggested using the phrase “the exercise of the rights of asylum”; however, the Dutch Delegation suggested it would be more appropriate to follow the wording of Article 14 of the UDHR and substitute “the right to seek and enjoy...
asylum in other countries.” However, in the end the conference decided upon the phrase “the grant of asylum,”\textsuperscript{75} which again acknowledges deference to the supremacy of state sovereignty.

**Refinements of the Concept of Asylum Through Regional Arrangements**

Most of the developments in the field of asylum since 1977 have been at a regional level, and have used the 1951 Refugee Convention as a basis. In Latin America, Africa and Europe the basic principles of the definition of a refugee as contained in the 1951 Refugee Convention have been reaffirmed but expanded upon.

In the 1969 Organization for African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa,\textsuperscript{76} the term “refugee” is extended to include:

\begin{quote}
... 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.\textsuperscript{77}
\end{quote}

Accordingly, people who do not have a well founded fear of persecution for a 1951 Refugee Convention reason are nevertheless eligible for refugee status when fleeing serious internal or external conflicts. Later, in 1984, a colloquium of state representatives and jurists agreed upon the terms of the Cartagena Declaration on Refugees.\textsuperscript{78} The Declaration, although not binding international law, recommends that the definition of a refugee used in Latin America should stem from the definition found in the 1951 Refugee Convention, but should be expanded to encompass:

\begin{quote}
... 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.\textsuperscript{79}
\end{quote}

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\textsuperscript{76} 1000 UNTS 46.

\textsuperscript{77} Ibid, Article 2.

\textsuperscript{78} OAS/Ser.L/V/II.66, doc. 10, rev. 1, 190–3.

\textsuperscript{79} Ibid, Article III(3).
Despite its non-binding status, many Latin American states use this definition in their domestic legal systems and it has been endorsed at an international level by the Organization of American States, the UN General Assembly and the UNHCR Executive Committee.80

From a European perspective, asylum has been a subject of European Union (EU) action since the entry into force of the Treaty of Amsterdam in 1999 which provided a detailed legal basis for the harmonisation of asylum policies within the EU. The first phase of what became known as the Common European Asylum System (CEAS), which spanned the period 1999 to 2005 saw the adoption of four key legislative acts: the 2003 “Dublin” Regulation which determines which EU state is responsible for examining an asylum application;81 the 2003 Directive on reception conditions for asylum seekers;82 the 2004 Directive on qualifications for becoming a refugee or a beneficiary of subsidiary protection status (the “Qualifications Directive”);83 and the 2005 Directive on asylum procedures.84 The CEAS is currently being revised and recast. However, for the purpose of this chapter, the relevant legislative act is the Qualifications Directive. The Directive takes as its basis the 1951 Refugee Convention definition, but acknowledges that other people may be eligible for “subsidiary protection.” In particular it extends protection to cover someone who does not qualify as a refugee under the Qualifications Directive, but who if returned to his or her country would face a real risk of serious harm.85 What constitutes “serious harm” is set out in Article 15 of the Directive and consists of:

(a) death penalty or execution; or
(b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or
(c) 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 definition of “serious harm” reflects a growing awareness of the application of human rights standards within an asylum context in Europe

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85 Article 2, Qualifications Directive.
A recast of the Qualifications Directive was adopted at the end of 2011 and EU Member States have two years from its entry into force in which to transpose its provisions into domestic law. However, the definitions of “subsidiary protection” and “serious harm” remain substantially the same as previously.

As is apparent the concept of asylum has been acknowledged and developed in various ways at a regional level. The definition of a refugee contained in the 1951 Refugee Convention remains core, but the regional arrangements have in some instances chosen to go beyond the strict Convention definition and have sought to take account of the changing geographic, political and temporal landscape. In addition it is evident that the concept of asylum has become increasingly informed by human rights discourse, to which the chapter now turns.

**Asylum in the Human Rights Framework**

The concept of asylum is fundamentally an issue of human rights. It is therefore not surprising that international human rights law instruments have been used as tools to protect the rights of persons seeking asylum. That said, very few human rights documents make explicit reference to asylum; the 1966 ICCPR is particularly notable in that regard. It has been recorded that during the discussions on the draft Covenant at the Seventh Session of the UN Commission on Human Rights, the Yugoslavian delegate voiced concern over the absence of a right to asylum. However a Yugoslavian proposal to include this right failed because many delegates “did not consider the right of asylum to be an individual’s fundamental right and because there was disagreement as to the class of persons to whom asylum should be granted.”

However, some international human rights instruments do refer to asylum. Article 22(7) of the 1969 American Convention on Human Rights provides: “Every person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued for political offenses or related common crimes.” The reference to the rights being “in accordance” with other international and domestic law, emphasises state sovereignty and the discretionary right of the state to grant asylum as opposed

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86 999 UNTS 171.
87 Boed, n6, 10. Note, ICESCR is similarly silent with regard to the issue of asylum.
to an individual’s right to be granted asylum. Another regional human rights instrument which addresses the issue of asylum is the 2000 Charter of Fundamental Rights of the EU. This Charter, following the entry into force of the Lisbon Treaty, has a legal status within the EU equal to the founding treaties. Article 18 of the Charter provides:

The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union .... 88

The reference to a “right to asylum” is somewhat misleading, as Article 51(2) of the Charter goes on to make clear that it simply consolidates existing EU rights rather than “elaborate or amend them.” 89 Therefore, it is unclear what, if anything, Article 18 of the Charter adds to the concept of asylum as it was already understood in the EU before the entry into force of the Charter.

Article 28 of the Arab Charter on Human Rights 200490 provides:

Everyone has the right to seek political asylum in another country in order to escape persecution. This right may not be invoked by persons facing prosecution for an offence under ordinary law. Political refugees may not be extradited.

As with other human rights law instruments which emphasise that the right is to seek asylum rather than to be granted asylum, this provision reinforces that the grant of asylum lies within the discretionary exercise of state sovereignty.

Despite the infrequent reference to asylum strictu sensu in international human rights law instruments, a fundamental right which is obviously a component of the concept of asylum is the right of a person to leave his or her country. This right is expressed in many human rights instruments, including Article 12 of ICCPR which states that “[e]veryone shall be free to leave any country, including his own.” This right is also found in regional human rights instruments, including Protocol 4 of the European Convention of Human Rights91 and Article 22(2) of the American Convention on Human Rights.92

89 Goodwin-Gill and McAdam, n3, 367.
90 12 IHRR 893.
91 213 UNTS 222.
92 1144 UNTS 123.
A more obvious example of the engagement of human rights law and the concept of asylum is the principle of *non-refoulement*. *Non-refoulement* as applied within the context of the 1951 Refugee Convention is dealt with below, however here the focus is on *non-refoulement* as it has been developed within an international human rights law framework. Essentially *non-refoulement* means that someone should not be returned to a state where either his or her life would be at danger or he or she would be subject to treatment which is deemed reprehensible. For instance, Article 7 of the ICCPR provides: “States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion, or *refoulement*.”93 A similar provision is found in Article 3(1) of the 1984 United Nations Convention against Torture94 which reads: “No State Party shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”

Regional human rights instruments reflect similar standards, including Article II(3) of the 1969 OAU Convention and Article 22(8) of the American Convention on Human Rights. The European Convention on Human Rights does not refer to *non-refoulement* at all but Article 3 nevertheless emphasises the absolute prohibition on the use of torture or inhuman or degrading treatment or punishment. The European Court of Human Rights, the judicial body which ensures state compliance with the Convention, has been unequivocal in maintaining that Article 3 admits of no exceptions.95 However, as will be seen, the difference between these named international human rights instruments and the 1951 Refugee Convention is that the beneficiaries of the former are not confined to those who are defined as Convention refugees. These instruments apply to anyone within a state party’s territory and not just to Convention refugees.96

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93 Emphasis added.
94 1465 UNTS 85.
From the foregoing, what then can be gleaned as to the content of the concept of asylum in contemporary international law? At this juncture the three components of the “right to asylum” set out by Professor Grahl-Madsen may be recalled: (1) the right of an individual to seek asylum; (2) the right of the state to grant asylum; and (3) the right of an individual to be granted asylum.

Right to Leave any Country and Seek Asylum

The right to leave any country is enshrined in many international human rights law instruments.97 It is for instance contained in Article 13(2) of the UDHR, directly preceding the article which spells out the right to seek asylum. It is set out in hard positive international law in Article 12 of the ICCPR, which provides that “[e]veryone shall be free to leave any country, including his own.” In the UDHR the right appears unqualified, however, in the ICCPR it is limited by Article 12(3):

The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

In addition to the limitations set out above, state practice has demonstrated further limitations on a person's right to leave. An example may be found in the European Convention on Human Rights; the right to leave a country is found in Article 2 of Protocol 4 of that Convention. The European Court of Human Rights has held that the right in Article 2 of Protocol 4 “implies a right to leave for such a country of the person's choice to which he may be admitted.”98 This limitation exists to fill the legal void in the absence of a duty on states to admit persons to their territory. To an extent the absence of obligation on a state to admit persons to their territory is circumscribed by the principle of non-refoulement, which is discussed further below.

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97 Goodwin-Gill and McAdam, n3, 380, referring to Article 13(1) UDHR; Article 12 ICCPR; Article 2 of Protocol 4 of the European Convention of Human Rights; Article 22 American Charter on Human Right; Article 12(2) African Charter on Human and Peoples' Rights; Article 21 Arab Charter on Human Rights.

98 Peltonen v Finland, Application No. 19583/92 (February 20, 1995) (inadmissible), emphasis added.
Under contemporary international law an individual cannot claim a right of asylum in a particular country, but rather, “states have a duty under international law not to obstruct the individual’s right to seek asylum.”

This must include the right to leave the country of origin. Notwithstanding this, there is evidence that certain states have introduced procedures to deter and prevent persons leaving the country. For example, the Council of Europe Commissioner for Human Rights, Thomas Hammarberg, drew attention at the end of 2011 to the measures adopted by the authorities of the Former Yugoslav Republic of Macedonia which attempt to prevent citizens from travelling to EU countries and seeking asylum there. Apparently those who are returned as failed asylum seekers risk having their passports temporarily confiscated. The concern expressed by the Commissioner is that the impact of such measures is falling on marginalised groups such as Roma people.

An example of alleged discrimination in the application of exit procedures can be seen in R. (European Roma Rights Centre) v Immigration Officer at Prague Airport (UNHCR Intervening), in which the UK House of Lords held that British Immigration Officers operating at Prague Airport discriminated against Roma people who were seeking to travel from that airport to the UK “by treating them less favourably on racial grounds than they treated others who were seeking to travel from that airport to the United Kingdom.” Although in practice, the Roma people were precluded from exiting the Czech Republic, the actions had not been taken by Czech officials, but rather by British ones who had been stationed at Prague Airport for the purpose of preventing asylum seekers travelling to the UK.

There is evidently a legal “gray area” between the right to leave any country and the right to seek asylum. Over recent years this “gray area” has received increasing media coverage, especially in the West where states have introduced policies to take advantage of this legal lacuna, such as the UK action at Prague airport highlighted above. The practice of states takes many forms and has been variously described as preventing asylum seekers from being able to claim asylum, intercepting asylum seekers, or deflecting them before they are able to claim asylum. Of course, such policies

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99 Goodwin-Gill and McAdam, n3, 358.
100 The Council of Europe Commissioner’s Human Rights Comment, The right to leave one’s country should be applied without discrimination, available at http://commissioner.cws.coe.int/tiki-view_blog_post.php?postId=193 (valid as at 10 February 2013).
102 Ibid, Lady Hale at para. 104.
illustrate the tension between the right to seek asylum and state sovereignty.

*State sovereignty and the right of States to grant asylum:* Territorial sovereignty is one of the fundamental tenets of international law. It is integral to the principle of the equality of states as well as to their territorial integrity and political independence as set out in Article 2 of the UN Charter. Territorial sovereignty denotes that a state enjoys the right to exercise jurisdiction over persons and property within its territory to the exclusion of the jurisdiction of other states. This competence embraces jurisdiction to prescribe (and proscribe), to adjudicate and to enforce the law. One component of territorial sovereignty is that a state has control over who will be admitted to its territory and to whom it will grant asylum. A state is not required to admit anyone to its territory. This aspect of state sovereignty is recognised in international law instruments which address the concept of asylum. As can be seen from the above, the principle of state sovereignty is evident in the wording finally agreed by those who drafted Article 14 of the UDHR and in subsequent international instruments including the 1951 Refugee Convention and the 1967 UN Declaration on Territorial Asylum.

Turning to the 1951 Refugee Convention, what it represents for those seeking asylum is the only internationally agreed definition of the criteria that, if met, warrants the granting of refugee status and international protection. It has provided a framework for the assessment and processing of asylum applications whilst still leaving discretion with states. However, that discretion is not absolute; it can be said to be limited by the operation of the principle of *non-refoulement*.

*Asylum and the Principle of Non-refoulement*

The starting point for a discussion of *non-refoulement* is Article 33(1) of the 1951 Refugee Convention which provides that:

No contracting state shall expel or return ("*refoule*) 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.

What should be noted is that Article 33(1) has as its beneficiaries those who fall within the ambit of the 1951 Refugee Convention. Simply, Article 33(1) provides protection to those who meet the definition of a Convention refugee. However, Article 33(1) has been held to apply to
asylum seekers who have been admitted to a territory, albeit temporarily, while they go through the refugee determination process. Those seeking asylum are granted temporary protection, which may be described as *de facto* asylum. However, this right is not unqualified as Article 33(2) provides:

> The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.

The principle of *non-refoulement* is further recognised by Article 3 of the 1967 UN Declaration on Territorial Asylum, a non-legally binding instrument, which provides that:

1. No person [seeking asylum from persecution] shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution.
2. Exception 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.
3. Should a State decide in any case that exception to the principle stated in paragraph 1 of this Article would be justified, it shall consider the possibility of granting the person concerned, under such conditions as it may deem appropriate, an opportunity, whether by way of provisional asylum or otherwise, of going to another State.

The definitions of *non-refoulement* in the 1951 Refugee Convention and the 1967 Declaration on Territorial Asylum apply only in the context of asylum. As has been seen from the above discussion though, *non-refoulement* has also developed within a human rights context and within this context states may find themselves unable to remove an asylum seeker who would fall to be excluded under Article 33(2) of the 1951 Refugee Convention, as well as those who fail to satisfy the criteria to be recognised as a Convention refugee. There appears to be a general consensus that the principle of


104 Article 33 is one from which no derogation can be made, as contained in Article 42(1) of the 1951 Refugee Convention.
non-refoulement has attained the status of customary international law however its status as jus cogens remains contested.105

What is important to extrapolate from the foregoing is that although the grant of asylum is at the discretion of the state, a state is nevertheless obliged not to return a person to a place where he or she risks persecution. However the principle of non-refoulement does not prohibit a state from sending that person to another state, much less does it impose a duty to grant that person asylum. Despite this, it has been said that “[t]he duty of a state not to return a person to a place where he would face persecution is presently the closest that an individual comes to a right to asylum in international law.”106

Conclusion

At its very basic asylum is a form of protection extended by a state to a person who has sought refuge within that state’s territory. The concept of asylum in international law defies simple definition. Rather it is made up of a myriad of constituent rights, none of which on their own can be said to amount to a right to asylum. It is necessary to unpack the constituent rights which cumulatively provide the content to what is otherwise a somewhat nebulous concept. These rights include the right of an individual to leave a country, the right to seek asylum and the right not to be returned to a country where one is at risk of persecution. As should now be apparent there is no freestanding right to asylum in contemporary international law. The concept of asylum as of now is one that has evolved through giving cognisance to the rights of the individual without undermining the sovereignty of individual states to determine who may be present on their territory. It is a dynamic concept, which undoubtedly will continue to evolve.

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106 Boed, n6, 23.
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1. Introduction

Armed conflicts bring in a series of devastating consequences to the persons as well as the objects that are adversely affected. These conflicts result in unprecedented movement and displacement of civilian population. A war zones and conflict areas generate a large number of refugees by forcing them to flee to other countries for the safety of life and liberty.

During armed conflicts, civilians often pay a heavy price. They face daily threats of violence and death as they find themselves inadvertently caught up in the middle of a conflict. Despite being protected, civilians continue to be the victims of violence and are sometimes deliberately targeted by belligerents. These attacks range from campaigns of sexual violence up to deliberate killings in order to instill fear and coerce compliance from the local population. In addition to and as protection against these direct attacks, civilians also need to be protected from the consequences of conflict such as being forced to move from their homes and thus losing ownership of land and property. Some may find temporary, but often only relative safety in camps, but the less fortunate may simply have to fend for themselves in inhospitable terrain. In recent years, their access to humanitarian assistance has been increasingly restricted by bureaucratic constraints, intense hostilities or violent attacks against humanitarian personnel and assets.

The forced displacement of persons within and/or across the national borders is one of the most tragic and persistent issues of the 20th century and it is likely to continue to be so. The refugee phenomenon refers to the flight across borders. Another common phenomena is people displaced internally due to hostilities in one part of the country. This phenomenon is unlikely in the latter case, as it is the object of a relatively well established,
if in some respects fragmented, international regime. Perhaps for this rea-
son one must remember that the international legal regime dealing with
the concerns of the refugees started soon after the First World War in the
context of the League of Nations.

There is a parallel between international humanitarian law (IHL) and
international refugee law (IRL) for both originate from the need to address
the protection of persons within the territory of a State of which they are
not nationals. Refugees caught up in an armed conflict can at the same
time be under the protection of both the international humanitarian law
as civilians and under the refugee law as refugees.

Since the end of the Cold War warfare of the classic type, i.e., pitting the
regular armies of one or more states against each other has become a rar-
ity. Internal armed conflicts which oppose regular armies to non-state
armed groups are now more common. In most of these conflicts there are
no front lines and the distinction between civilians and combatants is
often blurred. As a result of this development, the rules of conduct govern-
ning hostilities are increasingly being ignored. When serious violations of
IHL occur most of the victims are civilians. Although it is primarily the
responsibility of the governments concerned to protect the civilian popu-
lation, what often happens in times of conflict is that they are either
unable or unwilling to act on this responsibility. Individual States, the
UN, regional organizations and humanitarian agencies including non-
governmental organizations (NGOs) individually as well as collectively
play important role in protecting civilians, whether through political
and legal action, military activities or humanitarian action. However, the
international efforts to protect civilians in conflicts can often be insuffi-
cient, inconsistent or ineffective. It is for this reason that the protection of
civilians in armed conflicts is a subject of growing concern to the inter-
national community. The challenge is two-fold: to make both state and
non-state armed groups alike, respect international law during such
conflicts, and to address the needs of civilians caught up in the conflict
with appropriate assistance.

The protection of civilians during armed conflicts matters from two
perspectives, namely moral perspective i.e., everyone has the right not
to be arbitrarily deprived of their life and the right not to be tortured;
and legal perspective i.e., each State has specific obligations concerning
the protection of civilians in situations where it is involved in military
action. In addition, IHL provides that civilians shall enjoy general
protection from the effects of armed conflict, protects civilians from
being the object of attack, and prohibits attacks that are indiscriminate.
Therefore, the protection of civilians in armed conflicts contributes to the management and reduction of the direct impact of conflict on affected populations. For example, it helps to ensure that armed groups are less inclined to target civilians; that they are less likely to use civilian populations to achieve their military objectives and it also helps to ensure that civilians have access to humanitarian assistance.

At the same time, it is important to remember that each State in a conflict will have a number of roles in promoting and protecting civilians (i) as a member of international organizations; (ii) as a permanent member of the UN Security Council; (iii) as a party to IHL treaties; (iv) as a donor to intergovernmental organizations and other humanitarian actors operating in situations of armed conflict; (v) as a provider of international military forces, including peacekeepers, (vi) sometimes as a party to an ongoing conflict; and (vii) as a trainer of foreign military, civilian and police peacekeepers. In the context of an armed conflict, protection encompasses “all activities aimed at ensuring full respect for the rights of the individual in accordance with the letter and spirit of the relevant bodies of law, i.e. human rights law, international humanitarian law and refugee law.”1 Protections for civilians during armed conflicts are contained in various IHL instruments. Numerous UN Security Council resolutions have also increasingly dealt with the protection of civilians in armed conflicts, for instance, by reminding warring parties of their legal obligations.

IHL prohibits the forcible displacement of civilians and prohibits the same to be an objective of the conflict. Even when civilians are not actually forcibly displaced, violations of basic rules can cause them to abandon their homes.2 They may then flee away either to other parts of the country which are still a safe haven or in the inevitable circumstances flee away from their native lands and take shelters in foreign States. For this reason, respecting IHL as well as ensuring respect for IHL remains the core obligation of States. In cases of internal displacement, internally displaced persons remain entitled to the protection granted by IHL to civilians and are entitled to certain additional safeguards in view of their specific

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1 This definition was agreed in 1999 by a wide group of humanitarian and human-rights agencies regularly convened by the International Committee of the Red Cross (ICRC) in Geneva. It was subsequently adopted by the Inter-Agency Standing Committee (IASC), the forum for coordination, policy development and decision-making involving the key UN and non-UN humanitarian partners.

2 For example, such as the destruction of objects indispensable to the survival of the civilian populations including livestock and water supplies.
For example, the African Union’s role in Darfur, and the EU’s operations in Chad and the Democratic Republic of the Congo.

Regional Organizations play an increasingly important role in protecting civilians. Troops engaged in international military operations including peacekeepers must adhere to the relevant provisions of international law. Moreover, it is increasingly common for peace support operations, including peacekeeping troops and police, to play a key role in the protection of civilians affected by armed conflicts. Since the end of the Cold War, over thirty international military operations have been mounted with the protection of civilians as either the principle aim or one of the mission objectives. Such missions include UN or regional peacekeepers, as well as national, coalition and multilateral peace enforcement and post-conflict stabilization forces.

International organizations and their agencies, such as the International Committee of the Red Cross (ICRC), the Office of the UN High Commissioner for Refugees (UNHCR) and the UN Children’s Fund (UNICEF), as well as the UN Office of the High Commissioner for Human Rights (OHCHR) have mandates to remind States and other parties to conflicts of their obligations to respect and protect civilians, and to support them in meeting these obligations. The UN Emergency Relief Coordinator (ERC) promotes the protection of civilians in armed conflict and reports to the UN Security Council on this issue. The Office for the Coordination of Humanitarian Affairs (OCHA) supports the ERC in his role and supports protection activities on the ground by helping the Humanitarian Coordinator and Country Team to plan and coordinate humanitarian protection programs. NGOs also play a crucial role. Human rights NGOs usually focus on advocacy, monitoring and reporting violations of the law, and

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3 For example, the African Union’s role in Darfur, and the EU’s operations in Chad and the Democratic Republic of the Congo.
assisting victims to seek redress; while humanitarian NGOs, seeking to ensure that the basic needs of the civilian population are met, aim to reduce the population’s exposure to threats to its safety.

Increasingly, Private Military and Security Companies (PMSCs) are being used to provide risk consultancy and security services to States, NGOs and the private sector. The Montreux Document, an international initiative jointly led by Switzerland and the ICRC recalls existing legal obligations under international law for States in relation to PMSCs and sets out a series of good practices to be considered by States in fulfilling these obligations http://www.icrc.org/eng/assets/files/other/icrc_002_0996.pdf at page 16. Affected individuals and communities also count on their own capacity to develop coping mechanisms. These coping mechanisms should be supported whenever appropriate. Thus, international action to protect civilians in the midst of a conflict can be taken in many different spheres, by many different actors. It needs to be carried out in a coordinated and complementary manner, while respecting universal principles and taking into account the specific mandates of each actor.

The protection of individuals in situations of war rests primarily on three bodies of law: IHL, international human rights law (IHRL) and IRL. These three legal regimes have a common purpose namely to ensure the protection of life, health and dignity of people. However, the field of application, the precise contents and the formulation of the rules will expectedly vary. It is thus necessary for a reader to understand each one of these regimes as well as the relationship between them. The instruments of international law which provide a legal framework for the protection of civilian populations in armed conflicts notably include (i) the Fourth Geneva Convention of 1949 and the two Additional Protocols of 1977;4 (ii) the Convention Relating to the Status of Refugees of 1951 (Refugee Convention);5 (iii) certain fundamental rights such as the right to life and the prohibition of torture apply in situations of conflict; (iv) the Torture Convention, CEDAW and UNCRC focus on protection to women and child refugees. (v) the International Criminal Court (ICC) governed by the Rome Statute (1998) by means of which the international community is able to

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4 They establish basic rules of conduct during hostilities and the need for making a fundamental distinction between the civilian population and combatants. IHL offers protection to those not participating in the hostilities and to non-combatants.

5 It provides those who flee to another country to escape conflict at home and the associated persecution with a legal status and a legal framework of protection.
combat impunity, as the ICC has the power to initiate criminal proceedings against perpetrators of the most serious crimes.

Contemporary practices in humanitarian law emphasise on the complementary nature and the growing interface between IHL, HR AND IRL for protection of basic rights of refugees. Stress the complementary nature, and indeed the convergence of IHL, human rights and the rights of refugees as instruments for the protection of life and human dignity. Moreover, the fundamental principles of human rights and most of the provisions of IHL that protect civilians and govern the conduct of hostilities are now part of customary international law. Persons fleeing armed conflicts do not fall within the frame of refugee protection \textit{per se}. National legislation, regional conventions or binding directives guarantee the protection for those individuals affected by violence in cases of armed conflicts such as the 1969 OAU Refugee Convention or the EC Qualification Directive. It is for the above said reasons one must understand the interface between IHL and international refugee law in the context of protection to the refugees and examine their relevance in addressing the said concerns.

2. Scope and Extent of Application of IHL During International Armed Conflicts

2.1. Introduction

IHL is the legal framework which regulates the conduct of hostilities in situations of armed conflicts and applies in situations of war regardless of whether the conflict is international or non-international.\footnote{The principal instruments of modern IHL that protect people who have not taken part in the hostilities are (i) the Hague Conventions of 1899 and 1907; and, (ii) the Geneva Conventions of 1949 and their Additional Protocols of 1977 and 2005 (nuclear).} IHL, thus, does not apply in times of peace or during internal disturbances and tension. To qualify a situation as an armed conflict constitutes an essential preliminary stage before any application of IHL. The qualification of a situation of armed conflict is only the first stage; it is also necessary to determine if the armed conflict is international or non-international, since the contents of the applicable IHL are likely to differ according to the situation. Indeed, with respect to conventional law (and to limit itself to the principal instruments), the qualification of an international armed conflict involves the applicability of The Hague Convention of 1907, the Four Geneva Conventions of 1949 and Additional Protocol I of 1977, \textit{inter alia}, totaling more than 600 articles. On the other hand, the qualification of a
non-international armed conflict leads to the application of common Article 3 to the Geneva Conventions, and possibly to Additional Protocol II (AP II) if the threshold is met.

Numerous armed conflicts have taken place and the characters of the conflicts have gradually changed. The number of people affected are constantly increasing and about of 80% of all victims of armed conflicts since the end of the Second World War have been victims of an non-international armed conflict i.e., internal armed conflict.\(^7\)

Certain rules which solely govern international armed conflicts also apply to non-international armed conflicts. In view of the growing tendency to move towards a unification of applicable law regardless of the qualification of the conflict, it remains interesting to see whether the dichotomy between international and non-international armed conflicts is any more relevant and carries important legal consequences. The essential criteria within the framework of qualifying the conflict are due to the nature of the parties to the conflict.\(^8\) The situations of total or partial military occupation are also international armed conflicts even in the absence of any resistance on behalf of the occupied State. It is thus the official nature of the parties which makes it possible to qualify a conflict as international. On the other hand, non-international armed conflicts centre around a prolonged conflict between governmental authorities and armed organized groups or between such groups within a State. In this respect, the principal difficulty is in identifying the moment to which a situation of internal tension or disturbance evolves to reach the threshold of armed conflict.

The qualification becomes complex when a foreign State intervenes within the framework of a non-international armed conflict i.e., internationalized internal armed conflict. When there is a direct armed intervention of the foreign government the qualification of the conflict depends on the party upon whose behalf the foreign State intervenes. If military action is carried out at the request of the host government to support it against one or more non-State armed groups, the conflict remains qualified as non-international. Such a qualification is logical in this situation, since there is no armed opposition between two or several States, which is a

\(^7\) ICRC, Protocol Additional to the Geneva Conventions, and relating to the protection of victims of Non-International Armed Conflicts (Protocol II), Introduction See www.icrc.org (accessed 20 April 2012).

\(^8\) This is the result, in particular, of the International Criminal Tribunal for the Former Yugoslavia (ICTY) jurisprudence, which states that the armed conflict is international when there is recourse to armed force between States. See Prosecutor v. Delalić (the Celebici Case), 20 Feb. 2001, Para. 400.
requirement for an international qualification of the conflict. The qualification is more complex when the foreign armed intervention aims at supporting the non-State actors against the territorial government. In this situation, a minority of the doctrines support that such a conflict has an international character. The majority, however, follows the school of thought of dividing the conflict into various conflict relations. The hostilities between the territorial government forces and the armed opposition group remain a non-international armed conflict whereas the hostilities between these same governmental forces and those of the foreign State constitutes an international armed conflict. This complex qualification is most logical taking into consideration the definitions for international and non-international armed conflicts, but it implies that the applicable law can vary according to the forces engaged in the same conflict. The intervention of the foreign State can also be an indirect intervention taking the form of economic, financial, strategic support, etc., to the armed opposition group. On this assumption, the armed conflict could be described as international since the armed opposition group is benefited from this support and then can be compared to a _de facto_ organ of the foreign State.

The contemporary IHL is a complex legal sphere of conventions and rules of customary law, which apply to both international and internal armed conflicts. This body of rules in the case of international armed conflicts operates on all territories of belligerent States, and on the whole of the territory under the control of a party in the case of a non-international armed conflict. The above statements must be placed in their context in order to avoid any misinterpretation. They cannot be interpreted, _a contrario_, to imply an exclusion of the application of IHL beyond the zones controlled by the various warring factions. Whatever the nature of the conflict, it is clear that hostilities can be held away from the territory of the State itself, for example in the exclusive economic zone of a belligerent State, in open sea, and even in underwater spaces. However, it is not disputed that the belligerents which act in such zones remain subject to humanitarian norms.

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9 Though IHL lays down the minimum protection and standards applicable to situations where people are most vulnerable in armed conflicts, the gaps between protection in principle and reality are wide, and keenly felt by civilians in conflict situations around the world. In this context, the need for actions required for the protection of civilians in three key areas namely (i) secure humanitarian access; (ii) the clear separation of civilians and combatants; and (iii) swift re-establishment of the rule of law, justice and reconciliation during post-conflict transitions. In addition, the highlighted three new challenges...
IHL is often referred to as *lex specialis* as it applies to situations of armed conflicts and thus would comprise of inter-related and mutually strengthen set of rules i.e., human rights, humanitarian and refugee laws. Thus, the applicability of these three distinct regimes differs but their objective ultimately is the same namely protection of human life and dignity. The principle of non-discrimination is a core principle demonstrated in all of these three regimes and the core aim is “protection” as formulated: The concept of protection encompasses all activities aimed at ensuring full respect for the rights of the individual in accordance with the letter and spirit of the relevant bodies of law.

3. **Scope of International Protection to a Refugee During Armed Conflicts**

Over a period of time the movement of refugees has changed and is increasingly recognized as taking place more generally in the context of armed conflicts. This in turn has made the discussion on the parallel between the different legal regimes even more interesting urging the need to develop the interaction that is essential. Both IHL and IRL originate from the need to address the protection of persons within a State of which they are not nationals. A growing number of persons seeking international protection today are persons fleeing armed conflicts and breaches of IHL. They might not at all fall within the scope of the Refugee Convention as

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emerging for the protection of civilians in conflict: sexual exploitation and gender-based exploitation in situations of war, commercial exploitation and the escalating threat posed by global terrorism. That said, the importance of other issues has not receded and includes, especially: the growing phenomenon of non-state armed groups; and the need to vigorously promote respect for the law in war situations. Much of this agenda for the protection of civilians falls within the remit of IHL, though some aspects of reconciliation are beyond the purely humanitarian sphere – moving into the sphere of state politics. Carefully negotiated humanitarian access does much to improve the protection of civilians in the short term and to improve prospects for a transition to reconciliation in the longer term. ICRC has a specific mandate under the Geneva Conventions on the conduct of war to protect and assist victims of armed conflict and internal violence. This humanitarian imperative to assist the victims of war has, over time, come to include other humanitarian agencies assuming the right to have safe and unimpeded access under the Geneva Conventions when they offer their assistance as “independent and impartial” actors on behalf of civilians and other vulnerable people. Unimpeded access to all populations in need (on the basis of impartiality) can remove a basis for grievance, de-escalate a conflict, lower its intensity, give an indication of the benefits of peace, and set the stage for an effective transition to peace. Yet, in most cases, access continues to be a challenge.

10 The Convention on the Rights of the Child, 1989 is one of the international human rights treaties that explicitly includes both IHL as well as IRL.
persons who fear persecution based on their race, religion, nationality or membership to a particular social group.

The lack of established protection is the key reason for the evolution of instructions aiming at the protection for persons at serious risks because of armed conflicts. Examples in this regard are the 1969 OAU Refugee Convention and 1984 Cartagena Declaration on Refugees which have recognized that persons fleeing armed conflicts and violations of IHL are refugees. Hence, it is necessary to examine as to how far the relation between the IHL and IRL can function in different forms and at the same time be applied concurrently as persons at the same time can be refugees and civilians in an armed conflict; or the legal regimes may be applied consecutively as breaches of IHL can force people to leave their country of origin and end up as refugees in another country.\textsuperscript{11}

Armed conflicts, whether international or non-international, are the direct cause of important transfers of people. Also, it so happens in situations of internal violence that they don’t reach the threshold of an armed conflict. Under these conditions, it is essential to know the rules governing the status and treatment of refugees, IDPs and stateless persons and the interface amongst IHL, IHRL and IRL, taking into account their mutual importance as well as their applicability. IRL was developed to protect and assist the individuals crossing a border because they are victims or risk to be victims of persecutions in their home country. The Convention relating to the status of refugees, 1951 reads that a person benefits from that status if he owes

\begin{itemize}
  \item 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.\textsuperscript{12}
\end{itemize}

It is important to note that the Refugee Convention does not mention the fear of indiscriminate effects from armed conflicts or situations seriously

\textsuperscript{11} However, the author submits that all times the situations of refugees do not necessarily arise only on account of breaches of IHL. In a majority of the cases, it is noted that the oppressive and authoritarian political administrations ignoring the minority community’s aspirations in the political order of the civil society also contribute to the fleeing of people for better conditions of living.

\textsuperscript{12} Art. 1(A)(2).
disturbing public order as a reason to obtain refugee status when crossing a border.

On this point, the Refugee Convention is different from the OAU Convention on specific aspects of refugee problems in Africa or the Cartagena Declaration on Refugees (1984) applicable in Latin American countries. Various Conventions defining the term “refugee” nonetheless provide “exclusion clauses CAT, CEDAW, CRC, ICCPR, UDHR.” In a nutshell, an individual cannot be considered as a refugee if he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; or if he has committed a serious common law crime outside the country of refuge prior to his admission to that country as a refugee; or if he has been guilty of acts contrary to the purposes and principles of the UN. If IRL is not applicable to ensure the protection of these individuals, IHRL as well as IHL remains applicable.

One of the most fundamental principles governing IRL is the principle of non-refoulement which prohibits the forced return of a refugee to its originating country, where potential for persecution persists. The principle prohibits the return of an asylum-seeker to his country before his request for asylum is examined. Article 31 of the Convention also states that no penalty may be imposed on a refugee on account of his illegal entry in the host country if he comes directly from a territory where his life was threatened and if he presents himself without delay to the authorities of the host country. Non-refoulement of refugees may be considered as being embedded in international customary law on the basis of the general practice of States. At the same time, this body of rules provides refugees with elementary guarantees as regards to human rights in the country granting the asylum. Like domestic law, IHL in non-international armed conflicts and IHRL are applicable to those fleeing from one location to another inside the borders of their own country, becoming IDPs.

Persons flee their country and seek protection as refugees in order to survive in safety and dignity. The immediate objective of international protection of refugees is therefore to ensure their physical safety and security. Over the last two decades, the security of refugees has been seriously endangered through physical attacks against their persons, armed attacks on their camps and settlements, militarization of their camps and their forcible recruitment into regular or irregular forces. Guaranteeing the physical protection of refugees remains one of the most difficult protection problems for UNHCR. That this should be the case is not entirely surprising since much of these violations of the refugees’ security result from
armed conflicts which spill over into a considerable number of refugee situations. Suffice to consider problems relating to the protection of refugees in a large number of counties in Asia, the Middle East, Africa and Latin America. Many of these conflicts are non-international in character, for which reason it is timely to review and reflect on the protection of refugees in non-international armed conflicts. Some of the main issues which need to be addressed in this context include the meaning of non-international armed conflicts, the nature of asylum and refugee status and standards of treatment for refugees. Refugees are by definition civilians and benefit as a consequence from IHL norms on par with other civilians. These norms, complemented by general principles of international law, including elementary considerations of humanity prescribe humane treatment of refugees.

When examining standards of treatment of refugees, the physical security of the persons concerned remains the core issue, since as a rule, their protection situation in non-international armed conflicts is characterized precisely by a lack of security. Additional standards of treatment relating to other aspects of refugee protection as contained, for example, in the 1951 Convention relating to the Status of Refugees, its 1967 Protocol and the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa remain of course in force in countries which are parties to these instruments. Further, the non-international armed conflicts give rise to either the uprooting and external displacement of refugees who had originally found asylum in the country or the creation of cross-border movements of persons in search of protection as refugees.

IHL distinguishes different categories of armed conflict. Common Article 2 of the Geneva Conventions of 1949 defines international armed conflicts and includes all cases of declared war or any other armed conflict which may arise between two or more parties, even if the state of war is not recognized by one of them. They also include all cases of partial or total occupation of the territory of a party, even if it meets with no armed resistance. Article 1 of Additional Protocol I to the Geneva Conventions relating to the victims of international armed Conflicts adds to the category of international armed conflicts, those in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination.

Common Article 3 of the Geneva Conventions and Article IV Additional Protocol II outline the scope of minimum standards for protecting persons not taking active part in the hostilities “in the case of armed conflict not of an international character” during non-international armed
To distinguish a internal armed conflict from other severe forms of violence the ICTY set down a two-fold test for the determination of the existence of an internal armed conflict in a given State: (i) the hostilities must reach a minimum level of intensity namely there must exist a situation of "protracted armed violence", and (ii) non-governmental groups involved in the conflict must be considered as "parties to the conflict", meaning thereby that they possess organized armed forces. The Tribunal went further to determine the existence of an internal armed conflict "whenever there is ... protracted armed violence between governmental authorities and organized armed groups or between such groups within a State". Similarly, ICRC, entrusted by the States Parties to the Geneva Conventions, 1949, "to work for the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflicts and to prepare any development thereof" has given its definition of the term internal armed conflict as "Non-international armed conflicts are protracted armed confrontations occurring between governmental armed forces and the forces of one or more armed groups, or between such groups arising on the territory of a State [Party to the Geneva Conventions]. The armed confrontation must reach a minimum level of intensity and the parties involved in the conflict must show a minimum of organization". (See Prosecutor v. Kupreskic, 14 Jan 2000, para 683. See also, Prosecutor v. Akayesu, 2 September 1998, paras 461–470; Prosecutor v. Erdemovic, 7 October 1997, para. 91.)
3.1. *The Civilian Nature of Asylum and Refugee Status*

In examining the scope of standards of treatment and protection, it is necessary to clarify the nature of the grant of asylum and refugee protection and who is meant when referring to refugees. The grant of asylum is a peaceful and humanitarian act and that refugees are by definition civilians. Persons who are actively engaged as combatants in military or armed activities, while benefiting from the protection afforded this category of persons under IHL, are not refugees.

Preamble to the 1951 Convention expresses that all States, recognizing the social and humanitarian nature of the problem of refugees will do everything within their power to prevent it from becoming a cause of tension between them. Article 2 provides further that all refugees have duties to the country in which they find themselves, which require in particular that they conform to its laws and regulations, as well as to measures taken for the maintenance of public order.

In the preamble to the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, the Heads of States and governments recognized the need for an essentially humanitarian approach towards solving the problems of refugees. Being aware that refugee problems may be a source of friction among OAU member States, and desirous of eliminating the source of such discord, they expressed their wish 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 from outside. They also expressed their determination that the activities of such subversive elements should be discouraged. Article II (2) of the OAU Convention confirms that the grant of asylum to refugees is a peaceful and humanitarian act, and shall not be regarded as an unfriendly act by any member State. Article III contains specific regulations on the prohibition of subversive activities. Paragraph 1 of this Article contains the same

Ironically, at the international plane entities or authorities meant to determine the existence of an armed conflict are not just one and consequently the purposes for such determinations greatly vary. For example, the Security Council under the UN Charter is vested with the mandate to determine whether a situation is a threat to international peace and security and in such cases whether to bring Chapter VII and its mechanisms into force. Similarly, parties to a conflict can also assess the situation they find themselves in. Hence, the author submits that National or international courts may be required to determine the existence of an armed conflict in situations when they are required to assess whether the individuals alleged for the commission of mass atrocities and crimes that can only be committed during an armed conflict. Furthermore, it is the submission of the author that ICRC is another entity which is capable of determining the existence of an armed conflict as it is important for the applicability of international humanitarian law as well as for its activities.
general obligation as Article 2 of the 1951 Convention, but adds the important proviso that refugees shall also abstain from any subversive activities against any OAU member State. Paragraph 2 further declares that signatory States undertake to prohibit refugees residing in their respective territories from attacking any OAU member State, by any means likely to cause tension between member States, and in particular by use of arms, through the press and radio.

A large number of Latin American treaties relating to diplomatic and territorial asylum contain similar provisions. The 1967 UN Declaration on Territorial Asylum recognizes that the grant of asylum by a State to persons entitled to invoke Article 14 of the Universal Declaration of Human Rights (UDHR) is a peaceful and humanitarian act. Article 4 of this Declaration contains the additional and important proviso that States granting asylum shall not permit persons who have received asylum to engage in activities contrary to the UN purposes and principles. One such purpose is of course the maintenance of world peace, whereas the non-use of force and non-intervention figure prominently among the fundamental principles of the UN Charter. Similarly supportive language can also be found in the UN Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter 1970. Recourse may also be had to a number of statements of inter- and non-governmental meetings.\textsuperscript{14} Thus, it may be concluded that the grant of asylum to refugees as a peaceful and humanitarian act, which shall not be regarded as an unfriendly act by any State, constitutes a fundamental concept in international law. Inherent in this concept, is the general obligation of States to take all possible action to ensure that refugee camps and settlements remain civilian and humanitarian and, of course, refugees are, by definition, civilians and not combatants.

3.2. Standards of Treatment and Protection

Contrary to the IHL instruments relating to international armed conflicts, neither common Article 3, nor Additional Protocol II, contain any

\textsuperscript{14} Executive Committee Conclusion No. 22 (XXXII), 1981 on the protection of asylum-seekers in situations of large-scale influx provides, for example, that asylum-seekers should not become involved in subversive activities against their country of origin or any other State. Executive Committee Conclusion No. 48 (XXXVIII), 1987 on Military or Armed Attacks on Refugee Camps and Settlement states that (i) refugee camps and settlements have an exclusively civilian and humanitarian character; and, (ii) refugees have duties to abstain from any activity likely to detract from the exclusively civilian and humanitarian character of the camps and settlements.
provisions referring specifically to refugees. Refugees may nevertheless be considered as persons being protected by these texts since as civilians “they are taking no active part in the hostilities” (common Article 3) or “they are persons who do not take a direct part or who have ceased to take part in hostilities” (Additional Protocol II, Article 4). Generally speaking, these two articles state that civilians shall in all circumstances be treated humanely, without any adverse distinction. Both Articles prohibit explicitly a number of acts against the persons which include (i) violence to the life and person, in particular murder and cruel treatment such as torture and mutilation; (ii) taking of hostages; and (iii) outrages upon personal dignity, in particular humiliating and degrading treatment.

On the whole, however, beyond prescribing humane treatment relatively little else can be extracted from these provisions in relation to the protection of refugees in non-international armed conflicts, although it should be noted that Additional Protocol II contains further provisions for the treatment of wounded, sick and shipwrecked and the civilian population. These basic rights, which are enjoyed by all persons including refugees, may not be suspended even in exceptional circumstances. These non-derogatory rights include the right to protection against arbitrary deprivation of life, and against torture or cruel and inhuman treatment and punishment, the right not to be subjected to slavery and servitude or to retroactive penalties, the right to recognition as a person before the law and to freedom of thought, conscience and religion as well as the right to protection against discrimination.

It is consistent with these basic rights to consider that refugees in non-international armed conflicts must be protected from non-refoulement and continue to be provided at least with temporary refuge. Although neither the 1951 Convention nor the 1969 OAU Convention contain any provision which explicitly provides a right to be granted asylum or refuge, both contain similarly worded non-refoulement provisions which prohibit return to a situation where the refugees’ life or freedom would be threatened on the grounds which gave rise to recognition as refugees. The OAU Convention includes non-rejection at the frontier in the protection from refoulement. These provisions have been reinforced through both the practice of States as well as their pronunciations in international fora.\footnote{Executive Committee Conclusion No. 22 (XXXII), 1981 on “Protection of asylum-seekers in situations of large-scale influx” provides that asylum-seekers should not become involved in subversive activities against their country of origin or any other State. Executive Committee Conclusion No. 48 (XXXVIII), 1987 on “Military or Armed Attacks on Refugee Camps and Settlement” states that (i) refugee camps and settlements have an exclusively...}
Apart from receiving humane treatment, including being protected from *refoulement*, what other standards of treatment may be identified for the protection of refugees in non-international armed conflicts remains to be an important issue in the light of the situations involving attacks on refugee camps and settlements.\textsuperscript{16} There is, however, a marked increase in instances involving the recruitment of refugees into belligerent forces. Such recruitment occurs in several refugee situations and involves many thousands of refugees. Of course, recruitment into armed groups constitutes an unacceptable practice from a refugee protection perspective. It puts the life and integrity of refugees at risk and is contrary to the accepted notion that refugees are civilians and their camps and settlements have a strictly civilian and humanitarian nature. Article 4 (3)(c) of Additional Protocol II provides that children under the age of fifteen years shall neither be recruited in the armed forces or groups nor be allowed to take part in hostilities. No such protection is, however, foreseen for persons above the age of fifteen, leaving a gap in the legal framework for the protection of refugees in situations of non-international armed conflicts.

In more than one situation involving refugees in non-international armed conflicts, in addition to recruiting refugees, warring parties have pillaged camps and settlements, emptying them of essential relief items. Again some provisions of Additional Protocol II are directly relevant. Thus, for example, article 14 states that the starvation of civilians as a method of combat is prohibited. It is therefore prohibited to attack, destroy, remove or render useless, for that purpose, objects indispensable to the survival of the civilian population. On the other, if committed simply to feed the belligerent forces but not to starve the civilian population, no prohibition would appear to apply, save what is inherent in the right to humane treatment.

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\textsuperscript{16} Executive Committee Conclusion No. 94 (LIII), 2002 on "Military or Armed Attacks on Refugee Camps and Settlements" (i) condemns all violations of the rights and safety of refugees and asylum-seekers and in particular military or armed attacks on refugee camps and settlements; (ii) urges States to abstain from these violations which are against the principles of international law and, therefore, cannot be justified; (iii) further urges States and other parties to ensure that the civilian and humanitarian character of refugee camps and settlements be maintained. Hence, the author submits that, inherent in this conclusion is the need for all parties to respect the civilian status of refugees.
In conclusion it may be stated that refugees in non-international armed conflicts have a right to humane treatment which includes benefiting from basic human rights, including protection from refoulement. Thus, for example, the civilian status of refugees must be respected and they should not be subjected to recruitment in armed groups. Similarly, the civilian and humanitarian nature of their camps and settlements must be respected and relief supplies should not be diverted for use by combatants. This is all the more important in order to permit UNHCR to continue its activities on behalf of refugees in a humanitarian, non-political and neutral manner. Finally, the treatment of refugees affected by violence which is not of an intensity as to qualify as armed conflicts need to be considered. Elementary considerations of humanity dictate humane treatment also for these persons which includes respect for their fundamental human rights. This is consistent with the statement contained in the preamble of Additional Protocol II in which the High Contracting Parties recalled that “in cases not covered by the law in force, the person remains under the protection of the principles of humanity and the dictates of the public conscience”\textsuperscript{17}

Restoring the rule of law, which often breaks down in war situations – especially in protracted conflicts – is considered vital to a return to a situation of sustainable peace, based on the assured protection of civilians and the return of civil order. Situations of armed violence frequently generate the most appalling of crimes, including massacres, summary executions, death by starvation or disease, torture or ill treatment, as well as forced displacement or recruitment to arms, sexual abuse and violence, violations of rights to health, liberty and education etc., For the regular rule of law to really take hold during a transition from armed conflict, humanitarian workers stress, one of the first priorities has to be a comprehensive program of disarmament, demobilization and reintegration (DDR) of former combatants. This will also involve long term investment in education, training, family and community support. But, more closely connected to IHL, such a transition also involves justice, reconciliation and accountability for war crimes. In addition, the author also submits that an effective system of deterrence shall be established so as to ensure that the impunity with which armed actors violate IHL comes to an end.

4. Role of the UN Security Council in Safeguarding the Refugees

4.1. Strengthening of International Political Action on Protection

The UN Security Council has increased its commitment to the protection of civilians in armed conflict in recent years. Many peace operation mandates now include protection as a mandated task. While the thematic Security Council resolutions on protection issues, such as Resolutions 1674 (2006) and 1894 (2009) on the protection of civilians in armed conflict, or UNSCR 1325 (2000) on women, peace and security, continue to develop the international normative framework, the Council should act quickly and concertedly to prevent and respond to protection crises, hold governments to account and where necessary considering sanctions as well as referrals to the ICC.

The UN human rights fora, including the General Assembly and the Human Rights Council and their mechanisms (such as Special Rapporteurs), have long considered the protection of civilians in the context of human rights violations. It is important that these bodies continue to monitor such situations credibly, including holding governments to account for violations of their international obligations. The UN Secretariat also needs to be able to respond in a political capacity to protection crises, primarily through its Department of Political Affairs (DPA). However, resource constraints within DPA limit its capacity to carry out the necessary political analysis and action. A better understanding is needed of the political factors that drive conflict and give rise to the need for protection.

4.2. Strengthening International, Regional, and National Human Rights and Humanitarian Law Monitoring

Effective and independent monitoring and reporting of compliance with human rights and IHL in situations of conflict is critical to raise the awareness of protection issues, and provide the necessary evidence-base for political and legal action. The Office of High Commissioner for Human rights is well placed to monitor human rights obligations and ICRC has a mandate to monitor compliance with IHL. However, it is apt to note that when abuses take place, the independent monitoring of human rights and IHL violations is not always possible, often because of political obstacles. When monitoring occurs, information is generally not transmitted and shared adequately with and within the UN. Regional and national mechanisms are in some cases best placed to monitor and act due to their
regional connections and influences. The incorporation of human right standards within peace agreements and the ability to monitor those, including through national human rights mechanisms is essential, not only for the immediate crisis, but also in the longer term establishment of a peaceful resolution.

4.3. Supporting International, National and Community Efforts for Transitional Justice

When protection fails and civilians become victims of war crimes or human rights violations, there need to be mechanisms and processes to combat impunity and to allow victims and survivors to seek justice and redress. Hence, the author submits that a comprehensive approach to transitional justice is needed. Religion, ethnicity and the overall demands of the community should be considered when defining the strategies to be used. Wherever possible, domestic courts should be encouraged to try defendants locally. This often enjoys particular advantages of local legitimacy and visibility. International prosecution may sometimes be necessary particularly when the state lacks the stability or institutional set-up to try the perpetrators domestically. Other mechanisms in this regard would be truth seeking mechanisms, reparations for victims which offer symbolic or practical redress and recognition, as well as ensuring that state institutions are cleared of persons found guilty of conduct violating human rights (i.e. vetting processes and institutional reform). Transitional justice measures also need to be properly sequenced as part of broader peace building strategies and wider efforts to strengthen the rule of law, including building local security capacity, strengthening accountability and oversight structures and access to justice.18

4.4. Strengthening International Justice Mechanisms

An essential part of protecting civilians in armed conflict is to ensure that there is no impunity for those who commit serious crimes during armed conflict, and that perpetrators are held to account at both domestic and international levels where necessary. The importance of deterrence, with the ultimate threat of prosecution at the ICC, is playing an increasingly

important part in affecting the actions of leaders in armed conflict. The international community needs to ensure that, where serious violations of IHL and IHRL occur, those who bear the greatest responsibility for international crimes, including war crimes and crimes against humanity are prosecuted. Hence, ensuring justice for such crimes is an integral part of post-conflict reconstruction and reconciliation.

Protection by Peace Support Operations

Area 1: Improved Action by International and Regional Peace Operations in Protection Crises

(i) Better and more consistent language on protection in peace support operation mandates

While most of the UN Security Council peace support operation mandates include the protection of civilians as a mandated task comprehensive protection language in Council mandates are necessary for a more systematic approach. Agreement to strong and specific language on protection is often difficult due to the divergent views of Council members on needs and approach.

(ii) Better reporting on protection issues by peace operations

The Security Council receives regular reports from the Secretary-General on the progress of mandate implementation – normally on a six monthly basis and just before a mandate renewal. However, the coverage of protection issues in these reports is inconsistent. An improved coverage of protection in the Secretary-General’s reporting is important, as is the better coverage of protection in oral reporting to the Council. More input and a greater focus on protection in Council discussions would mean the Council is better informed when it considers the renewal of a mandate.

(iii) Better execution of protection tasks within a peace operation

The execution of protection tasks within a peace operation varies widely depending on the resources available, the approach of the mission leadership – including military commanders, and the capability, ethos and training of troops and police contributing countries. None of the major international or regional organizations running peace operations has a fully formed doctrine on the execution of protection tasks. At a very practical level, it is not always clear to troops and police what is expected of them. The development of guidance and military/police doctrine, within both the UN and regional organizations, and where necessary at a national level, is important. Troop and police contributing countries may
not have the necessary capability (numbers, training or equipment), or the political will to provide physical security to civilians as mandated. Peace operations need to make better use of local peace building capacity to complement their own efforts. The planning of peace operations should include analyses of local capacity, and making and retaining effective contact with local peace building organizations should be standard within peace operations.

(iv) More capable troops and police contributing nations on protection issues
The training of troops and police to serve in peace operations is a crucial factor in their ability to carry out mandated protection tasks. This issue is relevant for all the contributing nations.

**Area 2: Humanitarian action and improved international humanitarian response to protection crises**

(i) Improving humanitarian access
Parties to armed conflict must take all required measures to respect and protect civilians. States bear the primary responsibility to respect and ensure the human rights of their citizens and other persons within their territory. When states and other parties lack the capacity or will to respect their obligations, humanitarian organizations have an important role to play. Parties to conflict need to agree to and facilitate neutral, impartial and independent humanitarian aid reaching populations in a safe, timely and unimpeded way. Unfortunately, in many conflict affected countries humanitarian access is increasingly unsafe, delayed and otherwise restricted, leaving millions of vulnerable people deprived of life-saving protection and assistance.

(ii) Strengthening the work of humanitarian agencies with an international protection mandate
International humanitarian agencies, such as ICRC, UNHCR and UNICEF, have mandates under international law to carry out protection activities in times of crises. The UN Emergency Relief Co-ordinator (Head of OCHA) has a mandated responsibility to advocate for international humanitarian and human rights law and principles, and to support a more coordinated response by humanitarian actors to protection crises.

(iii) Strengthening the leadership and coordination of humanitarian protection
As part of the reform of the international humanitarian system, a new humanitarian coordination mechanism, the “cluster approach”, was
established. One of the eleven clusters is the Protection Cluster set-up in 2005 under the leadership of UNHCR. At the global level, the Protection Cluster aims to strengthen the capacity of humanitarian agencies to respond effectively to protection crises, e.g. by providing tools, training and overseeing professional roster mechanisms. At the field level, the Protection Cluster is responsible for assessing protection needs and ensuring an effective response by humanitarian actors. It also supports advocacy efforts by the UN Humanitarian Coordinator on issues relating to the protection of civilians. While some positive outcomes have been noted in pilot countries, leadership and coordination, as well as NGO participation, should be further strengthened. The cluster needs to become the standard coordination mechanism for humanitarian protection work.

(iv) Strengthening the work of humanitarian agencies that do not have an express protection mandate
In recent years, humanitarian agencies that do not have an express protection mandate, such as the World Food Programme and a number of humanitarian NGOs, have been increasingly aware that they have an important role to play, alongside mandated agencies, in enhancing the protection of the people they assist. Protection is therefore an emerging area of work for many such humanitarian organizations, with varying levels of capacity, knowledge, skills and professional practice.

Area 3: Building the Capacity of States to Protect Civilian Populations

(i) Strengthening security and justice services
In accordance with international law, States are responsible for protecting their citizens from abuses. However, in some circumstances States may not have the capacity to adequately protect their civilians. Protection requires legitimate, accountable and capable national security and justice institutions (military, police, prisons, courts) that provide equitable and effective security and justice services in accordance with the rule of law. They need to be responsive to citizens’ needs; be able to understand and meet domestic and IHRL and IHL obligations; and be particularly responsive to gender-based and sexual violence as women and children are disproportionately affected in conflict and post-conflict situations.19

(ii) Strengthening national capacities for human rights monitoring
National actors, particularly NGOs, community groups, lawyers associations, national human rights institutions – all have a key role to play in monitoring human rights in times of conflict, because of their knowledge and capacity on the ground. But the will and capacity of a national
government to support human rights monitoring varies greatly from country to country. Independent human rights actors often face considerable challenges to carry out their work, including threats to their own protection. International support can play a key role in helping prevent and address human rights violations in situations of conflict.

5. Relevant Principles of International Humanitarian Law for Refugee Protection

Refugees are protected by the principles and provisions of IHL applying to the protection of civilians or civilian population in armed conflict and in peace time by the more stringent provisions of international law applicable generally to the protection of individual human rights. Hence, the following is a brief outline of the humanitarian principles and legal provisions relevant to the protection of refugees against armed attacks.

5.1. Prohibition of Attacks against Civilian Population in Armed Conflict Situations

The principles for observance by all governmental and other authorities responsible for action in armed conflicts20 are (a) right of the parties to a conflict to adopt means of injuring the enemy is not unlimited; (b) it is prohibited to launch attacks against the civilian populations as such; and, importantly, (c) distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible. These principles reflect the laws of humanity and the dictates of public conscience as expressed in such instruments as the 1907 Hague regulations and 1949 Geneva Conventions; UN General Assembly in resolution 2444 (XXIII) of 19 December 1968; UN Conference on Human Rights resolution XXIII of 12 May 1968;21 UN General Assembly resolution 2675 (XXV)

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19 The 2009 DFID White Paper ‘Eliminating World Poverty: Building Our Common Future’ sets out an ambitious agenda for delivering security and justice as a basic service. (Cm 6576, Chapter IV. P 74, presented to UK Parliament by the Secretary of State for International Development, July 2009).

20 The twentieth International Conference of the Red Cross held at Vienna in 1965 laid down in a declaratory form (Resolution XXVIII).

21 It observed that armed conflicts continued to plague humanity; considered that the widespread violence and brutality of the times, including massacres, summary executions, tortures, inhuman treatment of prisoners, killing of civilians in armed conflicts eroded human rights and engendered counter-brutality, expressed the conviction that even
of 9 December 1970;22 1974 UN General Assembly Declaration concerning the Protection of Women and Children in Emergency and Armed Conflict (UNGA Resolution 338 (XXIX));23 resolution 32/44 of 8 December 1977.24

In the two Protocols additional to the 1949 Geneva Conventions, provisions are found for the protection of the civilian population against armed attacks. Many of these provisions reflect generally recognized principles and rules of IHL applicable to armed conflict, in particular the provisions of the Fourth Geneva Convention relative to the protection of civilian persons.

The basic rule stated in Article 48 of Protocol I is that in order to ensure respect for and protection of the civilian population and civilian objects, the parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct these operations only against military objectives. It is further stated in Article 51 that the civilian population and individual civilians shall enjoy general protection against danger arising from military operations; the civilian population as such, as well as...
individual civilians, shall not be the object of attacks; attacks or threats of violence the primary purpose of which is to spread terror among the civilian populations are prohibited; and attacks against the civilian populations or civilians by way of reprisal are also prohibited. In Article 57, it is stated that in the conduct of military operations, constant care shall be taken to spare the civilian populations, civilians and civilian objects; and certain precautionary measures governing the conduct of military operations are prescribed by that article.

The basic rules of protection of the civilian population are found also in Protocol II, where it is stated, in Article 13, that the civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations; that the civilian populations as such, as well as individual civilians, shall not be the object of attacks; and that acts or threats of violence the primary purpose of which is to spread terror among the civilian populations are prohibited.

Certain rules governing the conduct of military operations have also been enunciated in regard to attacks against groups or populations who may not be wholly civilian in character. In Protocol I, it is stated that the presence within the civilian population of individuals who do not come within the definition of civilian does not deprive the population of its civilian character (Article 50:3). Indiscriminate attacks are prohibited (Article 51:4). Accordingly, indiscriminate attacks are those which (a) are not directed at a specific military objective; (b) employ a method or means of combat which cannot be directed at a specific military objective; or, (c) employ a method as means of combat the effects of which cannot be limited as required by the Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

Among others, attacks considered as indiscriminate according to the rule of Article 51 are: (a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other areas containing a similar concentration of civilians or civilian objects; (b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated. Article 85 of Protocol I on repression of breaches of this Protocol states, inter alia, that making the civilian population or individual civilians the object of attack shall be regarded as grave breach of Protocol I.
6. RELATIONSHIP BETWEEN ‘VICTIMS OF ARMED CONFLICTS’ AND ‘REFUGEES’ AND EXTENSION OF PROTECTIONS FROM CIVILIANS UNDER IHL TO REFUGEES

Refugees are persons who have fled away from their countries unlike IDPs who still remain on their national territories. At the international plane, refugees enjoy first and foremost the protection afforded to them by refugee law and the mandate of UNHCR. If they are in a state involved in an armed conflict, refugees are also protected by the norms and provisions of IHL. Apart from the general protection afforded by IHL to civilians, refugees also receive special protection under the Fourth Geneva Convention and Additional Protocol I. This additional protection recognizes the vulnerability of refugees as aliens in the hands of a party to the conflict and the absence of protection by their State of nationality.

The general rules of humanitarian law for the protection of civilians, if respected, can prevent displacement. If not, they can offer protection during displacement. Following provisions deserve a special mention in this regard namely (a) attacks on civilians and civilian objects or the conduct of hostilities in an indiscriminate manner; (b) starvation of the civilian population and the destruction of objects indispensable to its survival; (c) collective punishments which often take the form of destruction of dwellings. Further, there are also rules requiring parties to a conflict to allow relief consignments to reach civilian populations in need.

Two situations may arise wherein the first one consists of refugees who as a result of a non-international armed conflict in the country of asylum find themselves forced to cross into a neighboring country in order to preserve their safety. In such a case, Executive Committee Conclusion No. 15 (XXX) on refugees without an asylum country is of particular relevance.25 The second type of situation concerns persons who leave their country of origin as a result of their physical safety or freedom being threatened by a non-international armed conflict and seek asylum and recognition and protection as refugees in another country.

While there is a case to be made for considering more persons who have fled, for example, on account of non-international armed conflicts as refugees, that is not to say that they all can be considered as meeting the

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25 In this conclusion, the Committee recommends that “where a refugee who has already been granted asylum in one country requests asylum in another country on the ground that he has compelling reasons for leaving his present asylum country ... because his physical safety or freedom are endangered, the authorities of the second country should give favourable consideration to his asylum-request.”
criteria of the refugee definition contained in the Refugee Convention. At the same time, however, there is a growing recognition that whatever their status, also other persons fleeing the effects of non-international armed conflicts deserve protection as refugees. Explicit recognition thereof is reflected in the 1969 OAU Convention which considers as refugees also other persons who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order ... are compelled to leave their place of habitual residence and seek refuge in another place outside their country of origin. A similarly worded recommendation is included in the Cartagena Declaration on Refugees; and in the Executive Committee Conclusion No. 22 (XXXII) on the Protection of Asylum-Seekers in Situations of Large Scale Influx. Thus, both categories of persons displaced by non-international armed conflicts are entitled, as a minimum, to the same humane treatment as refugees who find themselves in such conflicts.

7. Conclusion

Refugees are civilians and non-combatants and benefit therefore from the protection of civilians provided for under both common Article 3 and Additional Protocol II. These instruments, as well as general principles of international law, including elementary considerations of humanity, prescribe humane treatment. Although not explicitly provided for, such humane treatment should include continuing to provide at least temporary refuge as well as respect for the principle of non-refoulement and fundamental human rights. Refugees should also be protected from recruitment into armed groups and the civilian and humanitarian nature of their camps and settlements located in areas of non-international armed conflicts should always be respected. The foregoing basic standards of treatment should apply not only to the protection of refugees in situations of non-international armed conflicts but also to those who find themselves in areas of internal disturbances and tensions. The request

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26 Executive Committee Conclusion No. 22 (XXXII), 1981 on the “Protection of Asylum-Seekers in Situations of Large Scale Influx” recommends minimum standards of treatment of asylum-seekers which can be presumed to include persons seeking protection as refugees from the consequences of non-international armed conflicts. In particular, this conclusion recommends that in situations of large-scale influx, the persons concerned should be admitted to the State in which they first seek refuge, as a minimum on a temporary basis, and that they be protected from refoulement.
for asylum in a second country of refugees whose physical security or freedom are threatened by non-international armed conflicts and who as a result seek protection in a neighboring country should be given favorable consideration by that country; and finally, these persons, as well as those fleeing non-international armed conflicts because of a threat to their physical security or freedom, should also benefit from humane treatment.

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Working Papers


PROTECTION AND INTERNATIONAL COOPERATION
IN THE INTERNATIONAL REFUGEE REGIME

Natalia Szablewska and Saiful Karim*

1. INTRODUCTION

Viewing the legal framework for the contemporary international protection, one needs to consider the broader global context from which the refugee protection regime has emerged—in particular, a historical milieu that has aided the comprehension of modern discourses and debates on the feasibility and sustainability of current refugee policies at international, regional and national levels.

Since its conceptualisation, the international refugee protection framework has presented dilemmas such as balancing the discretionary nature of granting asylum from persecution with international commitments to human rights and obligations of non-refoulement, as well as non-discrimination. This poses problems as technical as they are practical. Consequently, states worldwide often fall short in fulfilling their obligations of protecting asylum seekers and refugees who seek safety in their territories.

The subject matter can be considered from different perspectives, including that of the individual, society, the state, and a multiplicity of international bodies and organisations. It is, therefore, difficult to talk about one accepted mechanism for protecting refugees or one model for preventing abuses against refugees or how to achieve consistent application of international protection standards. Nor indeed is it possible to state decisively what international cooperation currently entails in this context. As other chapters of this book look into the complex issues at a more detailed level, it is sufficient to state here that in order to comprehend what the protection of refugees involves, it is necessary to realise that refugee law falls under the wider banner of contemporary

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international protection - where different strands of various international obligations relating to the international protection of individuals and groups come together. Along with the traditionally understood protection of refugees deriving from the 1951 Convention relating to the Status of Refugees\(^1\) (hereinafter the 1951 Convention) and its Protocol of 1967,\(^2\) there is also international protection of those whose human rights are threatened but who do not meet the criteria of the international refugee regime set by the 1951 Convention. Additionally, there is the matter of human trafficking which, even though most trafficked people would not necessarily qualify as refugees, constitutes part of the wider complementary protection. Refugees and their protection come to play an important role in discussing the wider notion of civilian protection offered in and during armed conflicts, in terms of the rights of refugees during acute crises as well as exclusions under the 1951 Convention - relating to asylum seekers who are alleged to have committed war crimes or crimes against humanity. Moreover, something that has received a relatively large amount of attention lately is the issue of climate change migrants, and how the international protection regime could, and should, be extended to apply to this group. Furthermore, there are variations between universal and regional laws and practices. Quite often the legal norms developed at the regional level differ significantly from one another and from those at the global level. This demonstrates how the matter of refugees and their protection is a complex subject, requiring a multi-layered approach.

One approach which might prove helpful in understanding the controversies relating to laws and policies on refugees and asylum seekers, in particular in relation to the scales and levels of protection that should be offered to refugees, is the general knowledge and understanding of population movements. It might be well placed to lay blame on states (and governments) - especially in the Western World - for not engaging sufficiently in protecting refugees and providing help to those tens of thousands of people forced to flee their homes due to armed conflicts, serious human rights violations or natural disasters. However, this subject matter is highly politicised and therefore reflective of the wider public debates, which are often misguided and ill-informed but, nevertheless, highly influential on refugee protection strategies, policies and laws. There seems to be not

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\(^1\) Convention relating to the Status of Refugees, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954).

enough open discussions and debates as to the nature, causes and consequences of population movements; that is, the reasons why people migrate and the effect it has locally, globally, as well as at the individual and family level.

Against this backdrop, this chapter presents an overview of the international legal framework for the protection and international cooperation in the international refugee regime. Part 2 of this chapter provides a brief introduction to refugee protection in the wider context of migration studies. Part 3 presents causes leading up to the introduction of the international system of refugee protection. Part 4 examines the issue of protection itself. Part 5 elaborates on the historical evolution of the international protection of refugees. Part 6 discusses the issue of institutional developments. Part 7 presents an overview of international cooperation and, finally, part 8 presents a case study on the need for cooperation in the protection of refugees at sea. It is not possible to provide a detailed overview of the entirety of international law on protection and international cooperation pertaining to refugees in a single book chapter; therefore this chapter presents a general overview of this issue, highlighting its complexity and presenting the challenges facing the global system.

2. Placing Refugee Protection in the Wider Context of Migration Studies

People have migrated from the time the first people populated the earth, which, as Demuth puts it, makes migration ‘as old as mankind’.3 When the first civilizations began developing trade networks, products, knowledge and ideas started migrating across different locations and continents. Migration has allowed for the transmission of people and cultures, and has been one of the greatest causes for human development and human integration worldwide. Migration has been a fundamental human experience worldwide throughout time and the most important aspect of human population history. But there is also a darker side to migration: the great discoveries and explorations of the fifteenth century have led to exploitative colonisation, slavery, the spread of diseases and contributed to the

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proliferation of racism and xenophobic reactions often leading to internal conflicts and regional problems.

To understand the complex patterns and mechanisms triggered by migration, it is important to ask: why do people migrate?; why do some people move when some others decide to stay?; what are the consequences for those who migrate, for the resident population and host societies? There is no single theory of migration that can explain all of the reasons and causes for migration, as these factors can and do change. Change is, therefore, an important aspect of studying the phenomenon of migration. The patterns of, as well as the causes for, migration tend to evolve over time. Looking at it from a historical and geographic perspective, the European experience of migration in the early nineteenth century differed but remained closely related to that of North America and the rest of the New World. These experiences were very different from those experienced today, which include, but are not limited to, seeking the fulfillment of freedoms (e.g. political, religious or of expression) or fleeing natural disasters (e.g. earthquakes, volcanic eruptions, hurricanes) or the consequences of global climate change. Migration needs to be understood as a social process and has, therefore, often been perceived as gendered.

Some recent studies point out that migration affects women and men differently, with some emphasising that migration has been fundamental in women’s emancipation, increasing their participation in civil society as a result of their movement from rural to urban areas and the provision of better access to education, health care and resources. Over the centuries, migration has impacted on ideas of class and gender, and has brought cultural transformations. However, regardless of whether internal migration or external emigration is taking place, the insider/outsider dichotomy

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continues to play an important role in understanding social exclusion, racism and ethnic violence. Examined by migration studies (which investigate the changing nature of migration), these aspects are all important to the discussions and analyses of current refugee policies at the national, regional and international levels. It is essential to attribute and appreciate the problems, obstacles and fears involved in migration movements if we are to understand the development of policy and law in this area. Migration - whether voluntary or forced - continues to present a major challenge to societies worldwide, where the debates on refugees and asylum seekers are highly politicised and contested, causing major public controversies. The processes of globalisation and changes to state policies on employment and welfare have also had a significant effect on migration and in particular on refugee protection strategies. Migration encompasses many typologies and can be regarded among others as internal, international, trans-border, regular, irregular, voluntary or involuntary; it bears, therefore, a distinction into the root causes and consequences, and the legal differences it makes. Law often plays a decisive role in determining someone’s future life and resettlement options but it also is a reflection of the public debates on migration strategies.

3. Introduction of the International System of Refugee Protection

Migratory processes never have a single cause, or only and simply to fulfil a desire for discovery, exploration, economic advancement or human curiosity. People escaping poverty, starvation, religious confines, political persecution or armed conflicts are especially vulnerable to the results of being forced to migrate. This is the group that has a more pressing need to move from their country of origin, or habitual residence, due to the complex situations they find themselves in. These are the instances where international protection is needed most as such individuals are in need of assistance but can no longer rely on the protection of their own states.

It is important to note that migration studies are helpful in understanding the wider context and controversies relating to refugees and asylum seekers. However, migration control and refugee protection should not be treated as the same. The main and most important difference between them is that refugees have lost the protection of their country of origin whereas migrants have not. This is an important distinction to make. On the one hand there is an issue of discretionary control of the influx of
migrants exercised by states, while on the other is the fulfilment of international obligations relating to offering protection to those who can no longer enjoy the protection of their country of origin. This distinction, even though straightforward, nonetheless causes perplexity and often practical difficulties. In practice, it is often difficult to distinguish and differentiate between economic migrant workers and asylum seekers. No doubt, for reasons briefly mentioned earlier, migration law has a bearing on the development of refugee law, and the converse is also true. Nevertheless, there are different problems that these two fields have to deal with. The issues of national sovereignty and migration control are contentious and the impact states' international obligations have on them has been mixed but influential for national and international migration policies and refugee strategies. This complex web of dependencies and influences requires a high degree of cooperation between states, international organisations and relevant agencies. As a consequence, international refugee law has become a complex and constantly evolving field.

From a historical perspective the international system of refugee protection can be divided into three distinct periods, as has often been verbalised in the wider literature on the subject matter: phase one, up until the Second World War, which was characterised by collective recognition of refugees; phase two, shortly after the Second World War, could be seen as a transitional period leading to phase three; that is, individual recognition with the entry into force of the 1951 Convention and its Protocol of 1967 and the establishment of the United Nations High Commission for Refugees (UNHCR). In the last few years further developments have taken place within and outside international refugee law. More emphasis these days has been put on placing refugee protection under general international protection, especially international human rights law, which is often considered as part of 'contemporary protection', which is termed in the European Union (EU) as 'subsidiary protection' following the 2004 Qualification Directive. These changes have provided new avenues for adding yet another layer of interpretation in contemporary refugee law including international obligations on states to provide protection to those whose human rights are threatened but who do not meet the criteria set by the 1951 Convention regime.

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4. Protection

To understand both the origin and current state of international protection of refugees and its origin, it is necessary to understand the wider context in which it is placed. Under international law, states continue to maintain sovereignty over the control and regulation of entry, residence and exit (including expulsion) of aliens from their territories. It provides states with discretion in deciding who should be allowed in to reside within their borders and under what conditions. The right of entry for an alien is limited and regulated by national considerations. However, the right of states to regulate the entry, stay and exit of aliens is not completely boundless either. There are certain limitations on the scope of discretion exercised by states placed by the international legal system, including human rights law and international refugee law. However, regarding the latter, the protection is conditional on the person in question being able to secure the status of a refugee by meeting the relevant criteria in the first place.

In order to address the last point there is one other distinction which needs to be made, that is the highly related, but nevertheless distinct, notions of an asylum seeker and a refugee. Art. 14(1) of the UN Declaration of Human Rights (UNDHR) recognises the right to ‘seek and to enjoy in other countries asylum from persecution’. Thus, firstly, the right of an individual to asylum is limited to situations where they require asylum (protection) due to persecution; and secondly, the UNDHR is a non-legally binding document, thus it requires further clarification of whether the right to seek and enjoy asylum under the UNDHR is indeed a binding norm under customary international law. This still limits, however, the availability of states to offer asylum entirely discretionally in accordance with their own national rules and policies (i.e., so long as the condition of a fear of persecution is present). Thus the legal definition of an asylum seeker is much wider in scope than that of a refugee. Offering
asylum substitutes national protection in cases when the state of origin fails to protect the human rights of their own citizens. When these asylum seekers are granted refugee status by the receiving state—that is, when the state fairly and effectively determines their refugee status as falling under the 1951 Convention—their protection becomes part of the obligatory system of international refugee protection.

However, some people may not be eligible for refugee protection but nevertheless they may be in need of international protection. This often leads to protection gaps as those not qualifying for refugee status may only rely on discretional protection offered by the international community. One group especially vulnerable to such a gap are internally displaced persons (IDPs) who do not satisfy a specific condition; i.e., they have not crossed international borders. The increase in the number of IDPs in the 1990s has highlighted the embedded limitations and inadequacy of the international protection system to the current times. The main difficulty here is that there is no international treaty that would explicitly protect IDPs. The 1998 Guiding Principles on Internal Displacement,11 which even though based on binding international human rights and international humanitarian law instruments, do not establish international obligations which would be equivalent to the 1951 Convention regime.

One other point which needs to be made is that even though the 1951 Convention does not require State Parties to consider an application for a refugee status explicitly, it nevertheless does so implicitly by requiring them to offer the individual protection under the Convention regardless of whether it is confirmed in law or not (see for example Art. 7, 13 or 33). It requires the asylum country to consider the application in question and identify whether the applicant falls under the category of a refugee defined by the Convention.12 It does not change the fact, however, that the Convention lacks such obligation even if states tend to adopt this widely accepted standard. For this reason the development of the principle of non-refoulement (prohibition to return) has been critical. Art. 33(1) states that no State Party shall expel (return, deport, extradite or transfer) a refugee to 'territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social

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group'. Therefore, on one hand an individual has a right to apply for asylum (but there is no right to be granted it), on the other, however, the State Parties have an obligation to provide a minimum standard of protection and refrain from refoulement if that person is at risk of persecution if returned to his or her country of origin or nationality (or any other transit country for that matter). The narrow reading of Art. 33 rests on the need for the person either to already be granted refugee status or be in the process of applying for it, with an exclusion clause relating to those who pose a threat to national security (para 2).

However, the principle of non-refoulement has now become part of customary international law, and even possibly part of *jus cogens* of general international law, hence applicable to state and non-state parties alike. It is an integral element of international human rights discourse, enshrined in numerous treaty texts, for example Art. 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Art. 13 of the International Covenant on Civil and Political Rights (ICCPR), Art. 22(8) of the American Convention on Human Rights and Art. 3 of the European Convention on Human Rights, which all require states to refrain from refoulement of individuals if the fear of persecution is well-founded if returned, regardless of whether they fall under the categories set by Art. 33 of the 1951 Convention. For example, in the United Kingdom (UK) this point was clarified in a decision by the House of Lords in 2009, upholding an earlier decision by the Special Immigration Appeals Commission, on the radical Muslim cleric Abu Qatada. On the basis of diplomatic assurances as to his treatment, the House of Lords stated that the applicant could be deported to Jordan. The rationale for this decision was that based on the facts provided their Lordships concluded that any fear of torture was unfounded in the circumstances of the present case. But, if the House of Lords found otherwise, Abu Qatada could not be

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13 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* opened for signature on 10 December 1948, 1465 UNTS, 85, entered into force 26 June 1987.


15 Also known as the Pact of San José.


17 *OO (Jordan) v Secretary of State for the Home Department* [2009] UKHL 10. This decision was overruled in 2012 by the European Court of Human Rights but on different grounds (*please see below*).
refouled. This would be despite him posing a national security threat to the UK for allegedly being Osama bin Laden’s right-hand person in Europe as this would be in violation of the UK’s obligations under both international and European human rights law.\footnote{Abu Qatada had launched an appeal at the European Court of Human Rights (ECtHR) in Strasbourg and on 17 January 2012 the ECtHR handed down its judgment in Othman (Abu Qatada) v UK App. No. 8139/09 [2012] ECHR 56. The ECtHR held that the UK could not lawfully deport Abu Qatada to his native Jordan, overturning the House of Lords’ decision on the basis that he would face there a trial that would fall short of the standards set by Art. 6 (the right to a fair trial) of the European Convention on Human Rights. However, a claim under Art. 3 (prohibition of torture), in the case of expulsion to Jordan, failed as the ECtHR also believed the detailed assurances by Jordan were sufficient to conclude that the applicant’s return to Jordan would not expose him to a real risk of ill-treatment. Clearly controversy still remains as to whether ‘diplomatic assurances’ are satisfactory and whether they do indeed effectively remove any substantial risk of torture; nevertheless, this judgement confirmed the standing of the principle of non-refoulement outside the definition provided by the 1951 Convention.}

In order to understand where these conditions set by the system come from, and why they were put there in the first place, it is necessary to consider briefly the historical evolution of international refugee law and the system for the protection of refugees.

5. HISTORICAL EVOLUTION OF THE INTERNATIONAL PROTECTION OF REFUGEES

International protection of refugees started to take shape in the early twentieth century\footnote{See also James C. Hathaway, “The Evolution of Refugee Status in International Law: 1920–1950,” International and Comparative Law Quarterly 33(2) (April 1984): 348–380.} due to the massive changes taking place in Europe causing an influx of people seeking protection: Russians fleeing to Western Europe during the Bolshevik Revolution of 1917, Muslims leaving the Balkans for Turkey and Christians moving in the opposite direction during the collapse of the Ottoman Empire. These various waves of (often forced) migration led to developing international consensus on the need to deal at the international level with the consequences of increasing population movements caused by humanitarian emergencies. However, the origin of these various waves of migration as well as their consequences differed, and so the notion of the ‘refugee status’ fluctuated and changed over time. In 1933 the League of Nations (the predecessor of the United Nations) adopted the Convention Relating to the International Status of Refugees\footnote{League of Nations, Convention Relating to the International Status of Refugees, 28 October 1933, League of Nations, Treaty Series Vol. CLIX No. 3663, available at: http://www.unhcr.org/refworld/docid/3dd8cf374.html (accessed June 28, 2012).}
which for the first time regulated the problems relating to the lack of identification documents held by exiles, which was a major problem that the receiving states had to deal with. This Convention also set rules relating to certain rights that refugees would enjoy including the right to work (Art. 7) and to education (Art. 12). Moreover, it stipulated rules on reciprocity as not being conditional for refugees to be able to enjoy their rights (Art. 14), as well as set limitations on expulsions (Art. 3). This Convention is often perceived as a model for international refugee protection which has developed since then.21 But along with the changing political landscape during this time in Europe, and the inadequacy of the 1933 Convention for the new type of refugees escaping Nazi Germany and other Nazi-occupied European states, it necessitated the development of new international instruments that would adequately address the new refugee crises. The inter-war period was marked by the passing of a number of ad hoc instruments22 which were designed to deal with the situation as if it were an anomaly in international relations and not one requiring permanent oversight.

It was the Second World War that not only shocked the international community of the time but also necessitated some fundamental changes to the international system, including the introduction of a comprehensive international human rights protection system. From this point on, international refugee protection has become more grounded within the developing human rights regime. This required further changes and development of a more comprehensive regime for refugee protection which led the international community of the time to adopt the 1951 Convention which provided, even if narrow, a legal definition of a refugee as well as set the minimum international standards of refugee protection. The main weakness of the 1951 Convention was that it applied only to those who became refugees before January 1, 1951, and in relation to Europe only. Yet again, it left the future of refugee protection unregulated. It did not change

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until 1967 when an Additional Protocol came into force which abolished the geographical and temporal limitations of the 1951 Convention and opened the possibility for the 1951 Convention to be applied to any future refugee situation.

However, despite these amendments, when one reads the 1951 Convention it still echoes Eurocentrism and reflects the European political reality of the time, including reactions to the Second World War and the beginning of the Cold War. The definition is very specific as to who can gain the status of a refugee and it narrows the potential group. The provision defines a refugee on three conditions: firstly, the person must be outside their country of origin (or habitual residence); secondly, they must have a well-founded fear of being persecuted hence would be unable or unwilling to avail themselves of the protection of their country; and finally, the persecution feared is due to their race, religion, nationality, membership of a particular social group or political opinion. But even at the time of its adoption the limitations set by the definition were recognised and in Recommendation E, which was included in the final Act, State Parties were prompted to extend the protection offered under the 1951 Convention to others who might not immediately fall under the definition:

...the Convention relating to the Status of Refugees will have value as an example exceeding its contractual scope and that all nations will be guided by it in granting as far as possible to persons in their territory as refugees and who would not be covered by the terms of the Convention the treatment for which it provides.

This has led to the creation of a second type of refugee, a much wider and diverse group; that is, unconventional or de facto refugees - a group which comprises those who do not fall under the traditional definition of a refugee. These developments went hand-in-hand with the development of the principle of non-refoulement as well as the expansion of human rights provisions prohibiting torture and inhumane or degrading treatment. States have offered such ‘complementary protection’ on diverse grounds referring to it, among others, as: ‘subsidiary protection’, ‘humanitarian protection’ or ‘temporary asylum’. Mandal describes this as an ‘increasingly-apparent phenomenon in industrialised countries of relief

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from removal/deportation being granted to asylum seekers who have failed in their claim for 1951 Convention refugee status. As one can see, the criteria on which states would offer this complementary protection differ—often considerably. Some states have extended their protection to persons who become refugees after leaving their country of origin during whose absence the change of circumstances took place in their home country (termed as refugees ‘sur place’). Some other states have provided that fear of persecution for reasons other than those provided in the 1951 Convention would also be considered, for example, recognition of asylum claims involving gender-based persecution; or that persecution by non-state agents would be a valid reason for seeking asylum. The UNHCR has provided some guidance in interpreting the definition. These interpretations are, however, non-legally binding for the State Parties and so states still retain a certain scope of interpretation and discretion when it comes to offering complementary protection.

6. Institutional Developments

Developments at the institutional level have not been without importance for international refugee protection. Around the time when the 1951 Convention was negotiated the office of the UNHCR was established. Its main function continues to be to provide support and help to refugees worldwide; however, this was not the first institution of this kind set up for this particular aim. Under the League of Nations, in 1921 a High Commission for Refugees (replaced in 1931 by the Nansen International Office for Refugees) was set up in response to the influx of Russian refugees following the Russian Revolution and famine of 1921, and then extended to include Armenian refugees. Due to the political situation at the time the Nasan Office was not formally part of the League of Nations but rather was an autonomous body under the authority of the League. In 1933 a High Commissioner for Refugees coming from Germany was appointed who subsequently bore a responsibility to oversee the protection of refugees.

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25 This paper was prepared on behalf of UNHCR by an external consultant, Ruma Mandal, Protection Mechanisms Outside of the 1951 Convention (“Complementary Protection”), June 2005, PPLA/2005/02, at viii.

from Austria and Sudetenland. Both these organisations—the Nasan Office and the Commission for Refugees coming from Germany—were dissolved and replaced in 1939 by the Office of the High Commissioner for Refugees under the Protection of the League. The Intergovernmental Committee on Refugees also played an important role during that time. This body was set up in 1938 under an initiative of the United States’ (US) President Franklin D. Roosevelt to administer initially the resettlement of refugees from Nazi Germany and subsequently to then cover all European refugees. The functions of this organ were taken over in 1947 by the International Refugee Organisation (IRO) which has become the main forum for negotiating international mechanisms for the protection of refugees. Between the years 1943–46 an important role was played by the United Nations Relief and Rehabilitation Administration (UNRRA), the purpose of which was to ‘plan, co-ordinate, 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.’

The IRO, as a UN-Specialised Agency, took over some of the functions of the UNRRA and was itself replaced in 1952 by the UNHCR. All of these institutions and organs have contributed to developing the modern international refugee protection system.

Similarly, as is the case with the international refugee protection regime, so too has the UNHCR’s mandate changed and expanded over time through the successive General Assembly Resolutions to include protection of victims who would not fall under the original mandate. The organisation also took on becoming involved in humanitarian missions in acute conflict zones and since 2005 has been involved in protecting IDPs. Its expansive role is a reflection of the changes that have taken place within international refugee law as well as in the wider context relating to providing protection to the most vulnerable. The role of the UNHCR has been instrumental in setting the international practice for repatriation and resettlement of refugees, which marks yet another area of contention between refugee rights and states’ interests (and pressures) in the matter. Prior to the 1980s repatriation was perceived as a permanent solution. This changed in the 1980s to being the preferred, or as termed by High

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Commissioner Hartling in the 1970s, ‘durable solution’. The UNHCR’s approach these days is to favour voluntary repatriation (free and voluntary return to one’s home country). This also implies that when the refugees return to their country of origin, where the situation might not yet be fully settled, the national protection is restored and it obviates the requirement for international protection. In the context of the post-conflict situation the UNHCR relies on the ‘four Rs’ (Repatriation, Reintegration, Rehabilitation and Reconstruction) which are perceived to be crucial in ensuring returnees’ early and sustainable reintegration. In situations where conflicts are ongoing and/or it is not safe for refugees to return, the next best solution is for them to be settled in the asylum country; if this is not feasible option either then resettlement to a third country should be considered.

7. INTERNATIONAL COOPERATION

The role of international cooperation in refugee protection can be better understood through the existing complimentary provisions regarding the status of refugees in regional human rights systems in Africa and Latin America as well as Europe. Within the European context, the real changes to the diverse practice of applying the refugee definition among the European states came with the policy unification under the EU framework. The 1999 meeting of the European Council in Tampere clearly stated that the emerging unified system in Europe would be based on the 1951 Convention. These changes have had some considerable effect on the way that the EU Member States apply the relevant laws relating to refugees and their protection, and they have also led to adopting a regional definition for subsidiary protection.

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It needs to be stated that despite the apparent evolution of the international protective framework for refugees, and its relative advancement in comparison to the early days, there still remains significant scope for improvement. One such critique voiced in the early 1990s, pointing out that international commitment to refugee protection is weak and continuously marked by pursuits by states to fulfil their national interest often at the expense of refugees, continues to resonate today: ‘[c]urrent refugee law can be thought of as a compromise between the sovereign, prerogative of states to control immigration and the reality of coerced movements of persons at risk.’  

It is recognised that the scope of the refugee problem is an international one and therefore requires international cooperation in attempts to solve it. The 1951 Convention explicitly states in Part D that State Parties are to cooperate in ‘a true spirit of international cooperation in order that these refugees may find asylum and the possibility of resettlement.’ It also requires the State Parties to cooperate with the UN and its relevant organs on the matter (Art. 35), which is echoed in Art. 2 of the 1967 Protocol. Further strengthening of the need for international solidarity and burden-sharing came with the 2002 Declaration which reaffirmed the commitment of State Parties to the 1951 Refugee Convention.

In contrast to the refugee influxes in Europe at the beginning of the twentieth century, today’s developing countries host 80 per cent of the world’s refugee population. It comes at no surprise that refugee protection has been characterised by a North-South impasse. In more recent years the UNHCR has worked towards facilitating greater international cooperation within the global refugee regime through special conferences where Northern states are pressed to contribute to the costs of protection of refugees in the South.

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36 On the importance of recognising a substantive issue-linkage between refugee protection and other issue-areas such as security, immigration and trade see Alexander Betts, *Protection by Persuasion: International Cooperation in the Refugee Regime* (Ithaca: Cornell University Press, 2009).
8. Cooperation for Protection of Refugees at Sea

Apart from international refugee and human rights legal instruments, other areas of international law may be highly relevant in the protection of refugees as well as international cooperation in this regard. One such example is the protection of asylum seekers on the high seas. According to the International Maritime Organisation (IMO):

As a result of wars, famine, poverty, political or religious persecution, natural disasters, armed conflicts and many other causes, thousands of people travel in unseaworthy boats to find better conditions of living ... Generally the migrants transported by sea travel without documents, in crammed conditions, facing severe weather at sea and often even death.37

The protection of refugees on the high seas is very complex, as within the high seas no state has exclusive jurisdiction warranting a greater cooperation between states. Many asylum seekers in the world decide to go to another country via maritime routes due to a fear of persecution from their own country. They are sometimes, along with other maritime immigrants, termed as ‘boat people’.38 For example, in 2009 it was estimated that people on board these boats comprised 70 per cent of Italy’s asylum seeker arrivals and in the same period 44 per cent of asylum seekers arrived in Australia via boat through the high seas.39

Many of these boat people are genuine refugees trying to escape from their own country due to gross violations of human rights and fear of persecution from the government due to their political, ethnic or other background. For example, in Australia ‘between 70 and 97 per cent of asylum seekers arriving by boat at different times have been found to be refugees and granted protection either in Australia or in another country.’40 However, at the same time this crisis also opens up a lucrative business

40 Ibid.
opportunity for people smugglers. This prompted some states to introduce stringent measures.

The protection of refugees on the high seas may create some complex legal problems not only involving the application of international law regarding the protection of refugees but also involving international law related to maritime navigation. This complex scenario is discussed below using the MV Tampa (the Tampa) incident as an example. On 26 August 2001, a Norwegian flagged container ship, the Tampa, rescued 433 Afghan refugees from a small Indonesian flagged ship, Palapa 1, following a request from the Australian Search and Rescue Organisation. Initially the captain of the Tampa started towards Indonesia but he was threatened by some of the rescued people that they would commit suicide if the ship went towards Indonesia so he changed the ship’s course for the Australian territory of Christmas Island. Australian authorities informed him that if the ship entered Australia’s territorial sea he would be prosecuted for people-smuggling. The Tampa incident raised a multitude of international law issues involving the law of the sea and refugee protection conventions.

A number of international conventions including the 1951 Refugee Convention, the 1966 ICCPR, the 1989 Convention on the Rights of the Child (CRC) and the 1984 CAT may be relevant for the protection of so

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45 Ibid.


48 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force
called boat people. As these conventions have already been discussed in other chapters of this book as well as earlier in this chapter, this part is confined to international conventions relating to states’ obligations in the maritime domain. The international law of the sea has established a comprehensive humanitarian regime for the high seas. This regime ‘can be defined as a composite of maritime laws, norms and practices operated with high consistency by states and seafaring communities (including shipowners, insurers and maritime unions).’

Art. 98 of the United Nations Convention on Law of the Sea (UNCLOS) obligates every state to require the master of a ship flying its flag to render assistance to any person found at sea in danger of being lost. UNCLOS also obligates the coastal state to promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperating with neighbouring states for this purpose.

A boat person, like any other person in distress at sea, also has protection under the Safety of Life at Sea Convention (SOLAS 1974) and the International Convention on Maritime Search and Rescue (SAR 1979). The master of the vessel Tampa did in fact discharge his obligations under these international legal instruments - under international law the master is required to render assistance to a boat, irrespective of the legal status of the passengers, whether asylum seekers or irregular migrants. According to one commentator, Australia has violated its obligations under the above mentioned conventions in regard to the Tampa incident. Initially the
Australian authorities asked the Tampa to deal with the boat people in distress in conformity with the requirements of the SAR Convention to coordinate search and rescue; hence it obliged the Tampa to render assistance.\textsuperscript{55}

One of the main problems identified in international law is the issue of disembarkation and interception of asylum seekers.\textsuperscript{56} After the Tampa incident, the IMO Assembly adopted resolution A.920 (22) on Review of safety measures and procedures for the treatment of persons rescued at sea.\textsuperscript{57} Through this resolution the IMO Assembly requested different committees of the IMO to review on a priority basis the international legal instruments for the purpose of identifying any existing gaps, inconsistencies, ambiguities, vagueness or other inadequacies and, in light of such a review, to take action as appropriate, so that:

- survivors of distress incidents are given assistance regardless of nationality or status or of the circumstances in which they are found;
- ships which have retrieved persons in distress at sea are able to deliver the survivors to a place of safety; and
- survivors, regardless of nationality or status, including undocumented migrants, asylum seekers, refugees and stowaways, are treated while on board in the manner prescribed in the relevant IMO instruments and in accordance with relevant international agreements and long-standing humanitarian maritime traditions.\textsuperscript{58}

The Tampa incident revealed some loopholes in the humanitarian assistance under international law of the sea relating to maritime search and rescue. After this incident both the SOLAS and SAR conventions were amended in 2004 to address the above mentioned issues. The amended SOLAS and SAR conventions among other things obligate states to coordinate and cooperate to ensure that masters of ships providing assistance by embarking persons in distress at sea are released from their obligations with minimum further deviation from the ship’s intended voyage.\textsuperscript{59}

\textsuperscript{55} Ibid.

\textsuperscript{56} Ibid.


This shows that international cooperation may engage some critical legal issues not only involving international conventions directly dealing with asylum seeker and refugee protection but also many other international legal instruments. However, in practice states may not be willing to implement these international legal instruments because the issue has been highly politicised. They may consider that it is not in their national interest to offer protection to those in distress and requiring rescue. Success of the international legal framework is largely dependent on states’ willingness to implement and adhere to international law; therefore it is necessary to ensure that further cooperation at the international level is facilitated by the relevant international organisations as well as states themselves.

9. Conclusion

The international system of refugee protection is complex as it requires the balancing of states’ entitlement to immigration control with the human rights obligations of asylum seekers fleeing their countries to seek safety and shelter. Often the asylum states are unwilling to offer that protection and asylum seekers are stopped from entering the safe territory, or are returned despite the possibility that they might be subjected to persecution and human rights violations on their return. In the wider public discourse, they are presented as, and along with, illegal immigrants, who they are not. Immigrants, whether legal or not, still have the protection of their countries of origin, which is not the case with asylum seekers and refugees. But the process of determining who is in need of international protection (as their country of origin can no longer or is unable to protect them) is an expensive and time-consuming exercise.

It is, however, important to note that the status determination procedure is required to be fair and effective. This might require the right of appeal, in the case of a negative decision, before the national courts system, which entails that such an asylum seeker is present on state territory. Equally important in this context is access to legal assistance at all stages of the screening process, which ensures equality before the law and avoids the arbitrariness of an immigration officer’s decision. It might also require the presence of an interpreter - without whose help the asylum seeker might not be able to tell their story. All of these preclude the status determination processes from being carried out in international zones and at national borders, as they do not offer the necessary conditions for the
process to be indeed fair and effective. Moreover, if one takes into account the international obligation of non-refoulement, allowing access to state territory where fair and effective procedures can be employed to determine whether or not an asylum seeker requires protection becomes paramount. Often, however, those most in need of protection cannot access the system – a factor which might, and often does, affect how asylum states conduct refugee status determination procedures.

This chapter has shown that the issue of international cooperation regarding international protection is very complex as it requires combining migration management and the protection of refugees. To ensure a humane system, refugee protection must be considered in the wider context of global migration and population movements. There is no denying that protection of refugees is a highly politicised issue; states’ policies for refugee protection are often guided by internal political debates and the political actors’ preferences on refugee matters. While it is a state's obligation to cooperate in the ‘true spirit of international cooperation’ for the protection of refugees, it is, unlike in some other areas of international law, very difficult to enforce this obligation on an unwilling state.

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Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 18 December 2002, entered into force 22 June 2006.


Cases


RB (Algeria) v Secretary of State for the Home Department [2009] UKHL 10.

Other Materials


CLIMATE REFUGEES AND INTERNATIONAL REFUGEE LAW

Rafiqul Islam*

1. Introduction

The recent forced displacement of millions in the drought-stricken Horn of Africa is yet another manifest evidence of causality between climate change and involuntary migration, which triggered the UN Security Council debate over its potential threat to international peace and security.\(^1\) It is now widely recognised that large scale cross-border environmental degeneracy seriously impacts on both living organisms (human, animal, and plant) and non-living natural resources on the planet Earth.\(^2\) Anthropogenic greenhouse gas emission causes global warming and climate change. Its tangible effects are found in severe draughts and heatwaves, torrent of floods and hurricanes, increasing desertification, sea level rise submerging low-lying coastal areas, and frequent extreme weather conditions. The First Assessment Report of the Intergovernmental Panel on Climate Change (IPCC) foresaw this eventuality in 1990 and warned about the gravest impacts of climate change on forced human migration.\(^3\) Many experts and intergovernmental agencies unanimously confirm about the future flood of climate-displaced persons and their sheer number is likely to surpass all known refugee crises.\(^4\)

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4. IPCC, Climate Change 2007: Impacts, Adaptation and Vulnerability (New York: Cambridge University Press, 2008); Nicholas Stern, The Economics of Climate Change:
International political and normative responses to climate-induced involuntary displacement, particularly the so-called cross-border “climate refugees”, and their relocation and protection remain ambivalent at best and dismissive at worst. The political urgency of addressing the issue is often lost in the North-South conflict of economic interests and strategic political expediencies of developed countries apprehensive of greater influx of asylum seekers into their territories under the guise of “climate refugees”.

This chapter critically examines the existing international protection paradigms of (a) refugee under the 1951 Refugee Convention, 1967 Protocol on the Status of Refugees, and Office of the UN High Commission for Refugees (UNHCR), and (b) human rights with a view to seeking legal status and protection for “climate refugees”. Both paradigms predate the emergence of the “climate refugee” problem and as such provide no overt coverage to modern climate change exodus and their predicaments. Affording protection to “climate refugees” through interpretative expansion or reformist pursuit stretching the ambit of “refugee” under the Convention encounters its congenitally structural limitations and a lack of global consensus. But the need for this protection is too pressing to be trivialised or submerged in technical horse-trading and arguments. Technical differences between conventional and climate refugees may not be gainsaid but they are surmountable. The marginalised plight of “climate refugees” solicits a humane approach to their vulnerability and quest for survival, bringing human rights perspective as an integral part of this protection. The novelty of the task warrants a searching reappraisal and reorientation of these two paradigms or a particularised new one based on pragmatic reference to the real life experience of climate displacement and legal reasoning devoid of any antiquated or preconceived notion of refugees and their protection.

2. From Environmental Refugee to Climate Refugee

Few international issues have solicited world attention as intensely as has the issue of climate change and its consequential global warming. It has become a dominant feature in political and diplomatic vocabulary for an international response. It has divided the scientific community into supporters and doubters on the extent and effect of global warming. Amidst all these developments, the number of people displaced involuntarily for environmental grounds is constantly increasing, aggravating the problem of protection to refugees and internally displaced persons (IDPs). This environment-induced forced migration both internally and cross-borders are set to continue and augment in the future if the cause remains unaddressed. Climatic calamities affect millions of people, who are forced to flee their traditional habitat and seek refuge in safe places, internally and across borders. All of these forced migrations may not necessarily be mono-causal involving solely climate change but multi-causal involving other socio-economic reasons. Nonetheless, climate change vulnerability as a direct cause of widespread forced displacement is now widely recorded and recognised. It is estimated that between 50 and 200 million people is likely to be moved internally and internationally on a permanent and temporary basis by 2050 for reasons directly attributable to the environment.

International refugee law contains no agreed definition and/or identification of climate displaced persons. They are variously categorised as environmental migrants/refugees, climate migrants/refugees, ecological migrants, and similar other terms to refer to people forcibly fleeing environmental degradation including climate change. Lester Brown of World Watch Institute (WWI) engineered the term “environmental refugee” in 1970, which was subsequently used by International Institute for Environment and Development (London) in 1984 and the UN Environment


7 UNHCR, n.4.
Programme (UNEP) in 1985 and its 1992 Agenda 21. UNEP defines “environmental refugees” as “those people who have been forced to leave their traditional habitat, temporarily or permanently, because of a marked environmental disruption (natural and/or triggered by people) that jeopardized their existence and/or seriously affected the quality of their life”. Seemingly, this definition is broad and based on mono-causality. Radical changes in the ecosystem and resource bases can render them unsuitable to support human life temporarily or permanently. It identifies environmental disruption as the sole cause of migration, which appears to be a simplistic solution to a complex problem as people migrate for various reasons often a combination of reasons, including environmental, linked to other natural, economic, social, and political factors. In reality, the migration of people is a multi-causal and multivariate process. The definition is fraught with the risk of including people who involuntarily moved not for genuine or predominant environmental reason.

The term “refugee” has triggered particular controversy as it entails a specific meaning for the purpose of legal protection under international refugee law. Environment-induced displacement results in people movement both within and beyond national borders. Whilst the latter is classified as “refugees”, the former is IDPs who are technically not covered by international refugee law. As a result, UNHCR, IOM, and the Refugee Policy Group (RPG) prefer not to use the term “refugee” and suggest alternatives such as environmental migrants, climate change migrants, or environmentally displaced persons. Nonetheless, “environmental refugee” has gained widespread acceptance and become a “catch-all” term in

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modern academic discourses and diplomatic vocabulary,\textsuperscript{12} which can have a positive bearing on their protection. The presumption is that the same amount of environmental vulnerability should warrant the same level of protection – be they are displaced internationally or nationally. In this sense, the term “refugee” may have a literal connotation synonymous with involuntary displacement.

Environmental refugees obviously include, inter alia, victims of climate change. It is common that either environment or climate change is used as a prefix before migrants, refugees, or displaced. Relentless greenhouse gas emissions by human activities causing global warming and sea level rise has been dominating the debates over climate change induced displacement, dubbing it “climate refugee” particularly since the Kyoto Protocol in 1997. Global warming has been changing the physical climate hostile to normal human living conditions, exacerbating vulnerability to unprecedented climatic stress, and forcing them flee for safe refuges. Commencing a consciousness-raising campaign through its First Assessment Report in the mid-1990s to the latest Fourth Assessment Report in 2007, IPCC authoritatively establishes that human-made climate change is “unequivocal”, which is accelerating and severely impacting on human living space and livelihoods in many parts of the world.

The articulation of this link between climate change and large-scale migration won the Nobel Peace Prize in 2007.\textsuperscript{13} UNHCR chief, Antonio Guterres, identified climate change as the biggest driver of forced displacement, both inside and cross-borders, in the near future.\textsuperscript{14} UN Secretary-General Ban Ki-Moon organised a Climate Change Summit on 22 September 2009 at the UN headquarters in New York, where US President Obama spoke of “climate refugee” in his remarks. Mounting scientific studies confirm that climate change plays a substantial role in human displacement and developing, particularly low-lying islands,

\begin{itemize}
  \item \textsuperscript{13} Jointly awarded to IPCC and climate change campaigner and former US Vice President Albert Gore.
  \item \textsuperscript{14} Julian Borger reported in the \textit{Guardian} on 17 June 2008 and UNHCR press conference at the UN Climate Change Conference on 16 December 2009 at Copenhagen, http://www.unhcr.org/4b2910239.html (accessed July 29, 2010).
\end{itemize}
countries are likely to be the most vulnerable due to their adaptation and resource constraints. The recent UN climate change conferences in Copenhagen (2009), Cancun (2010), Durban (2011), and Doha (2012) seek to combat this climate catastrophes and human costs through preventative measures and setting up climate funds. The recognition of “climate refugee”, distinct from “environmental refugee”, and the urgent need to address their special protection and assistance have been receiving momentum in recent international discourses due to the growing evidence and awareness of impacts of climate change.

The proponents of a separate convention for “climate refugee” have defined the term as “an individual who is forced to flee his or her home and to relocate temporarily or permanently across a national boundary as the result of sudden or gradual environmental disruption that is consistent with climate change and to which humans more likely than not contributor”. This definition resembles the definition of “environmental refugee” and particularises to climate change, covers temporary and permanent displacement across national borders, and excludes climate change IDPs. The supporters of a global governance system within the UN Framework Convention for Climate Change (UNFCCC) to protect climate refugees have defined the term as “people who have to leave their habitats, immediately or in the near future, because of sudden or gradual alterations in their natural environment related to at least one of the three impacts of climate change: sea-level rise, extreme weather events, and draught and water scarcity”. This definition encompasses all those who flee the direct impacts of climate change and blurs the distinction between temporary and permanent relocation as well as internal and cross-border migration. The cause of relocation is solely attributable to three specific and less controversial climate change impacts, which appears to be restrictive that ignores the possibility of future scientific advancement in determining other severe impacts of anthropogenic climate change. Merging both internal and external climate displacement can create legal complication for their protection and assistance. Resort to the international community for protection is understandable as climate displacement is not covered under international refugee law.

17 Biermann and Boas, n4, 67.
3. Climate Refugee and International Refugee Law

The term “refugee” entails a precise legal meaning for the purpose of international protection under the Refugee Convention and its Protocol, which do not explicitly cover “climate refugee” in terms of their texts, intentions of the drafters, and UNHCR practice. Non-compliance with the conventional criteria of refugee classification prevents “climate refugee” from acquiring any status under international refugee law.\(^\text{18}\) In setting the yardstick for granting refugee status, Convention Article 1A(2) defines “refugee” as one who holds a

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\text{[W]ell 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[her] nationality and is unable or, owing to such fear, is unwilling to avail him[her]self of the protection of that country; or who, not having a nationality and being outside the country of his[her] former habitual residence as a result of such events, is unable, or, owing to such fear, is unwilling to return to it.}
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This definition has four distinctive legal requirements: (1) there must be a well-founded fear of persecution; (2) reasons of persecution are race, religion, nationality, membership of a particular social group or political opinion; (3) victims have fled their country of nationality or habitual residence; and (4) victims are unable or unwilling to return home. The Convention defines neither “persecution” nor “well-founded fear”. Persecution may be a threat to the life or freedom, or the infliction of suffering or harm usually through confinement, torture, substantial economic deprivation, or systematic violation of basic human rights under government sanction.\(^\text{19}\) The fear of such persecution may be well-founded when an existing, imminent, or potential atmosphere of insecurity gives rise to a feeling of vulnerability to serious harm that a reasonable person in the same situation would fear persecution which the government cannot or will not prevent.\(^\text{20}\)


A Well-founded Fear of Persecution

Understandably the people likely to be affected by climate change may be fearful but is this fear well-founded enough to feel persecuted? Some argue that persecution is a government act against individuals and climate migrants are generally forced to flee for environmental and political reasons. Many government policies can have consequences leading to natural disasters, putting certain groups of people at great risks. Persecution occurs for reason of their membership of a particular social group of climate refugees, who lack any political leverage to mitigate and address their environmental risk. “[W]ith governments playing so pertinent a role in the occurrence of environmental crises, refugees seeking refuge from the resulting environmental degradation are effectively seeking refuge from their governments.” So climate refugees implicitly fulfil the requirements of governmental persecution and come within the purview of the conventional definition of “refugee”. In reality though that the effect of climate change constituting persecution is far from being simple. Not all environmental degradations causing climate change are the result of deliberate government acts aimed at persecuting an identified group. Establishing a direct causal link between climate change impacts and the persecutory intent of a government would require more than the awareness of climate consequences and negligence or inaction in rendering assistance.

Climate change impacts may be the result of environment-unfriendly policies pursued for many years by a country and its people, not only its government. In most cases of climate displacement in developing and poor countries, governments cannot afford assistance due to their fragile economy and resource limitation. The affected people flee their country of origin or habitual residence for the economic inability of their governments not due to persecution. In instances of extremely severe climate impacts such as sea level rise threatening the existence of an island country, international cooperation and support appears to be the only viable option. Discriminatory government actions or inactions during climate disasters may render the government responsible for contributory

negligence in aiding or abetting displacement, which is not necessarily based on one of the conventional grounds. Moreover, there are technical difficulties to characterise climate change effect as a “well founded fear of persecution”. Global warming-induced rising sea level, severe draughts and floods, frequent storms, and devastating earthquakes are known perils to human existence and livelihood, but their use as instruments of harm to establish “well founded fear of persecution” falls short of the letters and spirits of the Convention.

Reasons of Persecution

The ground of persecution must be one or a combination of those specifically mentioned in the definition. It requires a demonstrable causal link between the feared persecution and personal affiliation to a particular race, religion, nationality, membership of a social group, or political opinion of the individual seeking refuge. It is these individual human attributes, not any general crackdown or discriminatory policies of the government, which are the root cause of persecution. Nonetheless, it has been argued that climate refugees can also constitute a social group for protection under the Refugee Convention when

[A] government systematically imposes the risks and burdens of decisions impacting environmental quality on members of a particular race, religion, nationality, membership of a social group or political opinion on account of one or more of these protected factors ... [and] where the relevant authority refuses to mitigate ... environmental disasters ... and in so doing ‘targets’ a group based on one of the listed factors.24

A social group is “a recongizable or cognizable group within ... society that shares some ... experience in common” and as such climate refugees also form a social group characterised by their “common experience”, which is a component required to form a social group under the definition.25

Climate change, sudden or gradual, and its impacts are invariably haphazard and affect people within its vicinity indiscriminately, regardless of their membership of a particular race, religion, nationality, social group, or political opinion. This nature and feature of climate change erodes the wisdom inherent in the argument referred to. Persecution under the Refugee Convention entails specific act aimed at targeted individuals for identified reasons. According to UNHCR, “membership in a particular

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25 Cooper, n22, 522.
social group” refers to those “persons with similar backgrounds, habits or social status” fleeing political, religious or ideological persecution, which rules out victims of climate change from acquiring refugee status.26 There must be a common, yet immutable, characteristic that distinguishes individuals belonging to a given social group from surrounding other social groups. It is this common characteristic that is central to their identity and serves as the basis of persecution they suffer.27 Environmental displacement is not necessarily a planned government action against a specific group with common and immutable characteristics. Neither is “climate refugee” the victim of any specific target, nor their reason to flee attributable to the reasons listed in the definition.

Fleeing Country of Nationality or Habitual Residence

The well-founded fear of persecution has a substantive element of identifying past, present, or duly anticipated imminent acts which generated that fear and led the person to flee the country of nationality or habitual residence to a foreign country for protection. This cross-border displacement is an indispensable requirement of being a “refugee” under the Convention and triggers the need for international protection due to the refuge outside the country of nationality or habitual residence. Most climate migrants prefer to relocate to safe places within, rather than leaving, their own country, thereby producing more IDPs than cross-border migrants. Climate IDPs are entitled to and enjoy their government assistance and protection. They do not fulfil the requirements of “exile” in foreign countries and lack of protection under the Refugee Convention and Protocol, which are inapplicable to climate IDPs. The distinction between climate refugees and IDPs appears technical and increasingly blurred in terms of their marginalised plight warranting equal protection.28 Climate

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IDPs in poor and small islands countries may be far worse than climate refugees. UNHCR has assumed limited responsibility toward IDPs predominantly displaced by conflicts rather than climate change.29

**Unable or Unwilling to Return Home**

The inability or unwillingness to return home implies that the fear of circumstance that caused refugees to flee in the first place persists unabated. They refuse to avail themselves of the protection of their own country because they fear persecution upon return by government acts and actors, or other acts and actors that government does not or cannot control. The prevailing circumstances in their own country, such as armed conflicts, may prevent their government from protecting them or render the available protection ineffective. Indeed, the Refugee Convention is premised on the presumption that the government itself is the cause of refugee displacement and it has failed to perform its duty towards citizens.30 Refugees are required to return home when their well-founded fear of persecution is over.

“Climate refugee” falls short of fulfilling these requirements. It is not their government or state apparatus that caused them to flee. The people who are already displaced and likely to be displaced in Bangladesh due to the direct impacts of climate change are in no way persecuted by their government, which indeed an important protector against environmental degradations caused by activities of developed and big developing countries. Climate refugees in some instances can never be able to return home that may have been destroyed by climate catastrophes or submerged by sea level rise as may be the case with Maldives, Tuvalu, Kiribati, and other low lying islands countries in the South Pacific.

**The Principle of Non-Refoulment**

Refugee Convention Article 33(1) stipulates the principle of non-refoulment, predicated on the continuation of “persecution”. No refugee should be compelled to return to his/her country of origin to face persecution or other forms of serious harm such as torturous, cruel, inhuman, or

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degrading treatment or punishment. This provision has elevated to the status of customary international law and an established principle of international human rights law. The application of non-refoulement obligations to “climate refugee”, though appears intuitively appealing with merits, has some limitations. The requirement of the Convention is not self-evident in the case of “climate refugee”. There is no state-sponsored persecutory or serious-harm inflicting condition prevailing in their usual place of residence. Climate IDPs still can rely on the assistance and protection of their own government, which is absolutely powerless to prevent the effect of climate change.31 This principle may be applicable de facto in circumstances where the usual place of residence of “climate refugee” no longer exists, turning them to become stateless. But both conventions on statelessness construe “statelessness” narrowly as the loss of nationality by virtue of a national law,32 not “climatic statelessness” as a result of the absolute disappearance of a state due to climatic destruction and/or inundation by rising sea level.

Other Conceptual and Practical Differences

Inapt Responsibility

The host country bears the main responsibility for refugees under the Refugee Convention, which places almost no responsibility on the home country and oblique burden-sharing though international cooperation (preamble paragraph 4). Convention member-countries are not required to provide protection until refugees have entered into their borders and “to admit those who acquire refugee status”.33 They retain discretion to interpret the definition of “refugee”, which is increasingly construed narrowly to minimise their duty of protection. Many countries impose stringent conditions to limit the number of refugee intake per year and show reluctance to provide adequate protection or respect their assumed obligations under the Convention.34 Climate displaced people cannot get

protection as a matter of right/duty in a foreign country until climate change had already occurred and forced them to flee cross-border. Their inclusion into the category of refugee is likely to have corresponding depreciatory effects on the number of traditional refugee admission and their treatment.35 Precisely on this ground, UNHCR is hesitant to expand the definition of “refugee”.36 In contrast, the main responsibility for climate refugees are arguably placed on developed countries that are mostly responsible for the causation of climate change and hence displacement under the principle of common but differentiated responsibility.37 Thus the perceived responsibility for convention refugees and climate refugees are different.

**Political Unpalatability**

The growing industrialisation and economic expansion in the West had serious labour and skilled shortages during the cold war, when refugees and economic migrants were accepted indiscriminately. The post-cold war era witnessed mounting unemployment with rising conflicts of interest between locals and migrants, resulting in refugee xenophobia in the West. There appears to be an ongoing pervasive unwelcoming and hostile attitude to refugees in many countries, particularly those feeling overwhelmed by the sheer numerical strength of refugees coming into their borders. Under these circumstances, shooving climate refugees into the conventional definition is set to attract strong resistance from receiving countries and as such may well be politically unattainable.

**Resource Constraints**

The current operation of the international framework for refugee protection and UNHCR encounters serious resource limitation. The need and consumption of resources by rapidly growing refugees generates additional economic and environmental pressure on host countries. Climate refugees will exacerbate this resource-burden disproportionately on underdeveloped and small islands countries – the epic centre of climate displacement – which are already struggling to sustain their own

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37 It is one of the core principles of the UN Framework for Climate Change Convention (UNFCCC); Docherty and Giannini, n16, 394.
populations. The inclusion of climate refugees in the conventional definition is likely to worsen the existing precarious funding situation, thereby deteriorating the available refugee services and protection further. Whilst UNHCR is increasingly expanding its operational scope to offer protection to involuntary displacement not covered by the Convention, such as IDPs, the over-extension of its mandate with limited resources has already put and will continue to put its services under severe strain. Foreshadowing this eventuality, UNHCR says: "lumping both groups together under the same heading would further cloud the issues and could undermine efforts to help and protect either group and to address the root causes of either type of displacement".\textsuperscript{38} Climate refugees caused by the inundation of their counties due to rising sea level need permanent and substantial international funding support for resettlement, which is beyond the mandate and resource capacity of UNHCR. To address such dire climate change consequences, the green fund has been created through the UN climate conferences (Copenhagen 2009, Cancun 2010, and Durban 2011) under the auspices of UNFCCC, which is unavailable for conventional refugees.

\textit{Mono and Multi Causal Complexity}

There are complex operations of multiple causalities for involuntary migration, in which natural environmental cause is inseparably linked to a matrix of economic, social, demographic, and political factors. The claim of climate displacement is predicated on the notion that climate change is the mono cause, which can be separated from other causes of displacement. In reality though, climate hardship is often aggravated by economic injustice and insecurity, social unrest and exclusion, political instability and conflict, and demographic unsustainability. Climate change may well be one of many interdependent considerations that trigger migration but it is exceedingly difficult to precisely ascertain the decisive role of climate change impacts on the decision-making for migration.

\textit{Institutional Gap}

There is no specific UN refugee and human rights agency assigned to deal with climate displacement. Operating mostly under the Refugee

Convention, UNHCR mandate is premised on temporary protection for the sudden flow of refugee displaced due to certain specified grounds. It is already overburdened, under-resourced and lacks mandates, expertise, and experience to deal with the slow and complex procreations of climate displacement warranting somewhat gradual yet permanent resettlement.

No En-Mass Protection

Climate displacement is anticipated to be on a mass-scale as well as gradual of affected communities. International refugee law is based on an individualised displacement, affording individual rights and protection determined by definitional criteria, which appears “highly inappropriate to the situation of climate displacement. The problem of climate displacement needs to be addressed by granting an en masse status to those already forcibly suffered, and/or potential gradual, climate displacements through a process of request and determination by relevant countries and institutions.

Inadequate Expansion Attempts

The OAU Refugee Convention 1969 and Cartagena Declaration on Refugee and 1984 have expanded the conventional definition to deal with their flow of refugees. The expanded definition includes those fleeing due to events causing disruption to public order. The large scale fleeing for climate change can be categorised as disrupting public order. But this expanded definition affords only limited and temporary protection to cross-border migrants, not adequate and lasting protection necessary for climate IDPs and cross-border refugees. Moreover, there is no consensus on the expansion of the conventional definition. Fearing a

42 Adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico, and Panama, 22 November 1984.
flood of refugees, most receiving countries today are increasingly restrictive, rather than expansive, in their interpretation of the definition.44

Conundrum of a Separate Framework

In response to the above situation, a separate framework for the protection of climate refugee has been advanced. It favours the term “refugee” because of its “strong moral connotations of societal protection” and the term cannot and should not be reserved exclusively for the “category of people who stood at the centre of attention after 1945” to exclude other categories of people worthy of protection against similar grim consequences.45 To them, the term resonates “a sense of global responsibility ... legitimacy and urgency it deserves for impending disasters”.46 Other however oppose the term “refugee” for climate displacement due to its moncausal simplicity which rarely occurs in practice and for its application to cross-border migrants to the exclusion of IDPs, both being the product of climate change warranting protection.47

The Historic Legacy

The distinctions between traditional and climate refugees emanate from the very genesis of the post-war international refugee law, propelled by the Refugee Convention enacted over 60 years ago. It was drawn up in the aftermath of the Second World War and wake of the cold war to manage a discrete refugee problem in Europe. It is a product of its time formulated to work in a specific geographic and ideological context to attain the western political agenda and ideological motivation of combating only certain grounds and types of persecution especially in the former Soviet Union. It is not meant to be covering and protecting any modern forced displacement other than its strategically circumscribed notion of refugees. As a result, various attempts at categorising “climate refugee” include, exclude, or even contradict the traditional features of the conventional definition. This explains why the conventional legal and institutional frameworks appear grossly ill-suited to cater for the recent problem of climate displacement.

45 Biermann and Boas, n4, 67.
47 Black, n10, 1; Castles, n10, 8; Bronen, n30, 5; Hodgkinson, n40, 8–11.
4. **International Human Rights Law Applicable to Climate Refugee**

There are certain well established international human rights regimes and principles applicable to climate displaced people regardless of their internal or cross-border location.

Forced climate displacement separates families and communities, and erodes socio-cultural ties, traditional roots, and support systems of those displaced. These effects generate problems of their insecurity of life, liberty, property, equality, food, shelter, water, agricultural production, livelihoods, resources, employment, living standards, education, health, and wellbeing, posing national and international human rights implications and challenges. These problems span from civil, political, economic, social, and cultural rights through to collective human rights of vulnerable groups (old, women, children, disabled, and indigenous) who are likely to be disproportionately affected. A number of established international human rights principles, norms, and treaties can be invoked in a myriad of ways to protect and fulfil these rights of climate migrants. A body of national constitutions, regional human rights conventions, and UN human rights instruments can innovatively be applied, interpreted, extrapolated, and inferred to protect the human rights of climate migrants. Similarly, vulnerable groups among the

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49. Michelle Leighton, “Climate Change and Migration: Key Issues for Legal Protection of Migrants and Displaced Persons,” (Background paper, the German Marshall Fund of the US, June 2010), 1.

50. Many modern national constitutions contain a list of judicially enforceable fundamental rights for citizens.


52. UN human rights instruments prescribing and implementing recognised civil, political, economic, social, and cultural rights in the main include: the Universal Declaration of Human Rights (UDHR) 1948; International Convention on the Elimination of Racial Discrimination 1965; International Covenant on Civil and Political Rights (ICCPR) and its Optional Protocol 1966; International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966; rights to health and food are also mentioned in environmental protection instruments, such as the Stockholm Declaration 1972, the Rio Declaration 1992 and its Agenda 21, the Report of the Special Rapporteur on Human Rights and Environment 1994, the World Summit on Sustainable Development Report 2002.
displaced may be brought within the purview of protection under various UN conventions.\textsuperscript{53}

This is not to assert that human rights law, principles, norms, and treaty provisions are directly and automatically applicable to protect human rights of forcibly displaced climate migrants presumably because these principles, norms, and treaties have been developed prior to the emergence of global warming and its consequential displacement as an international issue. Nonetheless, the Office of UNHCHR maintains that the international human rights regime provides the most effective framework for addressing the human consequences of climate change displacement.\textsuperscript{54} Indeed, it is distinctly possible to make a convincing case, as has many have done,\textsuperscript{55} that such displacement causes untold miseries and sufferings for those displaced, seriously violates their general and specific human rights both before and after displacement. They cannot be deprived of the rights guaranteed for non-affected people under international human rights law.


National governments individually and as members of the international community incur specific obligations under various regional and international human rights treaties to adopt measures for the protection and fulfilment of the recognised human rights of the people facing climate adversities and involuntary displacement. These treaties oblige their members to respect and ensure the rights embodied in those instruments, many of which are threatened and infringed by climate displacement. The climate affected people have specific needs and rights, distinct from those of the non-affected people, which call for specific national assistance and protection measures. The obligation to respect requires a country not to interfere directly or indirectly with the enjoyment of the rights that the climate affected people are entitled. The obligation to protect entails preventing public, private, and international actors from impinging on the rights of these people. The obligation to fulfil warrants a country to adopt laws and other necessary measures at the local and national levels to coordinate disaster response and relocation management. The obligations to respect, protect, and fulfil these needs and rights inclusively include: obligations to protect the right to life, health, and property; provide adequate food and housing; supply water; respect collective rights of vulnerable groups such as elderly, women, children, disabled, minorities, and indigenous. The obligations to ensure procedural rights, such as access to information and public participation, require national authority to collect pertinent and reliable information on climate displacement and disseminate to stakeholders, who should regularly be consulted with and actively involved in the formulation of necessary policies and measures to address the challenge of displacement.

The international community owes an obligation to cooperate and afford financial, technical, and logistical assistance to the governments of climate affected countries in order to fulfil their human rights obligations towards the displaced. This responsibility of the community of states has been underscored by the Deputy HCHR:

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56 Illustrative of these duties is ICCPR Article 2 in which each state party “undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant…”; also Office of UNHCHR, “CESCR General Comment No. 3: The Nature of State Parties Obligations,” (Article 2, paragraph 1, 14 December 1990).

States have a positive obligation to protect individuals against the threat posed to human rights by climate change, regardless of the causes. The most effective means of facilitating this is to adopt a “human rights-based approach” to policy and legislative responses to climate change; an approach that is normatively based on international human rights standards and that is practically directed to promoting and protecting human rights.\(^\text{58}\)

Thus it is incumbent upon governments to use international human rights laws, principles, and standards to formulate and construct their legal, policy, and institutional frameworks required to ensure that the legitimate rights of the climate affected people in their territories are duly respected. Such a human rights orientation of responses to climate displacement has obvious benefits for all stakeholders – the displaced, state concerned, and international community alike. It identifies which rights are violated or at risk by climate change and which national body is responsible to deal with it, thereby setting out a minimum standard of treatment to which climate affected people are entitled.\(^\text{59}\) Host states are also bound under international human rights law and apparatus to ensure a minimum standard of treatment and the full range of human rights for relocated people, who may have limited legal remedies for the protection of their rights in any third state of relocation.\(^\text{60}\) A human rights approach also harmonises climate displacement; fosters international cooperation; protects vulnerable; and facilitates policy coherence, legitimacy, and accountability.\(^\text{61}\)

### 4.1. The Emerging Human Right to the Environment

There is no explicit and independent human right to the environment yet in international law. But its evolutionary emergence is discernible in the nexus of existing international human rights and environmental law.

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\(^{58}\) Kang, n54.


The state of the global environment degrading dramatically has given rise to a common concern of the international community for the conservation and management of the healthy environment. Unabated adverse consequences, especially global warming-induced climate change inter alia, of economic globalisation through industrial development have already caused and in the process of causing many peoples’ survival at stake – the primary cause of climate displacement. The growing awareness of these global problems has led to the curative and preventative position of the international community to be less anthropocentric and more environment-centric with a distinct humane and social dimension. It is this change that has introduced a human rights perspective in contemporary international human rights and environmental jurisprudence.62

There is an indivisible interface between recognised civil, socio-economic, and cultural human rights with the environment, which forms the basis of the assertion that there is a basic human right to the safe environment. Such a right belongs to the same category and has the same potency as the right to life, health, food, water, livelihood, safety, and shelter – all being indispensable for human existence and survival.63 It has been asserted in a separate opinion in the International Court of Justice (ICJ) that “the protection of the environment is ... a vital part of contemporary human rights doctrine” and indispensable “for numerous human rights such as the right to health and the right to life itself”.64 But the claim of human right to the environment appears to be composed of a mixture of both hard and soft human rights and standing “in the twilight zone of embryonic and infant stages – perhaps an international law in the making”.65 It is likely to mature and become sophisticated through application, interpretation, and implementation with the passage of time. The international human rights paradigm, dedicated to the cause dignified and safe human existence, cannot afford to ignore the emerging right to the environment and the marginalised plight of climate refugees.

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64 Case Concerning the Gabcikovo-Nagymaros Project (Hungary v Slovakia), 1997 ICJ Report 92 (Judge Weeramantry), paragraph A(b).
Bringing environmental protection within the rubric of human rights has certain benefits. International human rights law has a well-developed legislative, judicial, and organisational structure evolved over a long period and considerable international pledge for their protection. International environmental law, by comparison, is of recent origin. Its implementation is often obscured and ignored in the shadow of dogmatic pursuit of national sovereignty and interests. Treating the environment as a human right is an attractive alternative to enhance the enforceability and justiceability of its protection. International human rights instruments, particularly UDHR (Article 14) and the Refugee Convention 1951 (Article 1) proclaim a right of every human being to seek and receive asylum from persecution. The looming global warming induced sea level rise has displaced and is on the verge of displacing millions, which has but added to an already overwhelmed problem of international refugees and IDPs. Both climate refugees and IDPs inevitably involve human rights consideration. The available scientific assessment and prediction of climate change impacts render it easier to affirm than to deny that they involuntarily flee environmental persecution to safety. The gerrymandering commitments of states on the greenhouse gases reduction in Copenhagen (2009), Cancun (2010), Durban (2011), and Doha (2012) suggest that states are still preoccupied more with their sovereignty and national interest than with managing emissions mitigation.66 Therefore bringing environmental protection and human rights together not only expands the frontiers of human rights but also bridges a huge abyss that exists in international human rights law on protection for victims of violations of environmental rights.

4.2. Responsibility to Protect (R2P)

A bi-product of the global human rights movement is the development of a new global human rights initiative, called ‘responsibility to protect’ (R2P). It recognises the right and responsibility of the international community and UN to protect people in need of protection against gross abuses of human rights. This responsibility has three specific dimensions: prevention of the causes/sources of abuses; reaction with appropriate measures to combat abuses; and rebuilding assistance for recovery.

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reconstruction, and reconciliation.\(^{67}\) For the first time, the UN Security Council Resolution 1973 (2011) invoked R2P in endorsing limited military action to protect civilians in Libya against its authoritarian regime ruthlessly suppressing demands for political reforms.\(^{68}\)

Arguably, the R2P principle may be extended to protect climate refugees in that it is incumbent upon the international community (a) to prevent carbon emissions, the cause/source of climate displacement; (b) to act through appropriate measures to protect those victims of climate change; and (c) to rebuild by providing assistance for recovery, reconstruction, and rehabilitation of climate refugees. This principle is steadily gaining momentum in international relations and at the UN as a working and enforceable norm that accrues its legitimacy and acceptance from human rights oriented sanctions and humanitarian intervention. However, it is currently no more than a soft norm, the application of which is likely to be arbitrary and discretionary at its best and absolute inaction at its worst due to the conflict of interests particularly among the permanent members of the UN Security Council.

5. **Climate Refugee: Status and Protection Under International Refugee Law**

The need for the protection of climate displacement has assumed and will continue to assume paramount importance in international relations. The underlying difficulty in arriving at an international consensus on the identification of climate refugee for the purpose of protection lies in the attempt at formulating it in the 21st century through the yardstick of 1951. The plight of climate displacement and its protection regime necessitates an active consideration of the current feature and nature of the problem beyond the mindset of the Refugee Convention. Past experience and practice of responses to global refugee problems suggest a dynamic and contextual approach.

\(^{67}\) R2P is a new international human security initiative to prevent mass atrocities, human sufferings, genocides, war crimes, ethnic cleansing and crimes against humanity; Canadian Government’s International Commission on Intervention and State Responsibility Report: “R2P” (December 2001); UN World Summit, “Declaration on R2P” in UN Secretary-General Report, “In Larger Freedom: Towards Development, Security and Human Rights for All” (UN Doc.A/59/2005); UN Secretary-General’s comprehensive report, “Implementing R2P” (July 2009).

The refugee crisis following the First World War was addressed through the conclusion of various international agreements under the League of Nations (LN).69 These instruments had no general application but limited only to the Kilaki persecution in the Soviet Union, and Armenian, Assyrian, Syrian, Kurdish, and Turkish refugee flows. The inapt of these arrangements to deal with the Second World War refugee crisis necessitated the enactment of the 1951 Refugee Convention, based on an “individualistic approach” in marked contrast to the “group approach” of the inter-war era. The 1967 Protocol was essential to remove the restrictions of geography and temporal landscape of the Refugee Convention to embrace the refugee problems of decolonisation particularly in Africa. This removal of the Euro-centric and time specific application in the Protocol and its widespread ratification suggest that these are living instruments, capable of continuing application “to a wide-ranging set of refugee-producing circumstances”.70

Hence it may be possible to stretch the limit of the existing international refugee law beyond the circumstances leading to its creation in 1951 and is capable of operating in refugee situations in this changing world. If the then prevailing circumstances could be the basis of the post-war refugee protection regime, there is no compelling reason why the changing times and current situations of climate displacement cannot form the basis of further expansion to include climate displaced persons as an independent category for protection under the existing or yet another additional protocol. The definition of “refugee” was not found but created in 1951 in view of the then prevailing circumstances and subsequent new developments have been added through the 1967 Protocol. Indeed the effects of environmental degradation and climate change are impacting on human habitation in a manner not foreseen in 1951.

Obviously an agreed definition of “refugee” would help formulate a protection framework. This lacking is not unique anyway. International law and relations are littered with similar situations, where a functional approach, instead of an immutable abstract definition, was adopted. In a sense, a functional approach works better than a technical definition, which may be obsolete or irrelevant with the passage of time and

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69 For examples, the LN Convention Relating to the International Status of Refugees 1933, Provisional Arrangement Concerning the Status of Refugees Leaving Nazi Germany 1936, and Convention Concerning the Status of Refugees Coming from Germany 1938.

The emergence of new necessities as precisely happened in 1951. The status of refugee is “an extremely malleable legal concept which can take on different meanings as required by the nature and scope of the dilemma prompting involuntary migration”.

The external and internal aspects of climate displacement requiring substantial and enduring protection calls for a move beyond the 1951 status quo and embrace an innovative functional or practical approach, which is likely to be rewarding in devising an appropriate protection framework for climate displacement. Such a framework needs to spell out the ways to narrow down to climate change as the driver of displacement as distinct from economic, social, security, or political reasons.

The geographical manifestation of climate displacement, that is, within and/or beyond an international border, is to be disregarded; otherwise large number of climate IDPs will remain unprotected. The requirement of involuntary displacement is also essential to justify legal protection and social and moral support for this vulnerable people. Distinction should not be drawn between permanent or temporary and sudden or gradual displacement as the need for relocation assistance and protection arises in all situations. Climate change tilts more towards anthropogenic than absolute natural causes as global warming is largely due to human activity since the Industrial Revolution – a factor deserving consideration.

Implicit in the Refugee Convention lies a human right overtone, for it was adopted in the backdrop of the west-sponsored UDHR. Initially the deep nexus between climate displacement and human rights was ignored and climate displacement was not construed a human right violation issue. But there is now a growing recognition of the human right dimension of climate displacement, underscoring the need for a policy framework to protect and respect the human rights of the affected. The application of relevant international human right law, principles, norms, and standards can bring a range of benefits to national and international efforts to address climate displacement. It is therefore imperative that any national and/or international protection framework for climate displacement adopts a human rights approach in working out a humane, cohesive, and acceptable response to the challenge and mobilising international assistance for affected poor countries.

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International refugee law has been developed prior to the emergence of the issue of climate displacement. But its development need not be rigidly circumscribed by pre-conceived perceptions and mindset. It is constantly expanding its frontiers and coverage and “capable of modification and development in accordance with ... the requirements of international intercourse”.72 The ICJ in Barcelona Traction case observed that “[i]n seeking to determine the law applicable to this case, the court has to bear in mind the continuous evolution of international law”.73 The despicable torment of human displacement today has blurred the grounds of persecution. The international community can no longer ignore new forms of persecution and human rights violations that were non-existent in 1951 and are not attributable to any states and/or intractable or totalitarian entities. The Refugee Convention does not automatically preclude involuntary climate displacement, which may constitute a novel form of “climate persecution”.

The quest for the special protection of climate displaced people warrants an innovative and creative application of international refugee law by pragmatic reference to factual experience and legal reasoning. This is all about its progressive development through particularised interpretation and analogical extrapolation to cater for new exigencies. Its ability to ensure human security in an increasingly insecure and hostile climate will ultimately lie not so much in the realm of law but in political good will, legal commitment, and policy capacity nationally and internationally.

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International Instruments

Owing to the existence of a variety of mechanisms at the international level for the protection of refugees and asylum seekers, the term “refugee” finds its definitive meanings in various international instruments. As the UN High Commissioner for Refugees (UNHCR) has advocated a broad interpretation of these instruments in favor of those who are in need of international protection, this chapter focuses on how various UN human rights bodies may use them to enhance the protection of refugees. The purpose of focusing upon the UN-based human rights law is to inform the reader about refugee protection issues at the international level. The practical difficulties often experienced in gaining access to information concerning the UN human rights bodies stand in contrast to some regional systems of human rights protection which have developed sophisticated jurisprudence on protection issues concerning refugees and other foreigners.

To begin, the author argues that while the UN human rights bodies may not provide an expansive, reliable and accessible framework of protection, this chapter provides a number of examples on how the refugee advocates may resort to these mechanisms to enhance protection principles and enable forms of enforcement. To this end, this chapter reiterates how refugee advocates and other related NGOs must play an important role for this positive evolution to result in effective linkages between core human rights standards and refugee protection standards. In the opinion of the

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1 These instruments include for example, the 1969 Organization of African Unity Convention governing the specific aspects of Refugee Problems in Africa and the 1984 Cartagena Declaration on Refugees.
2 UNHCR has produced a ‘Regional Policy and Strategy Paper on the Applicability of the European Convention for the Protection of Human Rights and Fundamental Freedoms to UNHCR’s Protection Work for the Period 1999–2002’ which suggests that UN human rights law and related mechanisms can make a significant contribution to refugee protection.
author, these linkages are integral in the international protection of refugees.

2. The System of International Refugee Protection

"Asylum", derived from “asylon” meaning “inviolable”, has been in existence for over 3,500 years. The beginning of the modern tradition of asylum in Europe is marked by the flight of 250,000 French Protestants called Huguenots, in 1685 who were then received as refugees in different countries. After the French revolution in 1789, the category of refugees fleeing political rather than religious persecution gained prominence. In the aftermath of the World War I refugees and displaced people were scattered in various countries. With the establishment of the League of Nations in 1920 it was argued that the international community owes an obligation to prevent the abuses and gross violations of human rights and also a positive duty to provide refugees ‘protection’ and constantly endeavor to find solutions to their problems found a new emphasis. The Norwegian diplomat Fridtjof Nansen, the first High Commissioner for Refugees, is regarded as the founding father of the international system of protection and assistance to refugees because of his ceaseless commitment to alleviating human sufferings. Under the auspices of the League of Nations he organized massive humanitarian relief operations. In the 1930’s, a succession of international refugee organizations was charged with resettling Jews and others who were fleeing Nazi persecution.

The steady growth of the refugees resulted in the swift loss of ground level State legal protection. Many State Parties to the international legal instruments went on to introduce radical legislative changes and interstate arrangements resulting in restricted access to asylum and legal rights to refugees.\(^3\) This trend of pulling back from the legal foundation on which effective protection rests resulted in narrowing down of the formal recognition of refugee status to minimal levels, exclusion of fair appeals before deportation, and to restrict the entitlement to basic rights for various categories of victims of civil conflict.

Temporary protection is a positive response by States to the concerns of the refugees. Interestingly, States had kept refugees for years classified under a temporary status which in turn left the refugees remaining as

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\(^3\) This includes, limiting access to refugee status determination procedures and employing an increasingly restrictive interpretation of the refugee definition.
unable to get work or to reunite with their immediate families. These tendencies became matters of real concern for the UNHCR to evolve suitable action plans.

Restrictions on the international protection regime may be of different types namely, (i) Measures to develop offshore or extraterritorial procedures to avoid the entry of asylum seekers; (ii) Practices that would deter the asylum-seekers namely use of administrative detention, misuse of readmission agreements, application of safe third country approach, use of first country of asylum, the imposition of carrier sanctions, visa restrictions and inspection of travelers in foreign airports, the absence of domestic refugee law or functioning determination procedures, restricting access to determination procedures including the right of appeal, and the imposition of airport regulations. These practices, as a whole, result in increased global restrictions on access to asylum procedures and adversely affect the basic human rights of refugees. Ironically, these regressive approaches have found favor amongst a number of traditional asylum countries that claim to be overburdened with asylum applicants. Although the arrival of increasing numbers of asylum applicants and the potential abuse of asylum procedures will result in a significant burden on receiving States, the system of international refugee protection could not have foreseen these unprecedented and wide-ranging developments to avoid State responsibility.

The gap in the international protection regime requires a new international legal framework or revised international refugee convention, although it is unlikely that the international community would ever be willing to engage in reforming the current international legal regime so as to make it more generous. In fact, revisiting the international legal instruments for the protection of refugees in the current political climate is a very limited option despite the overwhelming need to develop a new paradigm of refugee protection based on standards and mechanisms to implement common but differentiated responsibility towards refugees. There is an impressive array of international, regional and national human rights standards and structures which must continue to evolve to ensure that gaps and weaknesses are identified in the international protection regime for refugees. A primary objective of this chapter is to review the record of some of the principal UN human rights mechanisms so as to consider how they can provide a helpful and complementary body of law and jurisprudence and examine whether a human rights perspective provides a positive approach towards enhancing the protection of refugees through strengthening the normative and operational framework.
3. INTERFACE BETWEEN INTERNATIONAL REFUGEE PROTECTION AND INTERNATIONAL HUMAN RIGHTS STANDARDS

Although two thirds of the nations of the world are parties to the 1951 Refugee Convention and its 1967 Protocol, whether these international instruments in themselves, duly supported by the conclusions of the Executive Committee (ExCom) of the UNHCR, are sufficient to take account of today's refugee problems is the core issue for debate in discussions relating to the protection of refugees. However, the ‘definition’ and ‘rights’ of refugees enumerated in these instruments have been widely incorporated into a number of regional instruments and national legislations providing protection to refugees.

Adoption of the 1951 Refugee Convention is premised on its universal application to all refugee situations. The cornerstone of international protection, prohibition of expulsion or return of a refugee (non-refoulement) (Article 33), includes (i) prohibition on forced return from a potential asylum country at its frontiers; (ii) freedom of association with non-political and non-profit-making associations and trade unions (Article 15); (iii) free access to courts of law (Article 16); and (iv) administrative assistance by the Contracting State authority to allow a refugee to exercise a right under the Convention (Article 25).

Furthermore, the Convention provides that nothing in the Convention shall be deemed to impair any additional rights and benefits granted by a Contracting State Party apart from the Convention. (Art.5) Thereby, State Parties shall consider the rights provisions in the Convention as minimum standards of treatment. Furthermore, the Convention is a bill of rights for refugees granting rights such as enjoying non-discrimination; and, protection from persecution (i.e. denial of life, liberty and personal security). These are also, in one form or another, enshrined in international human rights treaties, i.e., the 1966 International Covenant on Civil and Political Rights (ICCPR), the 1966 International Covenant on Social, Economic and Cultural Rights (ICESCR), the 1984 Convention against Torture (CAT) and the 1989 Convention on the Rights of the Child (CRC) inter alia.

While under the Refugee Convention 1951 many of the rights are granted to refugees without restrictions, the above referred international human right instruments require that State Parties shall provide treatment as favorable as that provided to other foreigners subject to the jurisdiction of the concerned State. Unlike the Refugee Convention the human rights instruments provide broader legal protection. For example, in relation to housing rights and social security, the Refugee Convention guarantees the
equality of treatment to refugees with other non-nationals, while the relevant international human rights instruments provide such guarantees equally to all persons without restrictions.

Despite the satisfactory scope of human rights guaranteed to refugees under the above-mentioned principal international refugee instruments, at the enforcement level the provisions are commonly ignored by States and other actors as a disproportionate amount of energy and resources tends to be focused on determining who is a refugee. The definition of a refugee includes not only those who can, on a case-by-case basis, be determined to have a well-founded fear of persecution but also other large groups of persons who can be determined or presumed to be without, or unable to avail themselves of, the protection of the government of their state of origin.

Apart from variances of scope and application, the overriding difficulty with international human rights instruments is how to enforce the specified rights. In the case of the principal UN human rights treaties there is a system of treaty bodies that play a supervisory and enforcement role in ensuring compliance by state parties with the treaty provisions. This is done through examination of periodic state party reports by the human rights treaty body or a committee established under authority of a particular treaty which is made up of an independent group of experts. Depending on the agreement of individual states and the specific provisions of the human rights treaty, a treaty body may also deal with inter-state and individual complaints and conduct field investigations on the human rights situation in a particular country.

According to the author, despite the symbolic authority of the human rights treaty bodies as a part of the broader system of human rights protection, this set-up is unsatisfactory and requires reforms. The UNHCR on its own, or in conjunction with other actors, must develop assistance programs and protection initiatives aiming at safeguarding the human rights of refugees. By contrast, the international refugee protection regime has greater potential to ensure compliance with existing international refugee protection standards. In view of its extensive field presence in over 120 countries, the UNHCR can play an effective supervisory and de facto enforcement role in the application of international refugee law and

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4 For example, the 1951 Status on Refugee Convention reiterates the “importance of sharing”, but incorporates no mechanism to make it happen.

5 These instruments include for example, the 1948 Universal Declaration and the two 1966 International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights.
related human rights standards and has greater potential to ensure State compliance with International Protection Standards.

The system of international refugee protection differs from the approaches to human rights protection within the mechanisms of the UN. For example, unlike in the human rights regime, no formal mechanism exists in refugee law to receive individual or inter-state petitions or complaints. The UNHCR has not put Article 35 of the Status of Refugee Convention 1951 to full effect, whereby Contracting States undertake to provide the UNHCR relevant information and statistical data on _inter alia_ the implementation of the Convention. There exists no system of review of country practices through the public examination of state party reports or other such information which can be used to formulate concluding observations and recommendations so as to ensure effective compliance with standards of refugee protection. Most importantly, the extent of UNHCR involvement largely depends on the scope of permission granted to the UNHCR by the receiving country as well as the resources available for a specific operation. Limited human and financial resources of the UNHCR means understaffing of field operations and delay in addressing refugee concerns.

On the positive side, there are many advantages of the UNHCR ‘rights enforcement’ approach. The daily presence of the UNHCR protection officers in the field develops appreciation of the country conditions and potential solutions to refugee problems, and helps to assess and monitor the level and extent of human rights problems. As a part of the focus on human rights issues which affect refugees, the UNHCR has incorporated human rights principles relating to the refugee protection in its policies and programs including the (i) protection activities in countries of origin; (ii) working with states in the area of legal rehabilitation, (iii) institution building and law reforms; (iv) enforcement of the rule of law; and (v) developing specific protection guidelines for refugee women and children are all relatively recent areas of activities for UNHCR.6

This means that the UNHCR should support developing justice systems in post-conflict situations, and work towards making judicial authorities and the legal community aware of human rights problems of refugees and

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6 While in every year, the Executive Committee of the UNHCR adopts a general conclusion in relation to International Protection, specifically in this context, General Conclusion No 77 (XLVI), 1995 on ‘International Protection’ deserves a special mention since through this resolution the UNHCR Executive Committee called upon the States to reiterate the need “to strengthen its activities in support of national legal and judicial capacity building, where necessary, in cooperation with the UN High Commissioner for Human Rights.”
other persons of concern. Such awareness efforts positively impact the development of favorable administrative practices and policies. Hence, the author submits that the UNHCR must strengthen its involvement in the refugee and human rights standard-setting exercises, in order to ensure proper reflection of the Office's interests and concerns and to safeguard a liberal interpretation of these standards.

The extent of UNHCR involvement in such initiatives depends on the country conditions and the political commitment of governments to comply with international refugee law standards and cooperate with the UNHCR. Such achievements can only be undertaken through building a working relationship with government authorities and other actors taking into account the needs of the country concerned, and related sensitivities which respond to local diversities. The strength of the UNHCR's field presence should not, therefore, be underestimated in respect of its overall potential to build upon the system of international refugee and more broadly human rights protection.

4. UN Human Rights Mechanisms

The record of the UN treaty bodies and other human rights mechanisms in addressing violations of refugees’ human rights, is developing steadily. The decisions, pronouncements, conclusions and recommendations of the UN human rights treaty mechanisms, in the opinion of the author, will be a rich source for the legal foundation and add support to refugee protection efforts. This is the strength of international human rights law as a universal system of standards and obligations which States, whether through consent or some degree of imposition, are required to uphold. For this reason, the specifics of the UN human rights mechanisms which can be employed to enhance the refugee protection need a clear discussion.

Mandates, experiences and competence of a particular actor or group of actors vary enormously in the actual process of refugee protection. For example, some human rights bodies may be unwilling to deal with cases of individual refugees or issues concerning a state’s general asylum practice. Similarly, members of a given human rights body may lack expertise on human rights issues concerning refugees. That refugees are the primary responsibility of the UNHCR. Hence, the author submits that its continuous involvement in the work of the other human rights treaty bodies through information sharing and; exchange of views enhances the promotion of human rights standards that augment the protection and assistance to the refugees.
4.1. The UN Human Rights Council

The United Nations Human Rights Council (the Council) is an intergovernmental body within the United Nations responsible for strengthening the promotion and protection of human rights around the globe and for addressing situations of human rights violations and to make appropriate recommendations. It can discuss all thematic human rights issues and situations that require its attention throughout the year. It meets at the UN Office at Geneva. The Council replaced the former United Nations Commission on Human Rights and was created by the United Nations General Assembly on 15 March 2006 by resolution 60/251. Its first session took place from 19 to 30 June 2006. One year later, the Council adopted its “Institution-building package” to guide its work and set up its procedures and mechanisms. Among them were the ‘Universal Periodic Review mechanism’ (UPR)\(^7\) which serves to assess the human rights situations in all UN Member States; the Advisory Committee which serves as the Council’s “think tank” providing the expertise and advice on thematic human rights issues; and, the Complaint Procedure which allows individuals and organizations to bring human rights violations to the attention of the Council. The Council also works with the UN Special Procedures established by the former Commission on Human Rights. These are made up of special rapporteurs, special representatives, independent experts and working groups that monitor, examine, advise and publicly report on thematic issues or human rights situations in specific countries. The Council holds no fewer than three regular sessions a year, for a total of at least ten weeks during March, June and September. If one third of the Member States requests so, the Council may decide at any time to hold a special session to address human rights violations and emergencies. The Council is made of 47 Member States, elected by the majority of members of the General Assembly of the United Nations through direct and secret ballot. The General Assembly takes into account the candidate States’ contribution to the promotion and protection of human rights, as well as their voluntary pledges and commitments in this regard.

The Council’s Membership is based on equitable geographical distribution. Seats are distributed as (i) African States: 13 seats; (ii) Asian States: 13 seats; (iii) Latin American and Caribbean States: 8 seats; (iv) Western European and other States: 7 seats; and (v) Eastern European

\(^7\) The UPR is a State-driven process, under the auspices of the Council, which provides the opportunity for each State to declare what actions they have taken to improve the human rights situations in their countries and to fulfil their human rights obligations.
8 The authority to establish these mechanisms may be found in ECOSOC resolution 1235 (XLII) adopted on 6 June 1967. It is regarded as the legal basis for any public discussion or activity undertaken by the Commission in respect of any alleged violations of human rights. This resolution provides inter alia that the Commission may “in appropriate cases and after careful consideration of the information thus made available to it and make a thorough study of situations which reveal a consistent pattern of violations of human rights and report, with recommendations thereon, to ECOSOC”.

9 A good example of reporting to the Council was the report of the Special Rapporteur on Iraq, Mr Max van der Stoel, who in 1995 noted that neighboring States had in previous years experienced mass influxes of refugees, both from the southern and the northern parts of Iraq.
back to the Council on their findings. The mandates of the thematic mechanisms varies, but there are several ways to bring refugee protection issues to their attention. One of the most useful features of the thematic mechanisms is that they can take action, at any time, in cases involving human rights violations in any UN Member State, not just State Parties to particular treaties. The reports prepared through the thematic mechanisms also serve as an authoritative source of information relating to the country of origin. ‘Special Rapporteur on Torture’; ‘the Working Group on Arbitrary Detention’; ‘the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions’; and, ‘the Special Rapporteur on Violence against Women’ are the notable institutions before which the refugee related issues are brought before for an appropriate action.

4.3. The Sub-Commission on Human Rights

The United Nations Sub-Commission on Human Rights (the Sub-Commission) is a subsidiary body of the UN Council on Human Rights, and reports annually. It consists of 26 members who are elected by the Council to serve in their individual capacities. In contrast to the Council, the Sub-Commission operates in a politically less-charged atmosphere. The Sub-Commission meets annually for four weeks in Geneva. Government representatives, NGOs and international organizations are permitted to attend its meetings as observers. Its principal activity has been to initiate studies on human rights questions which often lead to the development of new international standards. It also takes up human rights issues in particular countries. While it has no specific agenda item dealing with refugee protection issues, at its 1992 session the Sub Commission has adopted an agenda item entitled “Freedom of Movement”. In 1994 the UNHCR spearheaded the adoption of a resolution on “the right to freedom of movement” affirming the right of persons to remain in peace in their homes, on their own lands, and in their own countries and the right of refugees and displaced persons to return, in safety and dignity, to their country of origin. These initiatives had urged, in turn, the governments and other actors involved to do everything possible in order to cease at once all practices of forced displacement, population transfer and ethnic cleansing in violation of international legal standards.

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Similarly, at 1995 and 1996 sessions, the Sub-Commission adopted further resolutions under this item.11

Apart from the specific resolution on freedom of movement, a number of country-specific resolutions of the Sub-Commission have made reference to specific violations of human rights of refugees. For example, in its resolution on the situation of human rights in Iran the Sub-Commission extraordinarily called upon the Iranian government to investigate fully the alleged various human rights violations in the country and stop harassing Iranian refugees abroad. Similarly, the Sub-Commission took account of the plight of Bhutanese refugees in Nepal and India and called for negotiations “in good faith” between Bhutan and Nepal to resolve this long-standing refugee problem. One would not normally expect such specificity being highlighted in resolutions coming out of the Sub-Commission.

There is wide scope to place refugee protection issues on the Sub-Commission's agenda. While NGOs are capable of raising issues concerning refugees' rights, the UNHCR also takes interest in the Sub-Commission's work and its activities and is closely involved in highlighting issues by making public statements and through lobbying efforts with individual members to press for setting standards on human rights which may benefit refugees.

5. Other Important Human Rights International Treaty Bodies

Human Rights Treaties/Conventions provide for the establishment of committees/bodies to oversee or supervise the implementation of Convention/treaty provisions. While the authority of these bodies varies depending on the sources, in general terms, they examine the periodic reports submitted by state parties which indicate the steps taken by the concerned State to implement the provisions of the Convention; and, receive and decide on the petitions from individuals or States

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11 ExCom Conclusion 78 (XLVI), 1995 on ‘Prevention and reduction of Statelessness and Protection of Stateless Persons’ urged “all state parties to the Convention relating to the Status of Refugees to safeguard and give effect to the right to seek and to enjoy in other countries asylum from persecution.” Similarly, ExCom Conclusion 80 (XLVII) 1996 on ‘Comprehensive and Regional approaches within a protection framework’ further affirmed that “the rights of refugees and internally displaced persons to return of their own free will under conditions of security and dignity to their country of origin.” It also called for an end to “all practices of forced displacement, population transfer and ethnic cleansing” and for
concerning specific violations of the treaty rights. In addition to these principal functions, they publicize findings of human rights violations. During the examination of State Party Reports concerned government representatives may be called upon to explain why there are shortcomings in complying with international human rights standards and they may be encouraged to work towards remediying difficulties.

The Committee’s observations and recommendations address a State’s level of compliance with the provisions of a treaty; the decisions on individual complaints, together form an important source of information on the country of origin and human rights jurisprudence. With regard to individual complaints procedures may be employed as legal remedies for refugees. However it is not always straightforward to submit an individual petition, as generally, in order for the application to be accepted for consideration by a treaty body the applicant (who must be the actual victim or someone with appropriate *locus standi*) must satisfy that he or she has exhausted all available domestic legal remedies and the matter is not being dealt with before another international procedure. Furthermore, individual complaints procedures are only available in respect of those State Parties which have recognized the competence of a committee to deal with such petitions.

However, the majority of the States do not recognize the competence of the respective committees to deal with such communications. In addition to the procedure to receive and decide upon individual petitions, some international human rights treaties provide for an inter-state complaint procedure which permits State Parties to lodge a complaint against another State Party. In order to initiate an inter-state complaint it is necessary that both states have recognized the competence of the committee to deal with such complaints. Due to the sensitive nature and implications of the inter-state complaints procedures, they have never been used and are unlikely to be used in the future.

There are currently six UN treaty bodies namely (i) the Human Rights Committee (HRC); 12 (ii) Committee Against Torture (CAT); 13

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12 The HRC began its work in 1976 and has eighteen members and was established under the ICCPR, 1966.
13 The began work in 1988 and is composed of ten experts and was established under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
(iii) Committee on the Rights of the Child (CRC);¹⁴ (iv) Committee on the Elimination of Racial Discrimination,¹⁵ (CERD); (v) Committee on the Elimination of Discrimination against Women,¹⁶ (CEDAW); and (vi) Committee on Social, Economic and Cultural Rights (CESCR).¹⁷

Each of the treaty bodies have adopted their own rules of procedure apart from the specific procedural requirements contained in the relevant convention. These rules of procedure govern such matters as the form and content of State party reports; procedures for examination of State party reports; procedures for submitting individual or inter-state complaints; election of members the committee; and establishment of pre-sessional working group meetings.

While HRC, CAT and CERD have established procedures for considering individual complaints CESCRs and CEDAW Committee are in the process of developing draft protocols which provide for the establishment of procedures to deal with individual petitions. Committees, such as Committee Against Torture (CAT) and Committee on Rights of Child (CRC), are involved in fact-finding missions. The authority for CAT to get engaged in such matters is found in Article 20 of the Convention Against Torture (Convention) which provides that “if the Committee receives reliable information which appears to it to contain well-founded indications that torture is being systematically practiced in the territory of a state party a confidential enquiry can be made and in agreement with that state party such inquiry may include a visit to its territory”. The CAT has exercised this power twice in relation to Turkey in 1993 and Egypt in 1996. The CRC has also been involved in field visits jointly organized by UNICEF and the Office of United Nations Commissioner of Human Rights (UNCHR) in order to assist the Committee to gain firsthand experience concerning the problems in safeguarding the human rights of children. In recent years the UNHCR has been involved in the work of a number of treaty bodies, in particular CAT, CRC and HRC. UNHCR participates in these committees so as to share information, either informally or during pre-sessional working group meetings, and to follow and report on the committee sessions.

¹⁴ This Committee was established under the Convention on the Rights of the Child and began working in 1989 and is composed of experts.
¹⁵ This Committee was established by the Convention on the Elimination of All Forms of Racial Discrimination which was adopted in 1965 and is composed of eighteen experts.
¹⁶ This Committee consists of twenty-three experts and is established by the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).
¹⁷ This Committee has eighteen experts and is established by ICESCR, 1966.
during examination of state party reports. The concluding observations and recommendations of these committees as well as published summaries of discussions coming out of the public sessions serve as a point of departure in negotiating and discussing specific refugee protection issues with governments.

5.1. **Committee against Torture (CAT)**

Of all the human rights treaty bodies, CAT is one of the most active body in terms of the protection to the refugees. Many unsuccessful asylum seekers look to the human rights treaties for alternative protection against expulsion and return to their countries of origin. The protection provided for refugees under the concept of *non-refoulement* of the Refugee Convention is paralleled in Article 3 of the Convention\(^\text{18}\) which prohibits the return (*refouler*) of any individual who would face torture or cruel, inhuman or degrading punishment or treatment. However, the scope of the protection granted to persons fearing torture in their country of origin or any other territory to which they could be returned, is broader than that offered by the corresponding provision under the Refugee Convention. To determine the existence of grounds for persecution, the competent authorities shall take into account all relevant considerations including, where applicable i.e., the existence of the state concerned of a consistent pattern of gross, flagrant or mass violations of human rights”.\(^\text{19}\)

The Convention against Torture does not contain any exclusion provisions requiring that a person be considered as not deserving protection under the treaty unlike the Refugee Convention.\(^\text{20}\)

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\(^{18}\) Article 3 declares that: "No state party shall expel, return (refouler) or extradite a person to another state where there are substantial grounds for believing that he or she would be in danger of being subjected to torture ...."

\(^{19}\) Under the Convention against Torture, the term “torture” is defined in Article 1 as: ...

\(^{20}\) Article 1\(\text{f}\) of the Refugee Convention 1951 provides that the Convention shall not apply to any person with respect to whom there are serious reasons for considering that: (a) he or she has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) he or she has committed a serious non-political crime outside the country
The Convention against Torture provides the universal jurisdiction of State Parties to take legal action against a person who has committed acts of torture. Further, the jurisprudence to be developed by CAT is complementary to refugee protection under the Refugee Convention. Its functions are to examine state party reports, raise issues of concern and make observations and recommendations; review states and individual complaints in respect of States which have made declarations (Articles 21 and 22); and conduct confidential inquiries where reliable information about systematic practice of torture in a state party is received pursuant to its authority (Article 20). State parties are obliged to submit periodic reports to CAT which describe the measures they have taken to give effect to their undertakings under the Convention (Article 19).

After the initial report which is required one year after ratification, additional reports are due for submission every four years. A State Party may at any time declare that it recognizes the competence of CAT to receive and consider inter-state and individual complaints respectively. The CAT considers such communications during in camera sessions. However, it may decide to make public its views relating to an individual or inter-state complaint. Of the present 108 ratifying States, only 39 states have made declarations to permit the CAT to hear individual complaints under Article 22. A refugee will only be able to individually petition before the CAT if the country which is threatening to deport him or her has made a declaration under this provision. It is therefore in the interests of international human rights protection in general, and refugee protection more specifically, that efforts be made to achieve further ratification of this important human rights treaty and to seek further declarations under Article 22.

The CAT does not consider any communication unless it has ascertained that the same matter has not been, and is not being, examined under another procedure of international investigation or settlement. Furthermore, the applicant must exhaust all available domestic remedies. For example, the asylum seekers petitioning before the CAT shall have availed themselves of every effective remedy in the country of asylum.

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of refuge prior to his or her admission to that country as a refugee; and (c) he or she has been guilty of acts contrary to the UN purposes and principles.

21 Rule 108 authorizes CAT, when considering the admissibility of a communication, to request the concerned State party to take steps to avoid a possible irreparable damage to the person or persons who claim to be victims of the alleged violation. CAT can thereby request the State party to refrain from removing from its territory a person who is the subject of a complaint. In a number of cases where CAT has been called upon to decide on
Two noteworthy pronouncements of CAT in this regard are *Kaven Yaragh Tola v Sweden*;\(^22\) and *Sadiq Shek Elmi v Australia*\(^23\) both of which have moved the law on refugee protection in a positive direction. Given the pressures placed on these treaty bodies due to the increased number of cases they are obliged to review, it is not inconceivable that this may result in a stricter application of their respective mandates and the adoption of higher evidentiary burdens and legal tests as well as a more strict application of the rules of procedure.

Whenever the CAT rejects the cases at the admissions stage, it is difficult to assess the reasons as the written decisions lack details and specificity. So as to dissuade asylum seekers from viewing the CAT as an international refugee appeals board, the CAT declares a number of petitions from asylum seekers, it has been able to make a positive contribution to the legal framework of refugee protection.

The general considerations which the CAT has developed in relation to the protection of communications from asylum seekers are (1) an asylum seeker is in the jurisdiction of a State Party to the Convention and must substantiate that he/she is personally at risk of being subject to torture through action or inaction of the State; (2) There is a causal link to this risk with the applicant's background, including ethnic origin; political affiliation, history of detention; (3) There is no internal flight alternative available to the applicant; (4) Inconsistencies in an asylum applicant's presentation of facts which do not raise doubts to the material elements of the claim, will not undermine an application because accuracy is rarely to be expected of survivors of torture; (6) Medical reports which corroborate bodily scars will be considered as compatible to torture wounds in addition to diagnosis of post traumatic stress disorders; (7) Status of ratifications of international human rights instruments and whether a State is a party to the Convention, as well as states human rights records will be looked into; (8) Findings of UN Special Rapporteurs, as well as Working Groups and Human Rights mechanisms of the Commission on Human Rights may also be considered in order to assess the human rights situation in the concerned states; and (9) any opinions or positions of UNHCR.

\(^22\) N 39/1996 In this case, an Iranian citizen claimed to be a political activist with the opposition Mujahhiddin party and as a result had been detained and tortured for three months in his country of origin. CAT found that Sweden's rejection of the asylum claim based on "inconsistencies and contradictory descriptions" could be explained as possible reactions to previous torture. It also determined that the applicant's return to Iran or any other country where he would be threatened with expulsion to Iran would constitute a violation of Article 3.

\(^23\) N 120/1998 This case was decided during its May 1999 session. The complainant was a Somali national of the Shkal clan who contended that members of the Hawiye militia had persecuted members of his clan living in his area. Australia attempted to resist the complainant's submission that he would be subjected to torture if deported to Somalia on the basis that the communication was inadmissible because the feared torture by the Hawiye militia did not constitute acts by "public officials or other persons acting in an official capacity" as required under Article 1 of the Convention against Torture. CAT held that a number of factors supported the view that the clans in Somalia operated in a quasi-governmental fashion and that these groups could be likened to official authorities for the purposes of Article 1. The area of Mogadishu where the applicant was from was under
plaints by asylum seekers as inadmissible, on the ground that the claims were not substantiated; domestic remedies were not exhausted; or, the complaint had been submitted to another procedure of international investigation or settlement etc.

Therefore, any restrictive application of rules of procedure and the adoption of higher evidentiary burdens will impede the development of refugee protection framework. Although the CAT does not admit cases where there are procedural deficiencies, it grants relief to a large number of asylum seekers and refugees. Hence, the CAT’s contribution in developing a body of jurisprudence relating to refugee protection will be one of the most positive offshoot of the individual complaints process.

International human rights NGOs including Amnesty International, Human Rights Watch and International Service for Human Rights have been particularly active in providing information to the CAT and following and reporting on its sessions. On refugee issues, the UNHCR has shared information with the CAT and in some instances followed-up with the concerned State party to monitor compliance with the CAT’s recommendations. During examination of State Party reports, the CAT regularly requests state party representatives to describe the efforts made to ensure implementation of Article 3. Hence, the author opines that continuance of this practice will be helpful in drawing the attention of States to the plight of asylum seekers who have entered their territory or have presented themselves at the border and are seeking international protection. It is further necessary for the CAT to continue to call upon the State Parties to ensure that education and information concerning the prohibition against torture and the general provisions of the Convention are disseminated to law enforcement, medical personnel and public officials. The value of such a continuing dialogue with States on these issues is not be underestimated as it brings into the public domain concerns regarding particular violations of treaty rights. Of equal importance, the dialogue with State representatives can provide impetus and awareness to the State party and other actors that deficiencies in law and practice in a particular State should be remedied.

In this respect the conclusions and recommendations of the CAT serve as a benchmark against which a State Party’s compliance with a treaty can be measured. This can be used in efforts to improve the protection situation of refugees in a particular country. Overall, the work of the CAT concerning refugee protection has set a high standard which the other treaty bodies would do well to consider as a positive example.
5.2 Committee on the Rights of the Child (CRC)

The Committee on the Rights of the Child (CRC) comprises of 10 expert members who amongst themselves represent a wide range of interests, professional experience and geographical representation. The CRC meets three times a year in Geneva in sessions which last for four weeks. There are currently 191 State parties to the Convention, making it the most widely ratified international human rights treaty. A principal focus of the CRC’s supervisory role is to monitor the State compliance with the Convention Obligations through examining the periodical reports. There is no provision for the CRC to deal with individual or inter-state complaints. State Parties are obliged to submit an initial report within two years of entry into force of the Convention, and thereafter for every five years. These reports shall indicate factors and difficulties affecting the degree of fulfillment of the obligations under the Convention. Moreover, they shall contain sufficient information to provide the CRC with a comprehensive understanding of the implementation of the Convention in the concerned State. In order to prepare the lists of issues to be discussed with government delegations during the formal examination of reports, the CRC establishes *in camera* pre-sessional working group meetings, taking place immediately following the end of a session to consider matters regarding the State parties due to report at the following session. These meetings facilitate the CRC receiving information from various international organizations and other NGOs.

At present, the CRC is the only human rights treaty body that has a full-time NGO Coordination Group. The Swedish International Development Cooperation Agency (SIDA) funds this Coordination Group, and facilitates the participation of NGOs in the CRC’s regular sessions. The UNHCR attends the sessions of the CRC and provides information on issues of concern to refugee and asylum seeking children that they have gathered from field reports. In regard to refugee children, the UNHCR shares its policy papers and the Guidelines on Protection and Care of Refugee Children with the CRC and thus establishes a framework.

As a part of the examination of State Party reports, the CRC prepares “concluding observations” making reference to refugee protection issues. In addition to the participation in the regular sessions of the CRC, the UNHCR also participates in the general discussions of the CRC on themes such as The Administration of Juvenile Justice, ‘Protection of the Girl Child’, and ‘International Cooperation and Technical Assistance’. The UNHCR also participates in regular meetings being held with other
UN bodies and specialized agencies and cooperates with the CRC members in providing logistical assistance during field investigations. Overall, the UNHCR in its work with the CRC provides an opportunity to engage in dialogue and raise awareness, share relevant information and advocate specific concerns relating to the protection of refugee children. These activities are premised on the view that cooperation with the human rights mechanisms enhances the protection of beneficiaries.

The Convention on the Rights of the Child is based on three fundamental principles namely (i) non-discrimination; (ii) the ‘best interests’ of the child; and, (iii) participation of the child in decisions regarding his/ her welfare. In the refugee context, non-discrimination implies that child refugees have access to fair and efficient determination procedures and implementation of protection measures. The “best interests of the child” principle, is (i) a key consideration to ensure that children are fully protected in the country of asylum; (ii) a useful principle for evaluating of possibilities for repatriation or family reunification; (iii) and, a key safeguard to ensure that the child expresses his/ her own views concerning all decisions affecting his/ her interests.

Article 22 of the Convention requires the States Parties (i) to ensure that a child refugee, whether accompanied or unaccompanied, receives appropriate protection and humanitarian assistance in the enjoyment of the applicable rights as set forth in the Convention and other international human rights and humanitarian instruments; (ii) should cooperate in any efforts with the UN or other competent organizations or NGOs to protect and assist refugee children. This may include providing assistance in tracing parents or other family members, and in the event the child is unaccompanied, he or she shall be accorded the same protection as any other child deprived of his or her family environment. Although the present scope and rules of procedure of the CRC does not provide for an individual complaints procedure, regularly the CRC raises refugee protection issues during the examination of State party reports.

In conclusion it may be stated that the recommendations and conclusions of the CRC have identified a number of violations and negative practices on the part of States which in turn were asked to rectify/comply with the rights enshrined in the Convention. In recommendations concerning refugee children, the CRC has made specific references to the State parties to seek assistance from the UNHCR. Therefore, the author states that the pronouncements of CRC not only established a positive reinforcement of the practices which States shall follow and ensure compliance with the Convention, but also showed the way for effective advocacy efforts.
Although the conclusions and recommendations of the CRC are not binding they can be used as standards against which compliance with the treaty provisions can be measured. This in turn can lead to the incorporation of the Convention rights into domestic law and practice, thereby making these children's rights more readily enforceable and just. As part of this continuing process, international organizations and NGOs can play a helpful role and strengthen the overall enforcement and implementation objectives of the treaty mechanisms. They can also play a key role in ensuring that the CRC's recommendations are implemented.

5.3. Human Rights Committee (HRC)

The Human Rights Committee (HRC) was established in 1976 under the International Covenant on Civil and Political Rights, 1966. It comprises of eighteen members who are elected by State parties to the Covenant. The HRC meets three times a year alternatively in Geneva and New York. Its sessions normally last for three weeks. Its two main functions are to (i) review reports from State Parties; and, (ii) Consider individual complaints made against States Parties. The ICCPR, 1966 provides for review of inter-state complaints. The HRC regularly issues general comments on the interpretation of Articles in the Covenant. The State Parties must submit an initial report to the HRC after becoming a member, and thereafter must submit periodic reports every five years. The HRC if required, may, request supplementary reports from State Parties. The reports submitted to the HRC are examined in public meetings. NGOs are permitted to attend the public meetings, but are not allowed to formally participate during regular sessions. NGOs are nevertheless afforded the opportunity to provide information to the HRC prior to the consideration of a state party report.

However, pursuant to the HRC's mandate international organizations may be invited to present information during in camera pre-sessional working group meetings. These meetings are attended by four members of the Committee. The First Optional Protocol to the Covenant if ratified by a State party, enables individuals to file communications alleging violation...
of rights under the Covenant. The rights under the Covenant complement those under the Refugee Convention. The efforts of the HRC in relation to the refugee protection during its examination of State Party reports are very helpful, for the formulation of effective national policies and practices towards refugees.

Though the extent of influence refugee protection debates through the HRC during examination of State Party reports remains debatable, it is encouraging to see that the HRC requires States to acknowledge that compliance with the Covenant which seeks the protection of human rights of refugees. Although conclusions and recommendations of any human rights treaty body, even those as prominent as the HRC are no panacea to improving State policies and practices with respect to refugees, they indicate the growing concerns to the continuing needs of refugees.

6. Conclusion

The UN human rights bodies provide a number of complementary legal standards which can be employed to enhance the protection of refugees. Not only do they provide legal remedies in the form of complaints procedures, but their decisions and reports focus on refugee issues and in turn provide a rich source of international jurisprudence; country of origin information; and, modes of cooperation with States and other actors in the better protection of refugees.

Hence, the ways and means through which NGOs and other stakeholders use these mechanisms to advocate the protection of refugees should be further explored. On its part, the UNHCR shall (i) continue to be closely involve with the UN human rights machinery, (ii) promote human rights standards and practices which are complementary and supportive of the international refugee protection regime and (iii) in cooperation with States, UN agencies and the NGO community should follow-up on the implementation of the resolutions and recommendations of concern for the refugee protection. To this end, the UNHCR should develop closer institutional and technical links with the Office of the United Nations

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24 For example, under Article 7 of ICCPR no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment and, in accordance with Article 2 (1) applies to foreigners. A practical application of Article 7 thereby embodies the principle of non-refoulement as it can be argued that the refoulement of an individual whose life, liberty or physical integrity would be threatened, may amount to cruel, inhuman or degrading treatment.
Commissioner on Human Rights; in order to better promote human rights standards and ensure compliance, and to act on behalf of victims when those standards break down. It is possible, however, to argue that refugee situations are fundamentally different from human rights issues and that an increased focus on human rights may, in fact, weaken refugee protection. The author contends that in a world where refugee protection is rapidly being eroded and pegged to the lowest common denominator, individuals and groups committed to refugee protection must employ all means possible to uphold the rights of refugees. In this sense, the international human rights mechanisms shall provide a complimentary body of legal principles which progressively sustain the refugee protection.

Where refugee protection continues to be the continuing priority of States Parties, individuals and organizations including the UNHCR must, by all means at their disposal shall endeavor to fulfill the fundamental mandate of protection of refugees. Only then the contribution of International Human Rights mechanisms develop into a significant step in the right direction.

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Gary Wilson

**INTRODUCTION**

While refugees have existed since time immemorial, international efforts to afford protection to them are very much a product of the twentieth century. A number of regional and international instruments have been established which commit states to adherence to certain standards in their treatment of refugees. Collectively, this body of measures can be labelled International Refugee Law, being that part of international law pertaining to the rights and status of refugees. However, where there are refugee flows an additional mechanism can be utilised for responding to these. This is the collective security apparatus conferred upon the United Nations Security Council by chapter VII of the UN Charter. The main aim of the paper is to consider the contribution to be made towards alleviating the problems of refugees through the Security Council’s use of its Article 39 power to determine refugee flows to amount to threats to the peace.

The paper begins by making some general observations on the history and nature of the phenomena of refugees, before tracing the development of international refugee law and highlighting its limitations in responding to contemporary refugee problems. We then move on to consider the ability of the Security Council to respond to refugee flows as a problem brought within its collective security remit. Through the examination of a number of examples, some conclusions on the Council’s approach will be drawn. Finally, a brief discussion is provided of the measures available to the Council to respond to threats to the peace and their limitations highlighted.

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1 On an international level, the most significant international instruments are arguably the Statute of the United Nations High Commissioner for Refugees 1950, GA Res 319 (IV) and the Convention Relating to the Status of Refugees 1951.
Throughout history there have always been refugees. If we understand a refugee in broad terms as a person who flees his or her home to escape any threat posed to his or her individual wellbeing – be that persecution, war, famine or any natural disaster – history is replete with examples. Even if we adopt a narrower definition of a refugee, in line with that used in international conventions, which requires that the individual concerned has crossed national borders in fear of persecution, examples abound, from the Huguenots of sixteenth century France to the Jews of Nazi Germany. While there are a variety of factors which produce refugees, there has always been a strong correlation between the existence of conflict and refugee flows. Examples such as the two World Wars, East Pakistan’s fight for independence in 1971, and from the 1990s onwards conflict situations in a number of states bear out the relationship between conflict and large scale refugee flows well. As Lohrmann notes, the civil wars of the 1990s – which included most prominently former Yugoslavia, Somalia and Rwanda – uprooted millions with tragic consequences for civilians caught in the fighting and for both national and international security. The problem of the refugee has grown over time. According to international law’s strict definition of the term ‘refugee’, the number of refugees internationally had grown from 1.5 million in 1951 to 14.5 million by 1996, with an additional 23 million internally displaced persons. Most refugees today are found in the developing world, which creates additional difficulties as the states presented with the task of accommodating them are those least resourced to do so. The states which are the source of the largest number of refugees today include Afghanistan, Iraq, Somalia and Sudan.

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all countries which have experienced the devastating effects of armed conflict in recent years.\textsuperscript{7}

International Refugee Law has developed since 1945, with the establishment of the office of United Nations High Commissioner for Refugees (UNHCR) in 1950\textsuperscript{8} and entry into force of a number of international and regional conventions and instruments.\textsuperscript{9} Under the various legal measures adopted, a narrower definition has been prescribed of a refugee than the term is understood in ordinary usage, leading Phuong to note that “the concept of refugee is broader than the legal definition.”\textsuperscript{10} Goodwin-Gill and McAdam suggest that in ordinary usage, a refugee is regarded as someone in flight, seeking to escape conditions or personal circumstances found to be intolerable.\textsuperscript{11} Indeed, the Oxford Dictionary defines a refugee in quite broad terms as being ‘a person who has been forced to leave their country in order to escape war, persecution or natural disaster.’\textsuperscript{12} However, the relevant legal instruments restrict the scope of their application in two important respects: to be a refugee, a person must have crossed the border of his or her country of nationality, and must have done so due to fear of persecution on particular specified grounds.

The first major instrument adopted to afford protection to refugees was the Statute of the United Nations High Commissioner for Refugees, adopted by the United Nations General Assembly in 1950.\textsuperscript{13} Under paragraph 6B of the statute a refugee is defined as a:

\begin{quote}
person who is outside the country of his nationality, or if he has no nationality, the country of his former habitual residence, because he has or had well-founded fear of persecution by reason of his race, religion, nationality or political opinion and is unable or, because of such fear, is unwilling to avail himself of the protection of the government of the country of his
\end{quote}

\textsuperscript{8} By GA Res 319 (IV).
\textsuperscript{11} Goodwin-Gill and McAdam, \textit{Refugee in International Law}, 15.
\textsuperscript{13} GA Res 428 (V).
nationality, or, if he has no nationality, to return to the country of his former habitual residence.

The statute goes on to set out the functions to be performed by the UNHCR, which basically entail the provision of protection and assistance to refugees. The UNHCR is to operate on a non-political and humanitarian basis. Notwithstanding the restrictive definition given to the term ‘refugee’ in its founding statute, over time the UNHCR has come to concern itself with a wider range of displaced persons, including those who are internally displaced within their country of origin, usually as a consequence of internal armed conflict.

1951 saw the adoption of the Convention Relating to the Status of Refugees, which now constitutes the major international legal instrument concerned with the rights and status of refugees, and which adopts a similar definition of the term refugee to that utilised within the Statute of the UNHCR. Under Article 1.A (2), a refugee is to be regarded as someone who:

owing to wellfounded 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.

Again, there is a requirement of persecution and the crossing of national boundaries. The 1951 Convention then details various obligations which states assume towards refugees coming into their jurisdiction. These concern such varied matters as their personal status, ability to enter employment, and welfare treatment. Subsequent regional instruments have built upon the Refugee Convention by placing further obligations upon states within particular regions. Such instruments have included the Organisation of African Unity’s Convention Governing Specific Aspects of Refugee Problems in Africa 1969 and the Cartagena Declaration on Refugees 1984, adopted by a number of American states.

Notwithstanding the considerable body of law that has built up to confer protection upon those fleeing persecution, it arguably suffers from four key limitations which have the effect of restricting its value in tackling contemporary problems caused by refugee flows. The first two limitations concern the actual definition of ‘refugee’ that has been used in the key international legal instruments. Firstly, a refugee is one who flees from persecution. Phuong notes that the definition of a refugee utilised in the
key instruments was based upon the circumstances that existed at the end of World War Two and reflected the traditional human rights focus of western states on civil and political rights.\textsuperscript{14} In her view, “it can be argued that the current refugee definition is inadequate, because the persecution based standard is too restrictive.”\textsuperscript{15} While undoubtedly many people flee their home country because of persecution on religious, racial or political grounds, huge refugee flows can arise without the existence of persecution as groups flee the more general consequences of conflict or occasionally a natural disaster. The presence of armed conflict has always been a major cause of uprooting of civilian populations. While sometimes armed conflict will be accompanied by campaigns against sections of the population on political, racial or religious grounds, this will not always be the case. Simply being caught up in conflict will be sufficient cause for many to flee their homes out of a genuine fear of the danger posed to their physical well-being by the presence of conflict in itself. Where natural disasters occur, refugee populations are in transit not out of fear produced by the actions of any other groups within their state, but simply to relocate at least for the short term to a less hostile physical environment which is not plagued by the circumstances which have made their home an unsafe one in which to continue to live. The second limitation of the definition of ‘refugee’ is found in the emphasis placed upon the importance of the border-crossing element, the notion that there is an element of forced displacement involving a breach of the bond with one’s nation state.\textsuperscript{16} However, it is somewhat naïve to assume that only those uprooted populations who flee to another state pose a problem of international concern. While substantial numbers of those who flee their homes because of persecution, war or natural disaster continue to cross state borders, the demands posed by traditional refugees as defined by the 1951 Convention have come to be superseded by the challenge of internally displaced persons, who have been forced to flee their homes but remain within their state of origin. Phuong notes that whereas the number of traditional refugees – those crossing state borders – assisted by the UNHCR had fallen to 10.6 million by 2002, the number of internally displaced persons had increased to somewhere in the region of 20–25 million.\textsuperscript{17} This underlines

\begin{footnotesize}
\begin{itemize}
\item Phuong, \textit{Internally Displaced Persons}, p. 18.
\item Phuong, \textit{Internally Displaced Persons}, 1.
\end{itemize}
\end{footnotesize}
quite clearly the extent to which the notion of a refugee is markedly different in reality to the theory underlying much of traditional international refugee law.

The third limitation of international refugee law lies in the fact that its concern is with the treatment of refugees, as opposed to the adoption of measures to tackle the substantive causes of refugee flows. This is one benefit of the United Nations collective security system, as the Security Council is empowered to adopt measures designed to respond to ‘threats to the peace’, a term which it will be demonstrated can be applied to include situations which involve the production of refugee flows. Finally, international refugee law imposes obligations upon those states who receive refugees. Given that refugee flows are greater in less economically developed parts of the world, many recipient of large numbers of refugees are inadequately resourced to effectively perform these obligations. In other cases, there is sometimes a lack of commitment towards affording the required level of protection. These limitations of international refugee law should not detract from the very important role which international conventions and bodies such as the UNHCR have played in promoting the well-being of refugees. Without their existence, the suffering that is experienced by many refugee groups would undoubtedly have been much worse than it has. Nonetheless, they do reinforce the premise from which this paper begins, namely that attention ought to be given to the role which can be played by the United Nations Security Council in taking measures to alleviate refugee flows under its collective security remit.

**The United Nations Collective Security System**

Notwithstanding the specific measures introduced for responding to the problems posed by refugees by the various legal instruments which comprise international refugee law, an important role can be played in this area by the United Nations collective security system. The United Nations Security Council enjoys primary responsibility for the maintenance of international peace and security under Article 24 (1) of the United Nations Charter and by Article 25 the member states agree to accept and carry

out its decisions, thus making the Council's decisions binding upon the membership. It is within chapter VII of the UN Charter that the Security Council's robust enforcement powers are found. Article 39 has been described as the ‘gateway’ provision to the Council's collective security powers, as it is following a determination made by the Council under this provision that it can proceed to authorise the imposition of particular measures in response to situations of concern. Article 39 empowers the Council to determine the existence of a ‘threat to the peace, breach of the peace or act of aggression.’ Having made such a determination it may then choose to follow this up by authorising the imposition of non-military sanctions, or the taking of military enforcement action in response to the situation at hand, leading Yamashika to describe Article 39 as “the key enabler in the Security Council’s decision-making.”

In making use of its Article 39 power, the Council has avoided using the term ‘act of aggression’ and has only determined that there is a ‘breach of the peace’ on four occasions which all involved inter-state conflict. Invariably it has determined that there exists a threat to the peace. This is a very broad term which can bring under the remit of the Council a wide range of situations and in the post-Cold War era it has been applied to various phenomena. There has certainly been a “notable evolution in the use of the concept of threat to the peace.” At its 1992 Summit, the Security Council itself recognised that “The non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security,” a view reinforced by the High

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20 Article 41.
21 Article 42.
23 In relation to the Korean War (SC Res 82 (1950)), Falklands War (SC Res 502 (1982)), Iran-Iraq War (SC Res 598 (1987)) and Iraq’s invasion of Kuwait (SC Res 660 (1990)).
26 UN Doc S/PV.3046, 124.
Level Panel Report of 2005. This broadened conception of the term has made it possible for refugee flows to be brought within the Council’s collective security remit, Goodwin-Gill & McAdam noting that, “the Security Council has turned its attention not only to internal and inter-State conflict, but also to genocide, massive violations of human rights, and crimes against humanity in formulating a variety of resolutions, measures, and actions, including under Chapter VII of the UN Charter. The actual displacement of populations has also been seen as a threat to international peace and security, or as contributing to such a threat.” Given the limitations of International Refugee Law, this broad conception of threats to the peace is especially important, as in considering responses to refugee flows, the Council is not constrained by narrow definitions of who count as refugees and can use its powers to respond to any flow of people, regardless of the cause of their flight and whether they cross any state borders or not. Furthermore, whereas International Refugee Law is concerned with responding to the effects of refugee flows, the Security Council is able to take action which seeks to address the causes of such flows in the first place if these are deemed to amount to threats to the peace.

Refugee Flows as ‘Threats to the Peace’ and Consequences of ‘Threats to the Peace’

Former British Prime Minister Tony Blair once remarked that “when oppression produces massive flows of refugees which unsettle neighbouring countries then they can be properly described as “threats against international peace and security.”” Without doubt the Security Council has labelled situations which have given rise to large refugee flows as threats to the peace on a number of occasions. However, the question to be asked is whether refugee flows in themselves are regarded by the Council as potential or actual threats to the peace or whether it is just the situations which give rise to the emergence of refugee flows which should be so labelled.

That refugee flows are a common product of situations which constitute a threat to the peace is, arguably, a non-controversial proposition.

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28 Goodwin-Gill and McAdam, Refugee in International Law, 5.  
29 Phuong, Internally Displaced Persons, 222.
Refugee flows are generally at their most serious levels when they take the form of huge numbers of people fleeing the effects of armed conflict, humanitarian crises and severe human rights abuses, causes of refugee flows which commonly combine to create environments for civilian populations that are sufficiently hostile as to compel them to flee. The sizeable refugee flows seen to have resulted from recent conflict situations in places such as Afghanistan, Iraq, and Sudan, amongst others, bears out the close nexus between the existence of situations which constitute threats to the peace and the presence of refugee flows. Invariably, wherever in the post-Cold War era there has been a situation involving the waging of armed conflict, a humanitarian crisis or serious human rights abuses, and which has been accompanied by the emergence of refugee flows, there has been a determination by the Security Council that the situation in hand has constituted a threat to the peace. However, it is also conceivable that refugee flows in themselves are capable of posing threats to the peace. Lohrmann identifies three ways in which refugee flows potentially threaten international security. Firstly, they challenge the national security agendas of recipient states by threatening their economic well-being and shared values. Often, those states who receive the largest shares of refugees are not those best economically equipped to handle them. They may also have pre-existing domestic security concerns of their own to contend with. This problem was particularly acute in some African conflict situations where large numbers of refugees would flee one state to take refuge in another where conflict was also present, for example Liberian refugees fleeing to Sierra Leone during the 1990s. Secondly, Lohrmann suggests that refugee flows impact upon relations between states and produce tensions. In particular, the presence of refugee camps in border areas can ignite tensions as camps become militarized, cross-border attacks increase and host community hostility hardens. Thirdly, if a conception of security is employed which places emphasis upon individual human security, by their very nature the phenomena of refugee flows is detrimental to the individual security of those classed as refugees.

Phuong suggests that the Council, in resolution 1296, “implicitly acknowledged that certain situations of displacement could, in themselves, constitute threats to international peace and security.”

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31 On this point, see also Dowty and Loescher, “Refugee Flows,” 48.
33 Phuong, Internally Displaced Persons, 221.
resolution the Council stressed the need to protect civilian populations during warfare and noted that their deliberate targeting or subjection to violations of international humanitarian and human rights law could amount to a threat to international peace and security.\textsuperscript{34} It also stated that where civilians in refugee camps are vulnerable to infiltration by armed elements, this may amount to a threat to international peace and security.\textsuperscript{35} Significantly, however, the Council stopped short of explicitly stating that refugee flows in themselves are capable of amounting to threats to the peace per se. In considering the extent to which refugee flows constitute threats to the peace or are simply a symptom of the existence of a threat to the peace, it will be useful to consider the approach of the Security Council to determining the existence of threats to the peace in some of the most pertinent situations in which refugee flows were of international concern.

The first instance in which refugee flows appear to have been of concern to the Security Council when it determined the existence of a threat to the peace appears to have occurred in 1991 when the Kurdish crisis in Northern Iraq led to the adoption of resolution 688.\textsuperscript{36} The crisis followed on from the end of the Gulf conflict and emerged as Iraqi authorities repressed the Northern Kurdish population. Expressing its grave concern at “the repression of the Iraqi civilian population...including most recently in Kurdish-populated areas, which led to a massive flow of refugees...and cross-border incursions which threaten international peace and security in the region”, the Council “condemn[ed] the repression...the consequences of which threaten international peace and security in the region.”\textsuperscript{37} Although the fact that only ten states voted in favour of the resolution illustrates the extent to which some states remained reluctant to pronounce on what they essentially regarded as a matter internal to a state, the language adopted by the Council leaves no doubt that the refugee flows resulting from the repression of the Kurds were considered to amount to a threat to the peace in themselves. It referred in its resolution to the “consequences” of the repression of the Kurds as threatening international peace and security in the region, one of the most obvious of

\textsuperscript{34} Para. 5.
\textsuperscript{35} Para. 14.
\textsuperscript{37} Para. 1.
which was the production of a significant refugee flow. The significance of resolution 688 should not be understated. As Freedman notes, it marked the first occasion on which the Security Council had deemed massive displacement combined with human rights violations a threat to the peace. In his view, the destabilising effect for the region of the flight of millions was key to the Council’s determination. Similarly, Dowty & Loescher label resolution 688 as the most explicit and far-reaching precedent for the view that refugee flows constitute grounds for Security Council intervention.

In the following years, the Security Council became involved in a number of civil war situations in which the humanitarian consequences of conflict – including refugee flows – significantly influenced its approach towards the determination of the existence of threats to the peace. During the early 1990s, conflict in former Yugoslavia, Somalia, Haiti and Rwanda all appeared on the Council’s radar. The relationship between the presence of refugee flows and the existence of a threat to the peace was made apparent in resolutions pertaining to conflict raging following the breakup of Yugoslavia as mass displacement of civilians was witnessed. In resolution 713 which deemed that the continuation of the situation constituted a threat to international peace and security, the Council expressed deep concern at “the consequences of fighting for the countries of the region, in particular in the border areas of neighbouring countries.”

Clearly, one of the most obvious consequences of civil war for bordering countries is the production of refugees. Subsequent resolutions reinforced this, encouraging humanitarian efforts to address the needs of displaced persons, and stressing the right of refugees to return to their homes. While the Security Council responded to the humanitarian crisis brought about by conflict in Somalia, there was no invocation of refugee flows simply because the conflict had remained essentially internal to Somalia. The crisis in Haiti which followed the military junta’s seizure of power from a democratically elected President in 1993 saw huge refugee flows which again had an obvious bearing on the Security Council’s determination that there existed a threat to international peace and security. After first noting with concern the incidence of a humanitarian crisis,

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40 For example, see SC Res 724 (1991).
41 For example, see SC Res 836 (1993).
including mass displacements of the population, becoming or aggravating threats to international peace and security.\textsuperscript{42} in resolution 841 the Council made a firm connection between refugee flows and threats to the peace. It noted “that the persistence of this situation contributes to a climate of fear and persecution and economic dislocation which could...increase the number of Haitians seeking refuge in neighbouring member states and convinced that a reversal of this situation is needed to prevent its negative repercussions on the region...in these unique and exceptional circumstances, the continuation of this situation threatens international peace and security in the region.” The existence of refugee flows was clearly considered to have a destabilising effect on the region.

The genocide which engulfed Rwanda in 1994 gave rise to significant refugee flows in the region of 2 million,\textsuperscript{43} in addition to the 800,000 who were murdered.\textsuperscript{44} There was considerable potential to produce spill-over effects of the conflict in neighbouring states, such as Burundi where most refugees fled. The conflict pitted Hutus and Tutsis against one another, these being the ethnic groups prevalent in both states, and indeed on occasions fighting spread over into refugee camps in Burundi. Undoubtedly, the very severe scale of the humanitarian crisis was sufficient for the Security Council to determine that a threat to the peace existed, resolution 929 proclaiming that the “magnitude of the humanitarian crisis in Rwanda constitutes a threat to peace and security in the region.” However, concerns over refugee flows appeared nonetheless important to its decision-making process. That it considered events in Rwanda to threaten peace and security in the region evidences awareness of the detrimental impact that refugee flows from war torn Rwanda would have on neighbouring states. Indeed in an earlier resolution, the Council had noted the “displacement of a significant number of the Rwandese population...[and]...significant increase in refugees to neighbouring countries.”\textsuperscript{45} Furthermore, when authorising a military intervention in Rwanda led by France, a principal purpose of the operation was “to contribute to security and protection of displaced persons, refugees and civilians at risk.”\textsuperscript{46}

\textsuperscript{\textsuperscript{42} UN Doc.S/25344.}
\textsuperscript{\textsuperscript{43} See Freedman, “International Intervention,” 586–90.}
\textsuperscript{\textsuperscript{44} Report of the Independent Inquiry into the actions of the United Nations during the 1994 genocide in Rwanda, UN Doc.S/1999/1257, p. 3.}
\textsuperscript{\textsuperscript{45} SC Res 912 (1994).}
\textsuperscript{\textsuperscript{46} SC Res 929 (1994), para. 2.}
It appears quite clear that by the mid 1990s, the existence and impact of refugee flows had become a key consideration of the Security Council when labelling conflict situations to constitute threats to the peace. It is true that the Council never explicitly stated refugee flows in and of themselves to be directly threats to the peace, but the many references to their existence and wider consequences makes it evident that they were very much regarded as part of the security threat which the UN was tasked with responding to. The continuation of this pattern can be seen a little later in respect of civil war in Sierra Leone. Expressing its grave concern at the violence “and the consequences for neighbouring countries”, the Council determined that there was a threat to international peace and security in the region.47 As with Rwanda, the reference to a threat to peace and security in the region as well as to the consequences for neighbouring countries reinforced the fact that conflict was seen as having external effects, refugee flows being one of the most obvious manifestations of these. The Council went on to urge “all states, international organisations and financial institutions to assist states in the region to address the economic and social consequences of the influx of refugees from Sierra Leone.”48 It is evident that in the Council’s view responding to the threat to the peace required responding to the consequences posed by refugee flows, suggesting that apart from simply being a consequence of a threat to the peace, they constituted a cause of detrimental consequences themselves and were very much part of the threat to the peace in existence.

By 1998 the Security Council agenda had become occupied with events in Kosovo, perhaps the most high profile crisis since that of Rwanda. The crisis emanated from a long-running struggle between the Kosovo Liberation Army and the authorities of the Federal Republic of Yugoslavia, of which Kosovo was a province. Tensions eventually reached the point of full blown conflict and claims that Federal authorities were responsible for the perpetration of mass atrocities against the Kosovan population. One of the outcomes of conflict was an outpouring of refugees from Kosovo into neighbouring states. In its resolutions on Kosovo, the Security Council makes the connection between the presence of refugee flows from the province and a threat to the peace obvious, and its debates from the time further reinforce this. In resolution 1199, the Council expressed grave concern at the “displacement of over 230,000 persons from their

48 Para. 15.
homes” and deep concern at “the flow of refugees into northern Albania, Bosnia and Herzegovina and other European countries as a result of the use of force in Kosovo, as well as by the increasing numbers of displaced persons within Kosovo.” It then determined that “the deterioration of the situation in Kosovo...constitutes a threat to peace and security in the region” and demanded the Federal regime facilitate the safe return of refugees and displaced persons.49

Arguably, the resolution could not have done a great deal more to link refugee flows with threats to the peace. The reference to peace and security in the region followed on from that to flows of refugees into neighbouring states and should leave no doubt that there was a threat to the peace beyond the boundaries of Kosovo or Yugoslavia because of the refugee dimension. There was certainly no spread of the actual physical conflict itself beyond the boundaries of these entities. The comments of Council members themselves support such a reading of the resolution. The US specifically noted that “At least 50,000 Kosovo Albanians are living in open valleys and forests, without shelter or basic necessities. The international community must act to prevent a disaster this fall.”50 The implication is clear, that the prime concern is with the refugee or displaced person. Similarly, Russia noted the “steady flow of refugees and displaced persons which...is fraught with grave humanitarian consequences.”51 In the subsequent debate leading to the adoption of resolution 1203, which reaffirmed that the situation in Kosovo constituted a threat to peace and security in the region, members again stressed their concerns over the refugee problem in supporting the resolution. For example, Slovenia’s representative noted that “The number of refugees and internally displaced persons has become alarming...[this] can have a dangerous spill-over effect in the region.”52 The wider threat of refugee flows is clearly noted. Other states expressed more general concern at the plight of refugees, clearly a motivating factor in their support for the resolution.

In several subsequent resolutions in which it has determined the existence of a threat to the peace, the Council has stressed the phenomena of refugee flows.53 During recent years the biggest humanitarian crisis
situation to pose challenges requiring the addressing of refugee flows has, arguably, been the conflict situation in the Darfur region of Sudan. Again, consideration of relevant resolutions and the debates among Council members reveal continued concern at both the consequences of conflict upon civilians who become refugees and the consequences of refugee flows themselves. For example, resolution 1556 expressed the “utmost concern” at the consequences of conflict on the civilian population, including women, children, internally displaced persons and refugees. In the debate preceding its adoption, the US representative noted the flow of 200,000 refugees into neighbouring Chad. In a later debate the Japanese representative commented on “humanitarian atrocities affecting millions in Darfur [having] implication for peace and security in the entire sub-region.”

The preceding overview of the Security Council’s response to conflict situations involving refugee flows makes it apparent that it has become firmly established in its practice that a demonstrable relationship between refugee flows and threats to the peace is recognised. While the Security Council appears to have avoided making an explicit statement to the effect that refugee flows themselves are a threat to the peace, the many references to their effects, in particular for neighbouring states, make it apparent that the Council believes they are capable of being so. Although its pronouncements on the subject might be clearer, refugee flows have been at least implicitly been identified as both consequences of, and causes of, threats to the peace.

**Responding to Threats to the Peace with Collective Security Measures**

Obviously, determining that a refugee flow or a situation giving rise to it constitutes a threat to the peace in itself does not mean that the situation will be effectively tackled. However, the main benefit of making such a determination is that Article 39 is the gateway to the Security Council’s chapter VII enforcement powers and having determined that a threat to the peace exists, the Council is then able to proceed to consider the application of non-military sanctions or the authorisation of military enforcement measures in response.

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54 UN Doc. S/PV.1556, 2.
55 UN Doc. S/PV.5519, 6.
Non-military Sanctions

Article 41 of the UN Charter provides that the Security Council may decide upon:

measures not involving the use of armed force ... These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

Non-military Sanctions can therefore take a number of forms and in practice have consisted of economic or trade sanctions, arms embargoes, the imposition of freezes upon financial assets, and diplomatic sanctions. The application of non-military sanctions ought to be at least considered by the Security Council before it proceeds to authorise any military enforcement measures under Article 42. This is made clear by Article 42, which states that the Council may take military measures should it consider that non-military sanctions under Article 41 “would be inadequate or have proved to be inadequate.”

The theory behind non-military sanctions is that they can be employed by the Council to respond to situations which threaten the peace without giving rise to the drastic consequences which military enforcement action inevitably does, in particular that of civilian casualties resulting from the effects of warfare. In reality, however, the morality of some sanctions regimes has been called into account in some cases, most notably that of Iraq where comprehensive economic sanctions were imposed over a decade from the time of the Gulf Conflict, and which were blamed for having a significant impact upon malnutrition and mortality rates within Iraq. Sanctions have also been subject to criticism on a number of other grounds related to their general effectiveness, which can collectively be

56 For an overview of the different forms of non-military sanctions applied by the Security Council, see Jeremy M. Farrall, United Nations Sanctions and the Rule of Law (Cambridge: Cambridge University Press, 2007), chs. 6–7. A summary of all sanctions regimes up to 2007 is provided in Appendix 2.


summarised by the proposition that essentially their success rate is questionable. One study of 116 cases of sanctions in the period 1914–90 suggested that only in 34% of cases had any success been enjoyed.59

There are several instances of long-standing sanctions regimes having been in place without there being any evidence that they were ultimately responsible for removing the threat to the peace that the Security Council had determined to exist when deciding upon their imposition. Situations such as those in Southern Rhodesia and South Africa both saw sanctions left in place for nearly two decades,60 and in the case of the conflict which accompanied the break-up of the former Yugoslavia, the role of NATO’s bombing campaign proved to be key in bringing the disputing parties to peace talks after non-military sanctions had failed to achieve this result. A special problem of wide-ranging economic sanctions is that they are designed to apply to the population of a state as a whole, and are thus unlikely to significantly impact upon decision-making elites who are responsible for having created the situation which has been determined by the Security Council to amount to a threat to the peace. As Mack and Khan observe, “The most damaging charge against sanctions is...that they impose widespread suffering on ordinary people.”61

In the context of refugee flows, the general problem which requires addressing if the refugee flows are to be alleviated is that of the conflict or perpetration of humanitarian atrocities which has given rise to this problem in the first place. Economic sanctions have not proven particularly successful in this respect, prompting a move towards greater efforts to apply ‘smart sanctions’, namely, sanctions which are carefully designed to impact upon those elites whose decisions and actions are ultimately responsible for having created the situation which constitutes a threat to the peace. Economic embargoes have become targeted, for example in relation to the diamond trade in West Africa which has served as a fertile source of income for some of the parties to conflict in Liberia and Sierra Leone.

The Security Council’s recent practice has placed increased emphasis upon a combination of arms embargoes upon warring parties and the


imposition of travel bans upon designated individuals whose conduct the Council wishes to influence, in addition to the freezing of the financial assets of such individuals. For example, in response to the internal conflict in Somalia, an arms embargo was placed on the country, accompanied by the imposition of a financial assets freeze and travel ban upon designated individuals. Similar measures were imposed in respect of Liberia, the Democratic Republic of the Congo, Côte d’Ivoire, and Sudan. All of these conflict situations involved humanitarian crises producing significant refugee flows. While non-military sanctions have certainly come to be applied in a more considered manner which serves to protect against the production of unintended devastating humanitarian consequences as witnessed in Iraq, the extent to which they have proven to be effective in positively tackling situations amounting to a threat to the peace is questionable. That many threats to the peace continue to exist long after sanctions have been imposed makes it difficult to assess what success they have actually had in achieving their objectives, and it is difficult to identify many situations in which non-military sanctions can be categorically said to have removed the threat to the peace which they were implemented in response to.

Military Enforcement Measures

Article 42 of the UN Charter permits the Security Council to respond to a threat to the peace by taking:

Such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

The original Charter scheme envisaged the Council having its own forces at its disposal for this purpose, although these were never implemented and it has come to rely on being able to authorise willing groups of states to take military action on its behalf, a practice which has been

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overwhelmingly considered as lawful by international lawyers.\textsuperscript{68} While traditional notions of collective security regarded it as consisting of an agreement among states to collectively respond to an attack against any one of their number, in practice military enforcement action has only been authorised as a means of responding to inter-state aggression twice, following North Korea’s invasion of the Republic of Korea\textsuperscript{69} and Iraq’s invasion of Kuwait.\textsuperscript{70} Generally speaking, military measures have been authorised in response to conflict situations that are essentially internal to particular states and have given rise to grave humanitarian consequences including the production of mass refugee flows. The main objectives for which military measures have been authorised by the Security Council have been broadly humanitarian, with willing actors – ad hoc groupings of states and regional organisations – being given mandates to take military action to facilitate and protect the delivery of humanitarian assistance and to afford protection to civilian populations. A detailed account of all such measures sanctioned by the Security Council is beyond the scope of this paper, but it will suffice to note some of the most pertinent examples.

In the early post-Cold War era, military mandates were in quick succession conferred upon actors willing to intervene in former Yugoslavia, Somalia and Rwanda to effect humanitarian objectives. Military action was authorised in former Yugoslavia to facilitate the delivery of humanitarian assistance\textsuperscript{71} and to support the UN peacekeeping operation in performing its functions around specially designated ‘safe areas’\textsuperscript{72}. In Somalia the US led UNITAF operation was empowered to “use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations,”\textsuperscript{73} and Operation Turquoise in Rwanda was given authority to take military action to provide security and protection to those at risk.\textsuperscript{74} Subsequent operations have been conferred with similar mandates upon a number of occasions. In 1997, the Council authorised an Italian led operation in Albania to take action “to facilitate the safe and prompt delivery of humanitarian assistance, and to help create a secure environment

\textsuperscript{68} However, for a dissenting view see Jonathan Quigley, “The “Privatization” of Security Council Enforcement Action: A Threat to Multilateralism,” \textit{Michigan Journal of International Law} \textbf{17} (1996): 249.
\textsuperscript{69} SC Res 83 (1950).
\textsuperscript{70} SC Res 678 (1990).
\textsuperscript{71} SC Res 770 (1992).
\textsuperscript{72} SC Res 836 (1993).
\textsuperscript{73} SC Res 794 (1992).
\textsuperscript{74} SC Res 929 (1994).
for...missions...providing humanitarian assistance." A few years later, an EU led operation was deployed under Security Council authority to the Democratic Republic of the Congo with a mandate to “contribute to the stabilization of... security conditions...improvement of the humanitarian situation in Bunia, to ensure the protection of the airport, the internally displaced persons in the camps in Bunia and...the safety of the civilian population, United Nations personnel and the humanitarian presence in the town.” The next year an operation in Haiti was empowered “to contribute to a secure and stable environment...[and]...to facilitate the provision of humanitarian assistance...” and the UNAMID operation in Sudan was subsequently empowered to take necessary action to protect civilians in the Darfur region. Most recently military enforcement mandates have been conferred upon operations within Libya and the Cote d’Ivoire, where intervening states were empowered to “take all necessary measures...to protect civilians and civilian populated areas under threat of attack” and “to use all necessary means...to protect civilians under imminent threat of physical violence” respectively.

The instances of military enforcement action cited all came in response to situations which had given rise to humanitarian consequences involving the production of significant flows of refugees and internally displaced persons and demonstrate the ability of the UN collective security system to be utilised to address the conditions which are responsible for them through the application of coercive military measures. The success of military enforcement measures in ameliorating situations producing significant refugee flows has been limited. While action in respect of Libya, for example, made an important contribution in removing the threats posed to the civilian population by the Gaddafi regime, in other cases various factors have restricted the contribution which military action can make. Military enforcement action relies upon the willingness of able and willing actors to undertake it. This is not always forthcoming or wanes as operations face turbulent circumstances. The unwillingness of any state to

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intervene in Rwanda until most of the genocide had already taken place and the withdrawal of US forces from Somalia after a number of casualties had been sustained are good cases in point. Furthermore, the very nature of mandates inspired by humanitarian objectives are often less clear cut than those concerned with a simple explicit goal, such as the reversal of one state's invasion of another. This makes their implementation and assessment of success more difficult, particularly where obstacles on the ground hinder their achievement. That a number of conflict situations, such as those in Somalia and Sudan, have continued for a number of years illustrates the limitations of the Security Council's military enforcement option.

Conclusion

This paper has demonstrated that some of the limitations of international refugee law can theoretically be addressed through the use of the UN Security Council's collective security mechanisms to address situations involving refugee flows by conceptualising them or the circumstances which give rise to them as threats to the peace under Article 39 of the UN Charter. Through an overview of the Security Council's response to a number of situations involving refugee flows it has been shown that wherever there is a refugee flow there will almost certainly be a threat to the peace. While the Council has invariably labelled the situations which give rise to refugee flows as threats to the peace, it has also in its resolutions and debates made it apparent that refugee flows are capable in themselves of constituting threats to the peace in at least some circumstances.

Thus, wherever there is a huge population flow as a result of some catastrophic occurrence, regardless of the motives of the individuals concerned in taking flight or whether they cross state borders or are simply internally displaced, the application of measures under Articles 41 and 42 will be a legally valid means through which the Council can respond. It is conceded that the success of such measures in practice has been far from perfect and, wherever possible, it is preferable if situations which threaten the peace can be resolved through peaceful means. However, where less robust measures fail non-military sanctions and military enforcement action can be utilised and on occasion make at least some contribution to the well-being of displaced populations regardless of whether they are considered to be refugees by international refugee law or not.
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THE LAW OF RETURN AND THE RIGHT OF RETURN

Howard Adelman*

THE LAW OF NON-RETURN

Though this essay is focussed on the Law of Return and the Right of Return, both have to be set against the background of the right not to be returned and the law implementing that right for this is the reference point of all modern refugee law and rights. The principle of non-refoulement, the right not to be returned if a person can establish that he or she is a genuine convention refugee, applied to some Roma who had fled Hungary.1 At the same time, it has to be recognized that the Law of Return and the Right of Return are designed to confer a special benefit to a particular group based largely on their ethnicity. Laws concerning non-refoulement (and extradition, as we shall see) are designed to provide protection to individuals under threat of persecution because of race, religion, nationality or political opinion. Non-refoulement provisions impose restrictions on actions. Laws and Rights of Return command preferential benefits be accorded to a specific group.

While Hungary was receiving refugees (Kardos 1995), Roma or Gypsies were fleeing Hungary and claiming refugee status in other countries. Over the next two decades, Roma continued to seek better conditions in other countries by using the refugee asylum process. Gergely Baráth, a Member of the Committee on Human Rights and Minorities of the Budapest Municipal Assembly, rightly dubbed the condition of Roma in Hungary a crisis, for many of the Roma “lived in extreme poverty because of the segregation to which they are subjected in terms of employment” (Barath 1997) and occupied wretched housing in spite of government attempts to alleviate their horrific living conditions. Their dire situation

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1 Article 33 of the 1951 Convention Relating to the Status of Refugees (“Refugee Convention”) establishes the principle of non-refoulement prohibiting the direct or indirect removal of refugees to a territory where they risk being persecuted “for reasons of race, religion, nationality, membership in a particular social group or political opinion”. That provision is implemented in many countries that are signatories to the 1951 Refugee Convention by being incorporated into domestic legislation as is the case in section 115 of the Canadian Immigration and Refugee Protection Act (IRPA).
was exacerbated when free market principles were adopted in the early nineties. The changes effected by the switch to a market economy ended subsidies to tenants and allowed market forces to determine interest on housing loans. As a result, more of the “gypsies” were concentrated in ghettos. Further, only 28.7% of Gypsy males held a job in 1993 compared to 64% for the non-Gypsy male population.

In a 2010 court case in Canada, the case of the appellant, Józsefné Németh, the Németh case backed by the Barreau du Québec, Québec Immigration Lawyers Association, and the Canadian Council for Refugees as interveners, came before the Supreme Court of Canada in an appeal from a ruling of the Court of Appeal for Québec that had upheld a ruling of the Minister of Justice who had ordered that the Némeths be surrendered for extradition back to Hungary to stand trial for a fraud charge even though the Némeths and their children had been granted refugee status in Canada in 2002. The lawyers for the Minister argued that, in spite of their refugee status, the Némeths could be extradited because they had been charged in Hungary with a serious non-political crime and, further, failed to establish any continuing risk of persecution upon their return. The Supreme Court remitted the matter back to the Minister of Justice for reconsideration.

The central issue was over scope of the principle of non-refoulement contained in Article 33 of the 1951 Convention Relating to the Status of Refugees which prohibits the removal of refugees to a territory where they

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3 The Minister’s decision was upheld on review by the Quebec Court of Appeal: 2009 QCCA 99, 2009 CarswellQue 8504.

4 The Némeths were accused of selling a lease right to an apartment in Budapest for CAN$2700 in November 2000 when they allegedly did not hold that lease right. The status of the fraud charge and whether it was or was not a “serious” criminal charge, that is, an offence punishable by a minimum term of ten years imprisonment, could be a factor in a refugee asylum claim but was not a core consideration in the request for extradition of a refugee in this case. As the Supreme Court found, the question of whether or not a serious crime had been committed “was never more than a peripheral issue in this case and the Minister did not base his decision on it.” [Németh 116] The failure of the Minister to address the appellants’ contention that, given the amount of the alleged deprivation, the offences alleged against them would not attract a punishment of 10 years in Canada, was a failure to undertake the requisite analysis and apply the test of “serious reasons for considering” where the test must be used with caution and not given undue weight. The judgement provided the key deciding factor that the fraud committed was not a serious crime, that is, one for which a penalty of ten years in prison was applicable for, under Canadian law, when a fraud is less than $5,000, the maximum term of imprisonment is 2 years. [Criminal Code, ss. 380 (1)(a) and (b).]
risk being subjected to human rights violations. The principle is incorporated in Canadian legislation, section 115 of the Immigration and Refugee Protection Act (“IRPA”). It prohibits a refugee from being removed from Canada “to a country where they would be at risk of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion” but does not explicitly address the issue of removal by extradition. The question was whether the refugee legislative prohibition includes even extraditing persons, that is, whether the phrase “removed from Canada” includes removal by extradition since Canada appears to have conflicting obligations under its treaty obligations regarding extradition (section 44 of the Extradition Act) and its obligations under the 1951 Refugee Convention. The Supreme Court determined that, even though a person was found to be a refugee because of a well-founded fear of persecution in their native Hungary on the basis of their Roma ethnic origin and that refugee status had not ceased or been vacated, the Minister of Justice was free to surrender that individual for extradition since the prevention of return and the requirement to extradite were not in conflict.5

The obligation not to remove applies to three types of removal orders: departure orders, exclusion orders and deportation orders but not to surrender orders under the Extradition Act.6

However, although the Minister retained the right to extradite, the exercise of that discretionary right was constrained by the Canadian Charter of Rights and Freedoms which, in accordance with the Extradition Act, required the Minister to reject an extradition request if the Minister was satisfied that the surrender of that person “(a) would be unjust or oppressive having regard to all the relevant circumstances; or (b) the request for extradition is made for the purpose of prosecuting or punishing the person by reason of their race, religion, nationality, ethnic origin, language, colour, political opinion, sex, sexual orientation, age, mental or physical

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5 The extradition and refugee protection statutes are not in conflict since the prohibition against non-refoulement does not apply to a person:

(a) who is inadmissible on grounds of serious criminality and who constitutes, in the opinion of the Minister, a danger to the public in Canada; or
(b) who is inadmissible on grounds of security, violating human or international rights or organized criminality if, in the opinion of the Minister, the person should not be allowed to remain in Canada on the basis of the nature and severity of acts committed or of danger to the security of Canada.

6 “The words ‘removed from Canada’ in s. 115(1) refer to the removal processes under the IRPA, not to surrender for extradition under the EA. There is, therefore, no conflict between the two statutes.” Németh Case. [31].
disability or status or that the person's position may be prejudiced for any of those reasons." The matter was referred back to the Minister for reconsideration under such constraints since the Minister has a duty of fairness under both the extradition legislation and the Charter, a duty that trumps any obligation to extradite, most especially if the motivation for extradition is to persecute the individual. The Minister had to reconsider the matter and demonstrate that due weight had been given to risk to the person proposed for extradition. In doing so, the Minister must appreciate what circumstances are “unjust or oppressive” and must balance “all the relevant circumstances, weighing factors that militate in favour of surrender against those that counsel against.” If the conditions that justified granting refugee status continued to exist, the Minister was obligated not to extradite the individual. For when a person has been found to be a refugee in accordance with Canadian and international law, the refugee retains a prima facie entitlement to protection against refoulement, and that determination must be given appropriate weight by the Minister in exercising his duty to refuse extradition on the basis of risk of persecution.

The onus rested on the Minister to prove conditions in Hungary had changed since the granting of refugee status; the onus did not rest on the refugee to prove conditions had not changed. The Minister had to be satisfied on the balance of probabilities that the person whose extradition was requested was no longer entitled to refugee status in Canada. The Minister had argued that he had determined that the situation in Hungary had changed since the refugees had been granted refugee status because since 2004 when Hungary had joined the European Union, the possibility of Roma being subjected to persecution on the basis of their being Roma was virtually nil. The Court, however, determined that this

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7 Németh Case. [72], quoted from Fischbacher, at para. 37. The finding also cited in Pacificador v. Canada (Minister of Justice) (2002), 166 C.C.C. (3d) 321 (Ont. C.A.).


9 As the Court found, “In this case, the Minister’s approach to the exercise of his powers failed to give sufficient weight or scope to Canada’s non-refoulement obligations in light of which those powers must be interpreted and applied. The Minister’s consideration of the Némeths’ case was fundamentally flawed. He focussed exclusively on s. 44(1)(a) of the EA in requiring the Némeths to establish, on the balance of probabilities, that they would face persecution on their return to Hungary and that the persecution they face would shock the conscience or be fundamentally unacceptable to Canadian society. He imposed too high a threshold for determining whether the Némeths would face persecution on their return and placed the burden of proof on this issue on the Némeths notwithstanding the earlier finding that they were refugees. Further, the Minister failed to address s. 44(1)(b) which is the most relevant provision of the EA in relation to their surrender. The Minister applied incorrect legal principles and acted unreasonably in reaching his conclusions.”
was insufficient consideration and a much deeper weighing of probabilities had to be undertaken.

Though my focus is on the Law of Return and the Right of Return, I raise this case, not only because it applies to Roma from Hungary, but because the ruling explicitly points out the wide obligations of non-return or non-refoulement. On the one hand, the obligation not to return is not absolute; a refugee status determination under IRPA in itself does not prevent extradition as the appellants had claimed. On the other hand, the obligation not only cannot be ignored but must be given pre- eminent consideration. Due weight to the possibility of persecution is a very serious obligation and requires adequate evidence and analysis, as well as application of the correct legal tests to demonstrate that the determination is both rational and defensible. As the Supreme Court found, the Minister “applied incorrect legal principles by imposing too high a threshold for determining whether the appellants would face persecution on their return and, by placing the burden of proof on this issue on the appellants notwithstanding the earlier finding that they were refugees.” [58]

If the laws governing non-return make clear that the norms are not absolute even in the very important realm of the applicability of non-refoulement in refugee law, the Right of Return and the Law of Return are highly unlikely to be absolute. Second, the meaning and application are not apparent on the surface. Third, the application of these norms depends on context. Fourth, as is usual, the devil is in the details and the detailed intentions and applicability of the specifically applicable rulings as well as other relevant legislation have to be taken into account in discerning the meaning of such norms, especially in the case of a Right of Return which does not even have a legislative foundation. Fifth, there is the issue of which agency or agent has the responsibility for making a determination of who is entitled to be governed by a Law of Return and who has a right to demand return.

Sixth, any obligations imposed by such norms are temporally restricted in two senses. They are not boundless in time in the sense that they are applicable regardless of the transition in time and changed circumstances. Further, they are time sensitive with respect to the norms and circumstances at the time of departure. Just as rights to refugee status depend on the circumstances at the time of such determination and not on abstract formal requirements, so too any applicability of a Law of Return or a Right of Return will depend on the de facto circumstances at the time the norms are invoked. If the rights to non-refoulement are entirely a function of a risk of being persecuted at a specific time and in a specific
territory, then the application of any right of return or any law of return will almost certainly be time sensitive and will only apply at the time at which return is being contemplated.

Seventh, even then, the process of giving consideration to such norms will be as important as the norms themselves. Eighth, even as the laws and procedures governing non-return in the case of refugees have not set forth a specific set of procedures for determining how the principle of non-return should be applied, though rights to legal representation before independent tribunals and rights to due process have generally been accepted, the procedural mode of determining the application of a Law of Return or a Right of Return have also not been set forth internationally for states. Ninth, just as the state assuming the obligation to house the refugee retains the right for determining those procedures, so will states determining who will have the right to return under a Law of Return or under a Right of Return even if such a right is generally accepted as a governing norm. Finally, it should be clear that the “binding effect” of any such norms will be highly qualified even when there have been formal “findings” that a person or group has rights under either a Law of Return or a Right of Return.

All of these considerations are aside from the overarching norm in the applicability of the provision. In the case of non-refoulement, the overarching norm is the risk of persecution to the refugee under certain categories. In the case of the Law of Return, it will be the ethnic affiliation of the individual applying for return. The case of a Right of Return is least clear, but since the right of return is about minorities, ethnic affiliation will not be the overarching governing norm though place of birth, the length of residency and consanguinity may apply. Possibly property ownership and almost certainly willingness to live in peace and accept the existing national jurisdiction and laws may also come into play. Whatever the norms applied, they will be subject to contention and interpretation.

Hungary and its Law of Return

My first involvement with refugees began 55 years ago with the Hungarian refugee movement to Canada. In the autumn of 1956, a number of students, including myself, became involved in a quixotic effort at organizing a brigade to travel overseas and aid the Hungarian uprising, a fantasy that quickly burned out with the total suppression of that uprising by Russian tanks. However, a new opportunity to become involved arose
when Canada, under its Minister of Immigration and Employment, Jack Pickersgill, used his power of ministerial discretion to admit over 37,000 Hungarian refugees into Canada.¹⁰ Of the 200,000 Hungarians who fled, the Louis St. Laurent Liberal Canadian government admitted almost 17% of them, about the same number as the United States with a population ten times larger than that of Canada. (Adelman 1991) In 1957, I was a student in charge of managing the Campus Cooperative Student Residence housing complex at the University of Toronto. I made as many beds available as possible to the arriving Hungarian refugees.

That involvement in 1957 was about resettling refugees. My involvement 34 years later in 1991 was about their return, not the Hungarians who came to Canada in 1957, but the return of ethnic Hungarians fleeing Romania, Yugoslavia and the former Soviet Union to Hungary. Members of the Centre for Refugees Studies at York University, of which I was the founding director, had been invited to a conference in Budapest to help Hungary forge a new refugee asylum law for their country.¹¹ For between 1988 and 1992, approximately 120,000 refugees arrived in Hungary, most of them after the fall of the Berlin Wall in 1989.¹² In 1989, Hungary adopted


¹¹ International Seminar on “Refugees and Displaced Persons in New Host Countries,” Budapest, 29 April 1991. Hungary would pass a fourth nationality law in 1993 to replace its 1957 and 1947 laws when Hungary was a communist state. In the 1947 law, Hungary acceded to the Armistice Agreement at the end of WWII that reified the existing borders in which nationality was stripped from millions of Hungarians living outside those borders.

¹² Ethnic Hungarians constituted 4% of the population of Kosovo and made up a significant minority of the autonomous region of Vojvodina, an autonomy that was cancelled by Serbia in 1989. The flight of Hungarians from Serbia was instigated by the bombing in February 1991 of the Hungarian Catholic Church of St. Teresa that had been scrawled with racist messages of extermination for ethnic Hungarians. The racism was subsequently enhanced by a campaign of ethnic cleansing targeting ethnic Hungarians. Shortly after our conference, Serbia made Serbian its only official language. Ethnic Hungarians began to desert the Serbian army in its fight against Croatia. Most sought asylum in Hungary. (US Department of State Human Rights Report, 1991; see also Minorities at Risk Project (2004). The Democratic Community of Hungarians in Vojvodina (DCHV), which won 18 of the 60 seats in Vojvodina’s parliament in the December 1992 elections, claimed that 17 new laws passed since 1990 denied Hungarian minority rights. (Minority Rights Group International 2011). Ethnic Hungarians were also a significant minority (6.6%), along with the Roma (2.5%), in Romania. A December 1989 protest against the forced relocation of an ethnic Hungarian pastor was the spark that set off the overthrow of the Ceausescu regime.
Ceausescu was executed, along with his wife, on Christmas day of that year after a cursory military trial. The flight of ethnic Hungarians from Romania only eased in 1996 when a coalition government was formed in December with the involvement of the Democratic Union of Hungarians in Romania (UDMR).

The ethnic Hungarians from Romania were the special concern at the time. The almost 40,000 who had fled discrimination, harassment and outright threats could have returned to Romania under the friendship treaties between the two countries, especially since dual citizenship was not permitted; those refugees were required to renounce their Romanian citizenship before acquiring Hungarian citizenship. They had not. Further, they also rarely entered the formal refugee asylum procedure within thirty days after their arrival. Lest they remain outside the law and their prospects for integration suffer, rapid efforts were initiated to regularize their status in Hungary.

The 1991 conference was designed to sort out the issues among the different parliamentary factions to allow the procedural protections to be incorporated into Hungarian domestic legislation. Ethnic Hungarians were not the only ones fleeing to Hungary. In the early nineties, asylum seekers arrived from 169 different countries, including a large number from China (estimated at 45,000). (Baráth 1997, 23) The debate at the 1991 conference in Budapest was between the conservatives who wanted to give preference to “returning” ethnic Hungarians and argued that Hungary had both a self-interest and special responsibility for ethnic Hungarians in

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13 “Everybody who is persecuted for his democratic behaviour, or for his activity to enhance social progress, the liberation of peoples or the protection of peace, may be granted asylum.”
adjacent territories. In contrast, young Hungarian “liberals” wanted to treat all refugee claimants equally.\textsuperscript{14}

However, ethnic nationalism won out when in 1993 only new statutes on citizenship and foreigners were passed but no refugee law, though the Constitution and other laws granted rights to refugees. Decrees defined refugee status and established refugee asylum procedures. Although no explicit immigration legislation provided a right to immigrate based on ancestry, Hungary effectively developed a Law of Return\textsuperscript{15} with a strong preference for protecting refugees of Hungarian ancestry. Hungary offered asylum to ethnic Hungarians, who were not necessarily even refugees, by imposing a geographic restriction to refugees of European origin only, offering special protection for persecution based on linguistic grounds and allowing ethnic Hungarian asylum seekers freedom of movement while shunting other asylum claimants into a temporary protection program with restrictions on their movement.\textsuperscript{16} The citizenship legislation reduced the residence requirement from eight to three years for those married to a Hungarian citizen, or who had a minor child who was a Hungarian citizen, or who had been adopted by a Hungarian citizen, or those recognised as a refugee in the Hungarian refugee asylum process. The residency requirement was reduced to one year for ethnic Hungarians. As Fullerton wrote, the refugee law functions as a Law of Return.\textsuperscript{17}

\textsuperscript{14} In the 1990 election, a coalition of right-centre parties formed the government led by the Hungarian Democratic Forum (MDF) that won 279 of the 562 seats in Parliament. However a great deal of the coalition’s youthful energy came from the Alliance of Free Democrats (Fiatal Demokraták Szövetsége or FIDESZ) which won only 22 seats, and only one constituency seat in a university riding. (By 1998, under a new leader, Viktor Orbán, a shift right and a modified name which added “Hungarian Civic Party” Magyar Polgári Párt. FIDESZ won almost 30% of the vote and Orbán was asked to form the government.) FIDESZ began as a youth organization with libertarian anti-communist roots. The members, mostly students, had been persecuted by the communists. At the conference, FIDESZ parliamentarians, almost all in their twenties, pushed for a totally open and egalitarian approach to refugees and insisted on no discrimination between ethnic Hungarians and other refugees. Parliamentary members at the conference from MDF temporized while parliamentary representatives from the Independent Smallholders’ Party (FKgP), a conservative ally in the government with 54 seats, strongly favoured a preference for ethnic Hungarians.

\textsuperscript{15} Other countries with an explicit or implicit Law of Return include the three “Ts”, Ireland, Israel and Italy.

\textsuperscript{16} Maryellen Fullerton (1997). See the critique by Dr. Béla Jungbert, head of the Hungarian Office of Refugee and Migrant Affairs, in the same volume (pp. 145–8) who, while explicitly admitting that Hungarian decrees and processes gave special favour to ethnic Hungarians wanting to return, insisted that the refugee asylum process was not manipulated to benefit ethnic Hungarians.

\textsuperscript{17} Op. cit.
One might have thought that the United Nations High Commission for Refugees (UNHCR) might have been opposed to this *de facto* distinction between ethnic and other groups of refugees. But a number of factors effectively silenced the UNHCR voice on this topic right until today. One factor was the effort to harmonize the legal framework for asylum given the EU efforts to build a Common European Asylum System (CEAS). UNHCR recognized that the legislation differed from country to country and that progress had proceeded only by focusing on actual practices. Second, major pressures had developed on Greece and Italy as refugees began to flood into Europe from Africa, Middle East and Asia. Western European countries – most recently France, Germany and Sweden – were being impacted the most with asylum claimants. Further, with the hardening of national attitudes towards both immigration and integration in Europe in general that had a significant impact on refugees, UNHCR was spending a great deal of effort on ensuring access to the asylum process for the particularly egregious cases. The preferences in the system of Hungary became a peripheral concern. Though xenophobia, discrimination and outright racism had become a cause for alarm, age (the cases of minor children) and particularly women at risk issues as well as individuals persons of concern occupied a higher priority and allowed for some degree of success.18

UNHCR thus found itself applying pressure on the margins – ensuring access to the territory, minimizing the use of detention, established minimal asylum refugee protection standards, and introducing measures to ensure reporting and accountability. At the same time, since UNHCR fosters national integration, it had to applaud Hungarian efforts to resettle ethnic Hungarians from the region. Further, over the next decade, the Hungarian Regional Office received about 20% of UNHCR funds directed at Europe which had risen to over US$11 million in 2012 as UNHCR focused on strengthening the asylum system and the protection of the rights of asylum seekers where opportunities seemed to be available. Since the fall of the Berlin Wall and the opening of the Austrian border with Hungary, it was more important to strengthen this opening and remove the barriers to movement than ensuring that all refugee asylum seekers in Hungary were treated absolutely equally, particularly since many of the non-ethnic Hungarian asylum seekers regarded Hungary only as a way station en route to somewhere else. Further, the eighties were a very recent memory

when Hungary was a significant source of refugee claimants in the West. Everyone applauded the new situation when Hungary was a receiver rather than an exporter of refugees.

The wider global situation also celebrated the return of ethnic groups after long periods in exile – the repatriation of exiles to Zimbabwe starting in 1980 and then South Africa in the early nineties for example. The Hungarian case did not seem so radically different. UNHCR was heavily involved in the effort to repatriate the large numbers of Chittagong Hill People who had fled from Bangladesh to India as well as the refugees from Papua, New Guinea to West Papua. In these other situations, the political, social and economic conditions posed far greater challenges to refugee reintegration than in Hungary and thus required much more attention from the international organization. In Hungary, there were none of the issues about access to land prevalent in predominantly agricultural countries. Nor was there the urgency to accelerate return as in the case of the Liberian refugees in Sierra Leone where the refugees were accused of decimating the forests in eastern and southern Sierra Leone. UNHCR was faced with increasing numbers of refugees in camps. Much longer stays, fewer opportunities for settlement or resettlement, inadequate food to feed the refugees in camps at even minimal levels, increasing restrictions on the movement of refugees quite aside from the usual social, psychological and physical health problems of the refugees, were all much more serious problems facing UNHCR. In that context, Hungary’s de facto discrimination in favour of returning ethnic Hungarians seemed to be of relatively minor consequence.

Finally, increasingly during the latter half of the nineties the Western world was preoccupied with a mass influx of refugees from Kosovo and particularly from Vojvodina in the former Yugoslavia where the Hungarian ethnic group feared that they would be the next target of ethnic cleansing. In 1998, Kosovo Albanians who had fled to Austria via Hungary had been sent back to Hungary. Hungary then tried to send them back across the Serbian border. This policy came into international prominence on 13 November 1998 when a failed Kazakh refugee claimant in the refugee centre at Kiskunhalas, Boris Zoltajev, hung himself in the washroom on 13 November and died six days later. Several months later, Hungary was embarrassed once again when a woman whose refugee asylum case had been rejected in Austria on the grounds that she had arrived from Hungary

which had been considered a “safe” country for refugees, won her appeal when, on the evidence, the court upheld the claim that Hungary discriminates against non-ethnic Hungarian claimants subjecting them to detention in barely inhabitable camps and sometimes even expelling those claimants even before the refugee claim procedure has ended. (Kosztolanyi 1999) Though the effect was that Austria could no longer deport refugee claimants arriving from Hungary, there was no long term effect in modifying the favourable treatment Hungary accorded to returning ethnic Hungarians.

Nor were the conditions for non-ethnic Hungarians significantly improved, though in order to enhance Hungary’s prospects of accession to the EU, Hungary sought to avoid the image of itself as a convenient transit stop for asylum seekers en route to Germany and other prosperous western European states. At the same time, Hungary sought ways to avoid imposing visa restrictions on ethnic Hungarians from non-EU countries once Hungary became a member of an enlarged EU. Previously, prior to Hungary acquiring EU membership, ethnic Hungarians in the adjacent states of Romania, Ukraine and Serbia-Montenegro enjoyed visa-free travel to Hungary via bilateral treaty obligations. One solution for overcoming the new denial of automatic non-visa entry for ethnic Hungarians was dual citizenship proposed by the World Association of Hungarians, a proposal supported by the Democratic Alliance of Hungarians in Romania (RMDSZ) and Sandor Tamas, a member of the Romanian Parliament. However, although preferential nationalisation continued in practice, the 2005 legislation rejected granting nationality ex lege to all ethnic Hungarians following the rejection of the idea in a referendum on 5 December 2005.20

Nevertheless, ethnic Hungarians continued to receive preferential treatment. In 2002 alone, for example, 2447 were naturalised under the “most preferential” class as ethnic Hungarians, 747 were re-naturalized, 404 were naturalised as the spouse, child or adopted child of a Hungarian national while only 244 were naturalised as non-ethnic Hungarians. (Toth 2005) Of the 178,000 who applied for refugee status in the twenty years between 1989 and 2009, 6,500 were successful, 70% (4,183) between 1990 and 1995. Only two-thirds of these became Hungarian citizens. (Klenner and Szép 2010) Most successful asylum seekers were ethnic Hungarians.

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from Romania. In sum, without ever formally passing a Law of Return, Hungary effectively became a country of immigration after 1989 primarily for ethnic Hungarians, though a small number of non-ethnic Hungarian foreigners did become naturalized Hungarians during that period.

The Right of Return

The Right of Return and the Law of Return are similar in that both apply to specific groups outside the state who may wish to return to the territory of that state. While the non-refoulement provisions of the Refugee Convention are directed against discrimination, the Law of Return explicitly favours discrimination. So does the Right of Return which, like the provisions of non-refoulement, also claim discrimination on behalf of those allegedly victims of discrimination.

The Right of Return differs from a de facto or de jure Law of Return in at least five important respects. First, those desiring return under a Right of Return have very little interest in acquiring the citizenship in and swearing allegiance to the state to which they wish to return; the opposite is true for those returning under a Law of Return. Second, there has never been a legislated right of return in practice and certainly not in law anywhere in the world. (Adelman and Barkan 2011) Third, whereas a Law of Return grants specific privileges re citizenship in one state to ethnic minorities in other states, the Right of Return claims privileges for a minority originally from the territory of a state to which they wish to return and who may even belong to majorities outside that state.21 Fourth, most importantly, this special privilege for a specific ethnic group with respect to a specific territory is claimed as a matter of universal right rather than as a preferential claim. Fifth, although there are very many minorities who have fled violence and persecution around the world, the right of return as a special privilege for a specific ethnic group with respect to a specific territory claimed as a universal right is almost exclusively applied to Palestinians who fled what became Israel in 1948, though it was also applied to the refugees from the civil wars in former Yugoslavia in the nineties.

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21 Thus, Palestinians in Jordan as well as Gaza and the West Bank are majorities in those territories. There are many parallel examples. Ethnic Ethiopians who left Eritrea and ethnic Eritreans who were forced out of Ethiopia when the Ethiopian-Eritrean War began in 1999 are the majority group in the states where they now live. If consistency governed international affairs, they too would enjoy a Right of Return and there would be ardent advocates on their behalf.
Several myths accompanied this claimed right. The Israeli War of Independence, referred to by Palestinians as Nakba (disaster), led to a wave of Palestinian refugees and displaced persons such that “almost three quarters of Palestinians (about 7 million) live outside their homeland”. In fact, if the national homeland of Palestine is the former British Mandate for Palestine given to Britain after WWI, then the majority of Palestinians live inside their homeland. Though there are no exact figures on the number of Palestinians living in Jordan, a reasonable estimate is that Jordan has a population of 2.6 million Palestinians, of whom almost 2 million (1,951,603) are said to be Palestinian refugees who fled the territory of what is now Israel. In Gaza, almost two-thirds of the 1.6 million population, or an estimated 1 million Palestinians, are Palestinian refugees or descended from the Palestinian refugees who fled to Gaza. Almost half the population or over 700,000 of the over 1.5 million Palestinians living in the West Bank are Palestinian refugees or descended from the Palestinian refugees who fled from what is now Israel. In addition, the Arab population of Israel at the end of 2009 was estimated to be 1,573,000. Thus, a total of approximately 7.3 million Palestinians of a worldwide population of 10 million live in the homeland of Palestinians. Even if that homeland is defined as the territory partitioned in 1948 and not the original Mandate of Palestine, about half the Palestinians in the world live in that territory. Of these, 2.6 million are registered as refugees under the UNRWA definition who ostensibly enjoy a Right of Return. Of the almost half of all Palestinians registered refugees who hail from towns and villages now located within the borders of Israel, at the end of 2009 993,818 Palestinian refugees lived in the Gaza Strip and 705,207 Palestinian refugees in the West Bank. If the Palestine mandate is the reference point for the homeland, then the vast majority of Palestinian refugees who fled what is now Israel and their descendents continue to live in Palestine and are internally displaced.

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22 Focus Migration, the Israel Country Profile. Focus Migration is an information service that claims to offer up-to-date figures, data and analysis on immigration, migration, asylum and integration issues. http://focus-migration.hwwi.de/index.php?id=4&L=1.

23 At the end of 2011, Israel’s population was 7,896,000, 5,901,000 (75.3%) Jewish and 1,610,000 (20.5%) Arabs according to Israel's Central Bureau of Statistics (CBS). http://www1.cbs.gov.il/reader/cw_usr_view_Folder?ID=141.

24 According to the Palestinian Central Bureau of Statistics (PCBS), in mid-2009, there were an estimated 10.88 million Palestinians worldwide divided as follows: 3.99 million in the Palestinian Territory (36.7%), 1.25 million (11.5%) in Israel; 5.02 million in Arab countries (46.2%), 0.62 million in other foreign countries (5.7%). http://prn.mcgill.ca/research/papers/PCBS2009.pdf.

persons (IDPs) and not refugees per se. “Internally displaced persons are “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 recognised State border.”26 The key element missing is that there is still no officially recognized state border between Israel and Palestine. However, at the time of flight, the border of Palestine included Israel, Gaza and the West Bank, and most refugees fled within that territory.

What really happened was a civil war, enhanced by the intervention of five Arab state armies, between the Jews and Arabs of Palestine and a de facto partition of the territory instead of the de jure partition sanctioned by the United Nations. The issue ever since has been to define and fix that border and have that border mutually and internationally recognized, though Jews for a Greater Israel want to claim all the territory while Arabs and Palestinians who continue to deny Jews a homeland and Israel a right to exist (such as Hamas) also refuse to recognize any partition of the 1948 territory of the Palestine Mandate. Even Israeli governments not controlled or heavily influenced by those who advocate a Greater Israel that includes at least the West Bank (Judea and Samaria) have practiced creeping annexation of part of the territory divided between the Jewish and Arab populations in the 1948 war, thus making the delineation of the border a shifting objective.27 However, since that war the percentage of Jewish Israelis advocating a Greater Israel and annexation of at least the West Bank has declined as has the percentage of Palestinians refusing to recognize Israel.


27 The charge of ‘creeping annexation’ was first made in 1984 in Meron Benvenisti’s “The West Bank Data Project: A Survey of Israel’s Policies”. More recently, more extreme critics of Israel, including United Nations Special Rapporteur on the Occupied Palestinian Territory, Prof. Richard Falk, on 20 February 2012 claimed that, based on information he received, Israel was engaged in increasing efforts “to deny Palestinians their right of self-determination. Ever-increasing and expanding Israeli settlements; ever-increasing confiscation of Palestinian land; ever-increasing settler violence; and ever-increasing demolition of Palestinian homes and other measures to displace Palestinians, have the manifest effect of making self-determination a decreasingly realizable prospect for Palestinians.” A reported 80 home demolitions in 2011 was the major source from the Israeli Committee Against Home Demolitions for drawing this conclusion. http://www.icahd.org/?p=8177, 21 February 2012.
Even in the Avigdor Lieberman “Populated-Area Exchange Plan” or populated land exchange (in contrast to the official idea of land swaps) proposed in May 2004 by the “extremist” current Israeli Foreign Minister head of the Israeli political party Yisrael Beiteinu, Israel would only annex those Israeli settlements in the West Bank contiguous to Israel and, at the same time, would transfer an approximately equal amount of territory that is now Israel located in the Galilee and referred to as The Triangle to a new Palestinian state. Tzipi Livni, when she was leader of the opposition party, Kadima, and regarded as a relative dove with respect to peace, also proposed to transfer Barta’a, Baka al-Garbiyeh and Beit Safafa, Israeli Arab towns situated along the Green Line, to Palestinian control. However, populated land exchanges have been proposed without getting the consent of Israeli Arabs for in surveys of their opinions, a majority opposes such exchanges. The reasons are not just the non-consensual nature of populated land exchanges, but opposition to change with unpredictable consequences, the prospect of a decline in the standard of living, and the loss of economic and welfare state benefits. However, proposals for coerced populated land or population exchanges practiced in the first half of the twentieth century and then considered to be legitimate are now considered to be prima facie unlawful. (Haslam 2008) Forcible or non-consensual population exchange is not to be confused with a Law of Return or a Right of Return.

Research soon reveals that the Right of Return is the outlier among concepts of return, not only for the reasons stated above – namely its total irrelevance to actual practices and the contradiction between the universality of the claim and the very particularity of its application – but also because of the way the conception emerged. The Right of Return of Palestinian refugees evolved as a belief with mythical and moral force

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28 Revealed in the Palestine Papers, the 16,000 documents on negotiations leaked to Al Jazeera. See Ariel Zellman, “Polls: Israeli Public Opinion on Land and Population Swaps for Peace.”

29 In a survey from July 2000 conducted by Kul Al-Arab among 1,000 residents of Um Al-Fahm, 83% of respondents opposed the idea of transferring their city to Palestinian jurisdiction, while 11% supported the proposal and 6% did not express their position. Kul Al-Arab, 28 July 2000, Nazareth, Israel, cited in Joseph Algazy, “Um Al-Fahm Prefers Israel”; Haaretz, 1 August 2000. A more recent poll in 2009 by An-Najah University in Nablus 62,9% of Palestinians rejected the idea. A Saban Center poll in late 2010 also indicated that 58% opposed the plan.

30 In the 2000 poll, 54% opposed because they preferred living in a democracy, enjoyed their standard of living or simply opposed change and were not prepared to make a personal sacrifice to create a Palestinian state.
rather than a principle with any legal status. For the Jews of Israel, return, except for token humanitarian and family reunification, was a non-starter. Refugee return was perceived as a threat to the security of their own self-determination project.

On 16 September 1948, the day before he was assassinated by the Jewish extremist Stern Gang, Count Folke Bernadotte, who had been appointed mediator on Palestine by the United Nations on 20 May, proposed a number of land swaps on the basis of the principle of “geographical homogeneity and integration” as the major objective of a peace agreement (the Negev to the Arabs and the Galilee to the Jews). He also proposed that innocent people be given the right to return to their homes and, more specifically, the right of Arab refugees to return to their homes in Jewish-controlled territory at the earliest possible date with the payment of adequate compensation for the property of those choosing not to return. There were no conditions placed on those who chose to return – there was no notion that they had to pledge loyalty to Israel.31

Why had Bernadotte made such a proposal? It was not a request made by the Arab states or by any Palestinian organization for they then expected to return under the protection of Arab armed forces. Nor was there any evident precedent for such a right. State authority over the territory it governed was the overriding sovereign decision maker and not the choices of individual refugees. (Benvenisti 2003) Even in the right not to be returned (non-refoulement), a state had to sign an international covenant and introduce the agreement into domestic law. Even then, the state was only obligated not to return the refugee and was not obligated to give the refugee a home or citizenship.

Gail Boling (2001) has argued that there were precedents. One alleged precedent lies in nationality law and laws governing the obligations of successive sovereign authorities. According to Boling, a state’s discretion relating to defining nationality is limited by binding obligations under international law, more particularly, the obligation of the State of Israel to uphold the obligations of the Mandate of Palestine held by Britain to offer...

31 CF. Folke Bernadotte, tr. Joan Bulman) (1951; 1976). To Jerusalem, Hodder & Stoughton; UN Doc S.863. As Bernadotte proposed it, “The right of innocent people, uprooted from their homes by the present terror and ravages of war, to return to their homes, should be affirmed and made effective, with assurance of adequate compensation for the property of those who may choose not to return.” AND “the right of the Arab refugee to return to the home from which he has been dislodged. It will be an offence against the principles of elemental justice if these innocent victims of the conflict were denied the right of return to their homes while Jewish immigrants flow into Palestine.”
nationality in the new state to the habitual inhabitants of the geographical territory whether or not the habitual residents are or are not on the territory at the time of succession. There are several problems with this interpretation.

First, it is an interpretation of customary law since it was never prescribed in written law at the time and the written sources cited as reflecting binding customary law are dated in 2000. Boling may be correct that this now reflects customary law, or at least the hope to establish the rule as customary law, a hope that would be helped if it could indeed be dated back over fifty years earlier. But the only precedents cited from the time by Boling are a legal advisory provided by Paalo Contini, to the UN Economic Survey Mission in 1949 and the ruling of an Israeli judge in a Tel Aviv court case in 1951. However, the Contini brief refers to Palestinians in Israel who had been legally permitted to return and not those still outside Israel, so the determination of Israel to admit the refugees was a necessary precondition for their having citizenship status. Although their temporary absence did not preclude their gaining citizenship, the willingness of Israel to re-admit them was a necessary precondition.

The court case cited merely declared that international law and state succession law at the time were relied upon. So the citation is only valuable if Boling’s interpretation is correct that this was indeed the understanding of international law and state succession law at the time. Further,

32 G.A. Res. A/RES/55/153 (December 12, 2000) arguing they reflect binding customary international law. Article 14(2) states: “A State concerned shall take all necessary measures to allow persons concerned [i.e., habitual residents] who, because of events connected with the succession of States, were forced to leave their habitual residence in its territory, to return thereto.”

33 There is considerably more evidence for such a claim. “Evidence for its customary international law status can be drawn from a number of international instruments such as provisions in human rights instruments (eg Art. 13 (2) UDHR; Art 5 ICERD; Art. 12 (4) ICCPR; Art. 22 (5) → American Convention on Human Rights (1969); Art. 12 (2) → African Charter on Human and Peoples’ Rights (1981)); → United Nations resolutions, peace agreements and soft law relating to internally displaced persons (Guiding Principles 1998).” Haslam (2008) 24. However, there is a general consensus that even if a right of return has more recently become part of international customary law, that law has been singularly ineffective, not only with respect to the Palestinian refugees and Cypriots and even the Croats, Bosniacs and Serbs displaced by the wars in former Yugoslavia in spite of the enormous effort expended, but also with respect the Thule tribe displaced by Denmark in 1953, the Chagos Islanders displaced by Britain between 1965 and 1973 and the millions of others forcefully displaced in ethnic and religious conflicts around the world in the last few decades. If the right of return is indeed now a right, its application is highly problematic.

34 “Arabs should be regarded as having the same citizenship status as Jews, both at the time of their displacement and upon their re-admission to Israeli territory.” (Contini 1949).

35 A.B. v. M.B., 17 ILR 110 (Tel Aviv District Court, 6 April 1951, Zeltner, J.).
the actual ruling applied to Palestinian Arabs who were on the Israeli side of the armistice line, not Palestinian Arabs everywhere.

Boling then argued that Israel's own nationality laws were contrary to international law since they were based on a discriminatory procedure in allowing Jews from anywhere to become citizens but not permitting former habitual resident to return as citizens. In other words, for Boling, Laws of Return are never legitimate. Further, since Israel did not permit the Palestinian refugees to return as a matter of right to at least allow their claims to be heard in a court of law, Israel violated rules of due process. Of course, such arguments are totally circular because they depend upon an acceptance of her interpretation of customary succession and nationality laws at the time while not citing any legal references related to such an interpretation in the late 1940s. Her arguments against denaturalization are also irrelevant because denationalization only applies to nations and whatever the refugees habitual status, they were never nationals of Israel. The precedents at the time were to prohibit denationalization or the revocation of existing citizenship to discriminate against a segment of its own nationals.

There are a number of additional problems. The consideration of the question of nationality in relation to the succession of states has a relatively short history beginning in the mid-nineties (Mikulka 1997), in itself an indication that precedent does not go back to the 1940s. Secondly, any of the norms discussed or proposed do not apply to territories acquired by force but only to territories where the jurisdiction is transferred by treaty as in states becoming independent, dividing or uniting. There was no treaty between Britain and Israel transferring jurisdiction so it is contentious to even claim that Israel was the legal successor state of Britain in international law.

Further, Article 4 of the Commission on Nationality and Succession stated that, even if Israel was legally considered to be a successor state, “A successor State does not have the obligation to grant its nationality to persons concerned if they have their habitual residence in another State and also have the nationality of that State.”36 That would mean that all Palestinians in Jordan and all Palestinians in the West Bank who acquired Jordanian citizenship when Jordan ruled the West Bank have no claims on Israeli citizenship. In any case, Article 7.3 required reasonable time limits for options to be exercised. Trying to exercise the option even in 1967 when the issue of right of return began to be an issue after Israel captured the

West Bank and Gaza, let alone 2012, would appear to many detached observers to stretch beyond a reasonable limit.

At the time, the dominant norm allowed forced population exchanges in cases of conflict, particularly where territory became jurisdictionally divided through the conflict. The precedent and practice was not to give nationality to those who were on the other side where sovereignty had become divided. Further, if discrimination is to be cited, it should be cited without discrimination for there were never any efforts to impose on Jordan the obligation to grant citizenship to Jews who fled or were forced to flee the territory captured by Jordan in the 1948 war.

In any case, there is no evidence that Count Folke Bernadotte had been guided in his opinions by international law and precedent. Quite the contrary! He seemed to have a deep belief that uprooting a person from his “natural” (not just habitual) place of residence was destructive to that person; every person belonged “naturally” to the territory in which he or she was raised. They thus had a natural and universal right to remain and return to the territory where they grew up. This belief had little to do with international law, citizenship rights, nationality laws, successor states or the other panoply of usual arguments. It was a romantic notion of belonging for Bernadotte, not a legal claim.

Did the UN agree with Bernadotte? If they did, why did they not incorporate the principle as a right as Bernadotte had claimed rather than leaving “right” out of the relevant UN Resolution and simply make a moral claim that Israel should permit the return. What is evident is that the UN did not want to abrogate the right of states to determine who could be its nationals at the same time as they wanted to respect Bernadotte who had just been assassinated. So with a whole host of misgivings, Resolution 194 was passed in homage to Bernadotte’s wishes the day before he was assassinated but with the issue of “right” omitted from that resolution. Note that all six Arab countries at the UN at the time (Egypt, Iraq, Lebanon, Saudi Arabia, Syria and Yemen) voted against the resolution for supporting a right to return meant recognizing Israel as a state that would have to give permission and Arab states were then adamantly opposed to Israel’s right to exist. Other states, including the communist bloc with very sorry human right records, also voted against the resolution.37

37 Afghanistan, Byelorussian, Cuba, Czechoslovakia, Pakistan, Poland, the Ukraine, USSR and Yugoslavia also supported the position of the Arab states and voted against the resolution.
Article 11 of General Assembly Resolution 194 reads:

The General Assembly resolves that the 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.

In English grammar, the ‘should’ is a modal verb and a conditional reliant on both Israeli permission and the pledge of the returnee willing to live in peace with Israel. Since Palestinians never moved towards the latter position until the seventies at the earliest, Israel was not even morally obliged to allow any return even though in a much better world, statelessness should be off limits and no one should be deprived of the right to return and live and grow up in the place where they were born. The verb ‘should’ refers to exemplary behaviour imparting a normative ideal to a sentence, and is quite different than an imperative or legal obligation or even a universal aspirational right.

However, whatever the intent of the General Assembly and the meaning of Res. 194 at the time, it is quite clear than since the late sixties, Res. 194 has been interpreted as embracing return as a right, but one that seems to have been exclusively applied to the Palestinians until the Yugoslavia conflict of the nineties when it was applied to the hundreds of thousands of refugees from that war. However, even when backed by billions of dollars to effect a significant return to their homes in the former Yugoslavia, few returned except to reclaim and sell land and property. Whatever the interpretation of the validity of a right of return, it does not take anything away for the right of the refugees to receive compensation.

**Conclusion**

A minority of states have a Law of Return. It is not rooted in right but in a sense of familial obligation and priority given to consanguinity rather than universal applications as in rights. The Right of Return could be applied to a majority of refugees, but it has only really been applied to two situations of ethnic conflict – that of the Palestinians and not even the Jews in former Palestine, and to all parties in the ethnic conflict in the former Yugoslavia. In spite of huge amounts invested in the process, with very little to show in terms of concrete long term results, the Right of Return has been singularly ineffective. The Law of Return is, in contrast,
particular rather than universal but has been effective in its application. Further, the Right of Return is supposed to be universal but has been only very particularly applied and then without any significant effect on outcomes. A refugee would be a fool to rely on the impact of such a norm even though the Law of Return seems to be a vestige of another age and the Right of Return appears to be a promising new iteration of the jurisdiction of universal rights but with relatively insignificant impact on the residential status of anyone.

Further, the Right of Return is not a right to return to a state or even to return to a previous homeland but the right to return to a specific home. This suggests it is really an obligation of restitution or compensation more than a law of recapturing membership in a state. Rashid Khalidi’s (1992) efforts to amend its interpretation to mean return to a homeland instead of a home have been helpful in fostering a path to a peace agreement while undermining the claim as a right of return to a particular home. The reality is that the Right of Return is an abstract principle, given the absence of homes to return to following widespread destruction of those properties, the political, social and economic difficulties of return, and the failure of both sides to instigate any implementable compensation program.

These differences should help us answer the question and puzzle of a “law of return” that is often observed but is also widely perceived to be discriminatory, while a “right of return,” which is very rarely observed, is widely perceived as having a positive moral status. I suggest that the

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38 This interpretation is reinforced on reading the second sentence of Article 11 of Resolution 194. “Instructs the Conciliation Commission to facilitate the repatriation, resettlement and economic and social rehabilitation of the refugees and the payment of compensation, and to maintain close relations with the Director of the United Nations Relief for Palestine Refugees and, through him, with the appropriate organs and agencies of the United Nations.”

39 There has never been an agreement on compensation. See Rex Brynen (2008). “It was agreed that refugees would be eligible for compensation for properties seized by Israel, and that host countries would also be compensated for the costs of hosting the refugees. There was no agreement on the valuation of compensation claims, with the Palestinians pressing for compensation of non-material as well as material losses. The issue of financing compensation was not fully agreed. Israel was willing to make a contribution towards this, but pressed for a lump sum amount that would include both cash and the value of evacuated settlements in Palestinian territories. Israel assumed that the international community would provide much of the compensation, possibly in the form of development assistance. The Palestinians emphasized full Israeli responsibility for paying compensation.” See Rex Brynen’s earlier paper (1996). Note that Article 11 of Resolution 194 suggests that many states, presumably including the invading Arab states, assume responsibilities for compensation.
answer is not to be found in history or politics, in economics or in English grammar. After all, the Right of Return gets its power precisely by insisting on being an absolute while all the evidence suggests that the interpretation is contentious. Like religious fundamentalists, interpretation is seen as self-evident, as long as the evidence provides only one answer. The context of the passage of the resolution – both at the UN and internationally at the time – is ignored. And any reasonably accurate interpretation requires a deep familiarity with details. Of course, any effective resolution requires making a particular agency responsible and accountable for carrying it out, but the agency responsible for delivering return, Israel, opposes return, and the agency responsible for delivering compensation is impotent. The more the meaning of the resolution has become atemporal as time has passed, the more the temporal restrictions have to be ignored and the obligations are now passed onto the fourth generation. Further, the proposition has distanced itself further and further from any procedural mechanism for delivering results. Finally, as time has passed the resolution has become a categorical rather than hypothetical imperative free of any qualifications.

In all these senses, the Right of Return is the opposite of a Law of Return which is never absolute and the meaning is always in the interpretation through actual cases which shift over time and are context dependent with a specifically assigned political body charged with and effective in assuming responsibility for delivering results because it has a self interest in doing so and a record and history of establishing bureaucratic procedures to do just that. The reason for the failure of the Right of Return in practice is precisely because it is seen as rooted in the rights regime which has become so entrenched as the normative standard over the last half century. That rights regime ultimately celebrates norms that are divorced from self interest and offer transcendent grounds for anything being moral in the first place. The glory of the proposition rooted in rights is the very same source as its impotence – its Kantian roots.

A categorical imperative is absolute in contrast to a hypothetical imperative for it is supposed to provide the foundation for any and all moral principles. Free of context and circumstances, wallowing in the glories of generality independent of accountability or the requirement of producing any deliverables, pure in its transcendence and oblivious to the need for process to become operational, the law of return is akin to Kant’s categorical imperative in offering an absolute and unconditional obligation at all times regardless of context and circumstances serving as an end in itself even if it means pushing the prospect of peace under the bus and
relegating hundreds of thousands of Palestinians on the bus to perpetual poverty and disenfranchisement. Such a deontological perspective decries any concern with consequences or with custom and habits that a Law of Return celebrates. Morality becomes a certain and mathematical formulation totally ignoring interests and subjective considerations. Thus, the rhetorical power of this elevation into the status of an idol is the every source of the Right of Return resting on quicksand rather than solid earth. Its very purity guarantees its impracticality.

By elevating return to an absolute status as an end and characterizing it as a right, by divorcing obligation from judgement and insisting it be the ground for all judgements in determining the outcome to the Jewish-Palestinian struggle, by the complete divorce from contingent empirical matters, universality is guaranteed at the cost of any particular application. By insisting on universal validity at the expense of any applied utility, by opting for moral universalism for a specific group of people rooted in a particular geography created at a specific time in history, there have been enormous gains in moral rhetoric but at the cost of a fundamentally paradoxical conception of rights. Humans are turned into individuals with absolute rights of choice divorced from their real membership in a community of displaced people rooted in time and space. By celebrating their absolute autonomy they lose any ability to make real choices. The purity of victimhood becomes equated with the mire of warehousing in camps for decades. It turns the refugee into Munchhausen, in theory capable of pulling him or herself out of the muck of statelessness by one’s own bootstraps but in practice a welfare bum dependent on international humanitarian largesse for welfare, education and health services. The most determined of humans – a refugee deprived of membership in a state – becomes idolized as a divine being, an autonomous source of his own destiny. By following Kant and making the least of us a divine idol, that individual is condemned to perpetual bondage.

That is also why the celebratory interpretations of a Right of Return are generally so devoid of the necessary Talmudic wrestling with various interpretive pushes and pulls and instead simply masses any and all evidence in its favour while ignoring matters that might contribute to the falsifiability of a reverential interpretation. The Right to Return does not become an empirical matter that emerges in history but a universal condition of being a human at any time and place. The refugee is bestowed with infinite powers of self actualization with a minimal number of tools to actually pull it off. Palestinians, and Palestinian refugees in particular,
have to be commended for ignoring this curse of their supposed celebrated individual will and achieving so much with so little. Many have dealt with enormous competence in tackling the particulars of their existence instead of living in a never land and have struck out on paths to become someone in the real world.

Instead of acting according to the maxim that they become instantiations of universal law without contradiction, they have recognized the contradictory position in which they have been placed and have tried to rise above it. Instead of being governed by perfect duties as the religious fundamentalists and political fanatics have chosen to do, they have ignored the sirens that try to seduce them to becoming exemplars to some conception of the ideal human and have chosen to raise families and fulfill their personal desires and passions based on personal preferences and choices to the best of their ability and as the circumstances have allowed. They have accepted a life of imperfection and contingency, of conditionality and incompleteness. Their autonomy has been worked on and developed rather than presumed as an ontological condition of their existence.

In doing so, they treat many others as means to their own goals but do not dehumanize them by denying that they have goals of their own that may appear to contradict their own aims but have to be reconciled with their own purposes. Rather than an abstract legislator of laws governing one’s own actions which in the end takes us from the starting point of a divine entity and turns us ultimately into massacring terrorists absolutely certain of his or her own moral rectitude, he learns to treat others not as he would himself be treated but as truly Other with his own and different goals and values. Instead of homogenizing humanity, differences are recognized and accepted. There is no divine Kingdom at the end, only the human kingdom of the day to day struggles of working with others to co-habit a state and a world of differences.

It is also to accept a preference for similarities and to identify with other Palestinians and try to create a collective enterprise out of autonomous selves. Self-determination applies to nations as well as individuals and one needs only a minimal set of commonalities to set out on the enterprise of establishing an effective state in which one is a member and in which the state is the agency that guarantees whatever rights one possesses. With this realization, Palestinians can create their own state alongside Israel that can also be a Light Unto the World and can also guarantee other Palestinians are protected by a Law of Return.
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1. Introduction

This chapter presents an outline of the situation in which we find ourselves with regard to asylum, refugee and immigration laws and practices. It is a situation that requires systematic and polycentric rethinking from the perspective of legal study, theoretical inquiry and pedagogical interrogation. It is important to appreciate the differential aspects, here, in terms of their proximity to one another. The mosaic of the continuously changing image and content of immigration laws in the UK (and elsewhere); the political, economic and geo-managerial apparatuses that come into contact with this conglomerate of legal provision and interpretational plasticity; and the ethical dimension with respect to the production of subjects that are subjectified or desubjectified through the legal regulation and governmental management of the polyportal gates of so-called sovereign territory. These three key schematic aspects, among others, pose a number of questions that are academically and ethically pressing: how are we to think of such approaches to management and regulation in terms of understanding the situation in which we find ourselves today? How are we to maintain the systematic understanding of legal adjudication and regulation in asylum, refugee and immigration law and in what relation to the political, economic and ethical conditions? Finally, how are we to reflect on the pedagogical need to teach the relevant laws in light of the situation in which we find ourselves?

In this chapter we attempt a provisional inquiry as to the elements prevalent today in the wider context of regulation and management – in order to ground the parameters within which any answers to these questions can be explored. It is important to maintain distinctions and draw them anew where necessary. The legal systems that adjudicate and interpret the laws that affect the subjects of asylum, refugee and immigrant
status offer a particular understanding and response. Irrespective of the political, historical and economic causalities in the production of such legal regulation, legal systemicity maintains – for its own code of understanding and decision-making – a code that cannot be dismissed or reduced to the single or exclusive plane upon which we can conceive of the social, economic and political life of the subjects in question. In the same manner that it is a mistake to approach the laws and systemic processes in question as mere political or crypto-economic constructions, it is a mistake to approach them in isolation.

Equally, in terms of the pedagogical dissemination, understanding and interrogation of such laws, it would be a mistake to not situate historical, political, economic, theoretical and ethical considerations or aspects along with a detailed and systematic teaching of the relevant legal provisions and practices. In light of this, it is necessary to reconsider the pedagogical approach to immigration, asylum and refugee law as such. It is worth questioning whether the mere – but necessary – study of the relevant legal material can any longer remain enough for the academic study of the subjects in question. This is made more urgent by the obvious fact that the subjects of the immigration, asylum and refugee law are not represented adequately (as active political and ethical subjects) in legal study, and need to become instead primary elements of pedagogical and political configurations. The study of law tends to focus on the elements contained in the law (which are statist, individualist and abstract). Yet, in light of the current situation it is necessary to further such an approach, by accepting the need for intra-disciplinarity; the need for a reconsideration of the subjects in question as placed at the centre of the analytical and theoretical study of the law; the need for further empirical study; and also the need for historical, geographical and economic mapping of the intersections between numerous policies and practices worldwide.

By employing the term ‘critical’ in the title, and in the character of the approach followed in this chapter, we indicate a generally academic approach to the wider field of mobility controls – by which is meant a reflective, theoretical revisiting of presuppositions and practices of control as they affect law and policy. Use of the term ‘critical’ further indicates a reflection on the subject matter of mobility control in relation to the imposed manner of understanding the movement of particular people as a matter of so-called crisis. While the work aims to maintain a certain eye to empirical detail, it is generally schematic, and thus constitutes a modest exercise in gathering different elements and aspects of the
situation in which we find ourselves. The approach is – by definition – intra-disciplinary and self-reflective and, as such, it aims to form an element in itself and only in the variety of current and future possible approaches to the subject matters in question.

It is important also to note the following from the start: the focus of this piece lies with the very notion of mobility controls and management in general. Our attempt is to understand and reformulate differential and distinguished logics while considering them from within a wider crisis-machine of control and government. To do so and to be able to expose the vast and hastily redrawn typology and administration of people on the move (i.e. ‘genuine/bogus asylum seekers’, ‘forced/voluntary migrants’, ‘legal/illegal migrants’, ‘Convention/proper refugees’, ‘regular/irregular migrants’ etc.) we conceive of what has been called a wider logic of the field or milieu of control over people on the move. As a result, this analysis will neither be focused exclusively on the nation-state or the reports and practices of the UNCHR, nor on the administration and policing of various receptor states as to the bureaucratisation, militarisation and micro-management of people on the move, but rather on their functional relation and mutual exposure. The aim is to suggest that an adequate, multi-faceted understanding of the fluid practices of inclusion and exclusion in a so-called post-sovereign world can only be reached by an approach that exposes the whole array of governmental techniques and apparatuses of controlling people on the move. This is not to disregard the variety of existent and possible approaches (or their differences), but to draw diagonal lines between them. Hence, between the economistic thinking of economic migration approaches, the humanitarian thinking of refugee studies, the legalistic thinking of immigration, asylum and refugee law studies and the resistance-suffused thinking of activism and critical theory of mobilities control, a fluid map of diagonal and intra-systemic fractures, lines, frustrations and fissures require attentive consideration. For this to be made gradually possible, an initial mapping of divergent elements appears necessary and useful.

A final word of caution as to our approach lies with the following: the consideration of the management of mobilities – in this theoretical and
pedagogical perspective – does not aim to conflate or confuse the factual
and pragmatic differences between various causalities and regulatory
frameworks of movement; in this sense it needs to be carefully understood
as simultaneously opposing the lumping together of groupings and typolo-
gies such as non-citizens, immigrants, asylum seekers, imprisoned for-
eign nationals and so forth by governmental apparatuses erasing
differences between them in order to reduce them to the lowest common
denominator of crisis control. In the meantime it remains important to
also oppose the historical denial of considering the production of citizen-
ship and denizenship as co-dependent. In this sense we turn to outline
elements that appear to form the current situation: the regulation and
management of grids of mobility worldwide.2

2. DEGREES OF HUMANIZATION ARE A DEPOLITICIZATION:
The Government of Movement

Doctrinal approaches to history and policy attempt to cover up the fact
that political, economic, social and legal artifices or categories (of degrees)
of humanity, legal personhood and righthood, are the condition of an
empirical remainder produced and presupposed by the so-called human
form. The key to studies of what has been called biopolitics lies perhaps
here: a radical empiricism of diminutions of constructed human life and
an assault on this institutional integration of life.3 We need to assault the
very logic of the separation between what is held to be a problem and
what is presented as its solution each time today in the name of progress
and civility or today in the name of managing crises. It has been clear all
along that the belief in the dogma of progress is an apparatus in the pro-
duction of the normalcy of human waste disposal. Too frequently the
focus of the denial of this fact, whether in so-called critical approaches or
not, reemphasizes the role of the nation-state or international organiza-
tions and attempts to refine the degrees of image-suffused sovereignty in
order to restore humanity to the law. What is overlooked in such
approaches is that the civil war machine of the State (and the internation-
empire of para-state crisis-brokers) has, for as long as can be remembered,
functioned through a polarisation between sovereignty and administrative government or policing. Thus in fact in the very logic of this machine, between the so-called problem and its so-called solution, lies their fusion or functional relation in the name of an evolving governmentality or police-management of both movement and life more generally.

Foucault determined that sovereign power and subjectivation go hand in hand and that the function of policing can be performed equally efficiently by the sovereign or the subject. Today we can add that the policing in question can be and is performed sufficiently by the conglomeration of sovereign states and para-sovereign economic and geopolitical interests, as well as subjects. Agamben's study on biopolitics and government shows the relation between macro-powers (governmentality) and micro-powers (omnes et singulatim) to be a functional one. The function is that of housekeeping (oikonomia), a function that draws the distinction between political life and politically-non-descript life and withdraws the ethos of life (each way of being) by replacing it with typologies of survival subjectivities through macro and micro-management. As Schütz has shown, this distinction between political life and its subtracted remainder, is a positive marker of what qualifies political existence (and what not), which then acts as a triggering device for its own transgression, ‘an indicator of an always colonisable, indefinitely politicizable’ and therefore governable territory of survival-citizenship and denizenship.

The intersection between citizens and denizens (e.g., the fact that both are subject to a neutralization of subjectivity) is always a matter of increasing the degree of distance from a presupposed zero-degree of what Agamben has called ‘bare life’. The reduction to bare life is not a reduction necessarily to being merely passive, as it is often understood, or a voiceless subject, but to an infinitely manipulated hierarchization of degrees of dehumanization. In other words it is a deduction or reduction understood as such from the perspective of the systemic point of view. To refer to one example of such a functional intersection, Bosworth and Guild write that: “Though many measures are first applied to non-citizens, soon enough, all

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5 Op.cit. n. 3.
are required to certify their identities and political allegiance through a range of means from submission to biometric border controls, to the surveillance of everyday correspondence in the name of counter-terrorism.\footnote{See Mary Bosworth & Mhairi Guild, “Governing through Migration Control: Security and Citizenship in Britain,” \textit{British Journal of Criminology} 46 (2008): 703–719 at 715; see also, David Lyon, “National ID Cards: Crime-Control, Citizenship and Social Sorting,” \textit{Policing} 1 (2007): 111–118; and Jef Huysmans, \textit{The Politics of Insecurity: Fear, Migration and Asylum in the EU} (London: Routledge, 2006).} As Agamben has shown both citizens and denizens are either included through the exclusion of their mere state of existence (bare life), or equally dehumanized through the reverse process (where being, or becoming, a citizen can mean being, or becoming, chronically poor and homeless). Both show, whether in the guise of so-called human rights or refugee rights, that a permanent status of a human being as ‘merely existing’ is inconceivable for the Law of Nations, for the Law of the International and now for the Law of Sovereign and Para-Sovereign Networks.\footnote{See Michael Hardt and Antonio Negri, \textit{Empire} (Cambridge, MA.: Harvard University Press, 2000).} If the refugee, as Agamben notes, throws into crisis the original fiction of sovereignty (by breaking up the identity between nativity and nationality), the citizen is thrown into crisis by seeing the identity between nationality and rights being broken, for instance, through more or less permanent emergency measures, laws and derogations, but also today more than ever through austerity and civil incapacitation.

A key problem is that the image-suffused sovereign notion of power (for instance, as to rights to be ‘had’) is presented as properly political and therefore in a certain sense in need of absolute defensibility and political correctness despite of the shifting coordinates of its proper name. Meanwhile the managerial government of disposable ‘men and things’ is presented as an infinitely shifting ground of managerial action that is forever covered up, in more or less successful ways, as a mere logistical and housekeeping exercise in \textit{human austerity}.\footnote{See Sonja Buckel and Jens Wissel, “State Project Europe: The Transformation of the European Border Regime and the Production of Bare Life,” \textit{International Political Sociology} 4 (2010): 33–49.} Hence, the drawing of a line in order to separate the one side from the other, the citizen from the denizen, is presented as a \textit{non-political} managerial act, that is, as an administration or an act of policing in an economy of life, effecting a more or less permanent dehumanization and planet-wide post-social reduction to survival. Reduced to a purely objective matter, increasingly, citizens
asylum, refugee and immigration law studies

... and denizens (e.g., undocumented migrants) can be administered rather than acted upon, or encountered. This renders possible the casting of entire populations as ‘refugees’ regulated by medical and other humanitarian aid, juridical-scientific categories of neutralization and reduced to survival-management; as well as the casting of problematic segments of the population into a containment field of such control-techniques, until ultimately, one fears, the vast majority of the population is reduced to the post-social being of survival barely disguising the managed co-existence of first, second and third class citizens and denizens alike.

3. Austere Managerialism: Control & Crisis

In a time of recession and austerity, we have the opportunity to situate our enquiry within the long history of the modern transformation of governmental action from one that aimed to supposedly ensure the undisturbed subjection of its subjects and their communal living, to one of governing through the continuous coping with urgencies, emergencies and crises. This latter situational form of governmental action finds everywhere perilous and precarious conditions before which the government can disguise the declaration of its powerlessness and instead act in the name of necessity and exceptionally austere powerfulness. The reservoir of exceptional power is produced and constantly re-triggered through this powerlessness, which must immediately be covered up.

Post-sovereign governmentality is an adaptive, unaccountable crisis-government that has now overtaken its other side, that is modern politics and economics). This is to say that what takes place today, as a current phase of intensification, is the mutual exposure and functional relationship of a political sovereignty and a managerial, administrative, emergency-governance that is the improper, but more efficient, side of politics: a politics of denial. When a minister declares that the nation needs to be defended before the hordes of the unwanted she/he makes this point in the civil servants’ terminology of managed migration and logistical integration while discoursed in the name of law, security and order. It is within this understanding that migration or movement management in general is to be viewed as a form of government. The capacity to manage is functionally concomitant to the capacity to regulate what is captured as manageable while in perpetual crisis.
The perception of asylum, for instance, as a matter of crisis originates at least in its current form in the mid 1980s. In the name of a progress towards a regulated flow-norm, asylum and refugee law cannot disguise the manner in which it is itself perceived as crisis. The crises of mass-arrivals, humanitarian needs and asylum seekers as helpless victims are crises produced by the legal parameters of the laws in question which were humanitarian in origin but geopolitical in their eventual practice. As such, for example, the empirical distinction between a predominantly individually focused definition of the refugee under the 1951 Convention relating to the Status of Refugees and the reality of mass movement purports to underscore the fact that the refugee regime has always reflected first and foremost the interests, economies and legal systems of the more powerful Western states. Crisis and control therefore must be seen in this light as they serve particular interests disguised as mere crisis-management.

The control paradigm has prevailed in the so-called developed countries since the 1970s. International migration management is a term coined in this particular form in the field by Ghosh.\footnote{See Bimal Ghosh, \textit{Managing Migration: Time for a New International Regime?} (Oxford: OUP, 2000); see also Martin Geiger and Antoine Pécoud, eds., \textit{The Politics of International Migration Management} (Basingstoke: Palgrave Macmillan, 2010).} Migration management can be seen as an attempt to, first of all, terminologically neutralise and re-problematise the phenomenon of migration and of mobilities more generally, while also disguising and maintaining control under terms such as securitization, austerity, health and safety, rationalisation, efficiency etc. Hence, the period of crisis in which we live is constructed and communicated once more in the most \textit{universal} manner of problematization. As a result, if one follows its logic, there is no one really to blame for each crisis and no one who can properly be held accountable. This period conveys not the information of situations and practices that require attention, but instead the very administration of crises as a universal field, regardless of knowledge, agency and responsibility. As such, crisis-as-government establishes conspicuous connections that render anything familiar and nothing accountable. The crisis communicates not empirical information but an informational image, a spectacle of knowledge with no real content. Crisis-governmentality does not prohibit and does not order, it rather invites indefinite critical measures only to enhance its self-proclaimed plasticity through, in the first place, an informational and counter-factual austerity.
The reformist state since the post-cold war era, thus, can be conceived as a promulgation of a self-produced indefinite crisis (as a problem) requiring indefinite control (as a solution). In this light the incessant subjection of institutions to waves of meaningless and ineffective reform (e.g., prisons) becomes more understandable. The preparation for the crisis as a free-floating control, that, as Deleuze showed, displaced (shifted the grounding of) disciplinary societies, has been in the making for a long time and the current proliferation of crises is but the latest form of control-intensification. Deleuze writes:

The apparent acquittal of the disciplinary societies (between two incarcerations); and the limitless postponements of the societies of control (in continuous variation) are two very different modes of juridical life, and if our law is hesitant, itself in crisis, it’s because we are leaving one in order to enter the other. [...] We no longer find ourselves dealing with the mass/individual pair. Individuals have become ‘dividuals,’ and masses, samples, data, markets, or ‘banks.’

Control here is used as a paradigm that merges the disciplinary with the diffuse rationality of control-management, and as such reveals itself to be the paradigm of government, used in responding to cycles of interminable and contingent, albeit, uncontrollable crises. If the State was born out of the logic of classic control in order to discipline, contain and order and re-fuse crises, post-national biopolitical crisis-government is to some extent born out of the logic of control in order to reproduce crises turning them into the very dominant form of an image or spectacle of a social relation. The increased expansion of exclusionary practices (e.g., imprisonment, but also ghettoes and shanty towns), the continued expansion of inclusionary practices (e.g., detention, home confinement, electronic tagging but also chronic poverty) and the increased legitimacy of pre-emptive controls (e.g., surveillance and securitization, but also military interventions and pre-crime models or virtual deviance) can be now seen in their conspicuous functional and historical connections.

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As a result techniques of control used on prisoners in the name of incarceration and deterrence are soon used on refugees without hesitation, while techniques of control introduced in the name of immigration enforcement are soon used on the unemployed and the protesting students and workers.

4. Institutionalizing Typologies: Juridical, Bureaucratic and Ontological Suppositions

Once the logic of reductive data as the rationale for decision-making and policy setting has been accepted, the door is open to an infinite amount of specializations, re-specifications and sub-typologizations. The artificiality of such labelling is easily demonstrated with regard to the failures of the UN to respond to situations in Darfur, Nepal and Colombia over the years. Victims of persecution, retypologized as Internally Displaced Persons (IDP) represent today the fastest growing and most numerous group of ‘forcibly displaced migrants’. Furthermore, the UNHCR is progressively institutionalizing the label IDP as it attempts to manage its mandate of legal protectionism by offering diminished or temporary protection. However, the UNHCR’s complicity with this labelling is not a mere administrative inevitability. The UNHCR has in fact plainly accepted a hierarchy of humanitarian privilege that distinguishes the IDP from the refugee so that logistical pragmatics can once more pre-determine the future. Once one starts typologizing there is no end to one’s administrative reductions: the Convention Refugee, the asylum seeker, the economic migrant, the foreign national in prison, the highly skilled non-EU professional, the undocumented migrant, the bogus asylum seeker, the sub-category asylum seeker, the internally displaced, the short term migrant, the guest worker, the trafficked migrant etc. Bureaucratic fractioning to effectively manage both individuals and entire populations is now deemed necessary. But not too long ago the same state and inter-state actors were actively advocating ever-inclusive and homogeneous approaches. Is necessity really that relative? Is contingency that predetermined? Typology is, therefore, the bureaucratic and administrative operation of constructing artifices of ever-reducible sub-identification of an individual applicant or person before the law, that simultaneously reduces the factual destitution of the subject to a mere status-determination. It is a dangerous, racist and hypocritical operation that replaces a genuine examination of causality and empirical situations,
while excepting responsibility and deducing artificial categorizations of people on the move, in order to administer their life in the name of the lowest common denominators of status geographies and status dispossession.14

5. The Economic Production of Waste

Refugee law indirectly exposes the acceptance by States of the fact that they produce refugees. Therefore refugees are not produced by exceptional crises, but by the normalcy of state formation, politics and government, as well as economic and geopolitical policies. The additional fact that colonial and so-called post-colonial capitalist states produce immigrants and other destitute categories of human beings, could, at least for the sake of a consideration of the worldwide situation of mobilities, be examined more fully. This dual factuality is mirrored by another equally important, that between those that move and those that do not. The first fact is that the vast majority of refugees do not reside on the borders or the cities of modern European states, but in the poorest regions of the world. Furthermore, more than one billion people live in urban slums and squatter settlements worldwide at the margins of national and international legal, political and economic orders.15

In capitalist societies the freedom of the movement of goods by far exceeds the freedom of movement of the people, unless such people are useful members of a labour force. Capitalism has been characterised by the triad of accumulation by dispossession, the production of a reserve army of labour and the sustenance of an informal economic sector. As such it is important to insist on the need to examine refugee law and immigration law (in particular) from also within the lens of capitalist accumulation and production. Hyland writes: “The purpose of immigration controls is not to prevent all migration, but to ensure that people move according to capital’s needs, rather than their own desires Any violation of this principle would fundamentally threaten the capitalist order, by undermining the geographical division of labor it has depended on

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since the dawn of imperial expansion and slavery."\textsuperscript{16} The economic and geopolitical changes and the social reductionism of the last 30 years in general need to be seen in conjunction with the negative effects these have had on immigrants, asylum seekers and refugees. For example the privatization of productive forces worldwide, the vanishing of low-skilled employment, the thriving of information sectors in contrast to industrial sectors of the economy, the virtualisation of financial markets, the legitimisation of precarious labour, the restructuring of public sectors and services, the detachment of social services and welfare benefits and the current period of austerity, among others, can and need to be viewed as relevant considerations in the state of immigration and asylum today. In addition it is well known that, for example, in the U.S. large sectors of the labour market rely fundamentally on undocumented immigrants as a labour force, comprising about 5% of the total U.S. labour force.\textsuperscript{17} Removing the nearly 12 million undocumented people in the country would be not only impossible and impractical but also would mean that the U.S. economy would suffer a significant loss.\textsuperscript{18}

Meanwhile in times of recession racist rhetoric rises together with irregular worker numbers. The irregular migrant becomes capitalism’s ‘lubricant’ where the State directly or indirectly enhances the operation of the traffickers. Marfleet expresses this plainly: “the US state accepts irregulars because powerful business groups demand cheap and vulnerable labour. According to the Cato Institute, a conservative American think-tank, in 2001 the benefit of the US economy of importing irregular migrants amounted to US$30 billion annually (\textit{Observer}, 3 June 2001).”\textsuperscript{19} British researchers revealed in 2005 that irregular labour “had for years been used routinely in key areas of economic activity, notably construction, catering, contract cleaning, agriculture and care services”,\textsuperscript{20} while the previously accepted Sri Lankan refugees from war were by 1997 rejected in their vast majority. Such a capitalist \textit{administracide} accepts as necessary ‘collateral damages’ such as the production of human waste specific to the


\textsuperscript{20} Ibid, 182.
new planetary frontier-land conditions. The collateral damage becomes the irregular migrant who is exploited in the informal labour market, as much as the migrant who is given access to a residual and private form of sub-citizenship under an employment contract which renders the employer an indirect screening official able to affect the employee's economic, as well as immigration, status.21

This is also to say that one needs to include in this perspective the wider problem of how immigration is used as a tool of international politics and negotiations. As Papadopoulos, Stephenson and Tsianos write: “treaties on trade, aid and support coupled with threats of penalties and sanctions are intended to pressure countries of origin and transit states to accept a ‘common management of migration flows’ and the return of their own citizens, as well as transmigrants, who are unwelcome in Europe.”22 The nature of migrant and refugee mobilities has proven to be uncontrollable and the old logic of the Fordist era of a rotational inclusion has met the failure of the post-Fordist era of flexible regularisation. In this sense Papadopoulos, Stephenson and Tsianos argue that: “What takes place now within the legalised spaces of camps is the transformation of undocumented labour migration into controllable migrational flows.”23 Thus, the control of movement is intertwined with the controlled insertion/rejection of bodies into economic and para-economic processes. These processes are rooted within the wider terrain of biopolitical government and affect both citizens and denizens in the survival field of control operations.

6. Secure Exceptionalism is Terrorization

If security produces itself through insecurity, the law produces itself through the exception. Rudge writes: “To an alarming degree decision making in the area of asylum is moving away from the traditional human rights and humanitarian field of policy making. It is increasingly the subject of dealing with terrorism, drug trafficking and policing on the one hand, and with economic streamlining on the other.”24 In this light

23 Ibid, 196.
Agamben’s contribution to the understanding of the logic of exceptionalism is quite known and has lost none of its currency:

Law is made of nothing but what it manages to capture inside itself through the inclusive exclusion of the *exceptio*: it nourishes itself on this exception and is a dead letter without it...Exception does not subtract itself from the rule; rather, the rule, suspending itself, gives rise to the exception and, maintaining itself in relation to the exception, first constitutes itself as a rule.25

Exceptional government is an *ahistoric* performance-paradigm coping with events and situations characterized by precarious, virtual, circumstances. If the logic of the administrative-management of the exception has become the rule, it turns immigration-and movement control more generally-into an administrative matter stripped from the very start of its political and legal significance and entitlement. Any institution can become a management-administration centre and every legal concept or principle can be transformed through its exception. Protection becomes securitization and the political-legal subject becomes a circumstantial data hub. Circumstances, however, are not governable in the same way that subjects are.

Immigration control as a form of neo-governmentality transforms protection measures into policing measures and crisis management as policing renders the logic of security into a mode of self-production, a continuous trigger of violence. Terrorized insecurity has been met with market-generated terror to establish a terror of degrees for denizens and citizens. The transformation of the humanitarianism into securitization is nothing but the refocusing of migration control not on the human subject, but on the bare life of a now wholly securitized and desubjectivized ‘dividual’. If what is to be screened is not an objective threat but a perception of exceptional vulnerability, then the person who has only his/her vulnerability to present to the authorities becomes, through a shameful and ironic twist, the security threat par excellence. Overall the logic of security and its infinite array of exceptions empowers the State to determine when the so-called normal conditions under which the principle of non-refoulement will apply.26 Thus a demonstrable threat to national security remains ever-demonstrable rather than demonstrated.

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7. Pre-criminalization

Garland has carefully examined the structural shift, during the later part of the twentieth century, from a penal-welfarist crime control paradigm centred on collective risk management to a new model of what he calls the ‘criminology of control’.27 As a result the workplace, the school, the university among other institutions have become such sites of criminal governance and control intelligibility. Furthermore, it would be worth comparing, though this cannot be done here in any detail, the globally used ‘medical’ criteria for the assessment of mental ‘disorders’ that decide that ‘failure to conform to social norms with respect to lawful behaviours as indicated by repeatedly performing acts that are grounds for arrest equals to ‘antisocial personality disorder’28 with the assessment of asylum seekers, benefit claimants and so many other dehumanized categories of social banning and abandonment. Further comparisons could be drawn between the assessment and policing of irregular movement and the penalization of the movement of the urban poor; or the policing of public health and safety that renders infectious diseases and ‘white trash’ as ‘social threats’.29 Yet another example of such a criminological/penal development is the variety of ways in which large aggregates of asylum seekers are processed contravening due process and non-refoulment, whether through the infamous White lists in the UK,30 or the mass rejection of Afghan applicants in Greece in recent years.

The primary pre-emptive mean of criminalization is to predetermine people that are on the move, or who are fleeing a situation, as unreliable, threatening and ultimately as dangerous. Immigration laws in their infinite multiplication follow suit and predetermine the criminalization of moving or fleeing subjects. The function of these legislative and policing practices however is not merely administrative. It is first and

28 See, i.e., The American Psychiatric Association, *The Diagnostic and Statistical Manual for Mental Disorders – IV* (DSM-IV), code 301.8.
foremost ontological. That is, an ontological predetermination of a neutralized emptied out subjectivity through a desubjectivation and ultimately a reduction of citizenship and denizenship to the lowest common denominator of precarious survival. A government of contingent crises no longer deals with subjects in their actual presence and civic deliberation, but with objects, virtual, desubjectivized ‘things’: waste, failed, rogue remainders. The fact remains that the pre-emptive breaches and the pre-criminalized deviance is produced by the very apparatuses that immediately arrive to police them. In 2008 the Council of Europe’s Commissioner for Human Rights expressed concern that migration policies were increasingly criminalising the mobility and presence of immigrants in Europe.

The criminalization of movement, arrival and presence in either national territory or on the fringes is closely linked with the process of securitization that today proliferates and affects ever greater numbers of people (including citizens). The machine of criminalization comprises different apparatuses of pre-emptive criminalisation, surveillance, penalization, exceptionalism, detention, deportation, profiling, certification, and securitization. An encounter with an asylum seeker is, for instance, criminalised in a number of Western States even to the point that offering a person a drink or a bed for the night can result in criminal proceedings. The agents of (pre)criminalisation have also multiplied and proliferated. They can be the border patrol, the welfare benefits interviewer, the judge, the police officer, the employer, the neighbour, the academic institution, etc. Alongside the logic of exceptionalism and securitisation, the criminalization of a person in movement generally falls within a range of


33 See *R v IO at Prague Airport and Another ex p EERC* [2004] UKHL 55.

operations claiming that virtual presence, action and possibility are the only motors of reality production. A \textit{de facto} criminal act and a \textit{de jure} criminal act or an actual breach of a regulatory code and a virtual, or pre-empted, breach have entered an indistinct area in the post-welfare world of managerial logistics.\textsuperscript{35} It is possible, thus, to say that Management, Control and Pre-criminalization have formed the new triad replacing the doctrines of Democracy, Order and Safety.\textsuperscript{36} Fear-based criminalized logistics affecting the movement of immigrants and asylum seekers are, however simply enhancing the policing and discrimination against a globally pre-criminalized, destitute underclass.

8. \textbf{Militarization}

The most obvious and crucial fact to note as to the engineering of a militarized migration-coercion is the wide avoidance of considering the legal and ethical responsibility of particular parts of the world over the circumstances that other parts of the world encounter and which lead their populations to move. The so-called ‘war on asylum’ betrays evidently a militarized logic that absconds from considering the vast range of actions and military campaigns that form causalities of movement. For example, one could consider the wars and anti-Muslim targeting of the Middle East, the resource wars in Africa, the so-called colonial legacy and the fall-out wars born of the perverse boundaries of colonialism and finally the economic wars on the poor peoples’ of the south, the promotion, support and legitimization of dictatorships in various parts of the world by powerful western states and the explicit or implicit support by western states of death squads and paramilitaries. It cannot come as a surprise, too, that “population movements [...] are deliberately created or manipulated in order to induce political, military and/or economic concessions from a target state or states.”\textsuperscript{37} For instance, such examples include the Cuban migration crises in 1965, 1980 and 1994, the Kosovo ‘demographic bomb’ in

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1999 and the invasion of Haiti in 1994 by the USA. The historical links with such causes are significant. Counter terrorism, for instance, originated in the colonial military apparatus of counter insurgency, also known as the so-called ‘low intensity conflict’ utilised to aid western imperial exploitation and domination.38 Sentas, further, offers another example as to the emergence of the Australian police through the practices followed during the genocide of the indigenous people.39

Significant is, in addition, the legitimating of the use of force in the war on asylum in a wide variety of direct or indirect manners. Additionally, the use of force by naval forces of Italy against refugee ships since the late 1970s, the creation of refugee camps next to war zones, the mass deportations of Lampedusa and so forth, but also the policing of immigration and asylum-seeking in the urban centres of the big metropolitan centres of the affluent West, suggest a growing move to weaponize40 immigration enforcement and further militarise its managerial logic within and outside of national borders. It is significant to note that in the field of urban studies the development of various forms of urban warfare is widely being acknowledged.41 Peters writes that “the future of warfare lies in the streets, sewers, high-rise buildings, industrial parks, and the sprawl of houses, shacks, and shelters that form the broken cities of our world.”42 Graham offers in addition the suggestion that the overexposure of urban centres to this new military doctrine links a wide variety of fronts and threats: “mobile pathogens, malign computer code, financial crashes, ‘illegal’ migration, transnational terrorism, state infrastructural warfare and the environmental extremes triggered by climate change.”43

Indirect militarization presents an example of an ever more widespread practice. In Canada, for example, anti-terrorism legislation, information exchange by intelligence and security agencies, biometrics, technologically enhanced identity cards and refugee interdiction measures extend the border into a multiplicity of sites for the surveillance of movement

41 See Paul Virilio, The Lost Dimension (San Francisco: Semiotext(e), 1991).
wherein the border becomes as mobile as the body itself.\textsuperscript{44} In Europe, since 2004, a Council regulation founded the Warsaw based EU agency for the management of Operational Cooperation at the External Borders of the Member States of the EU (FRONTEX).\textsuperscript{45} FRONTEX’s field of operations covers an extended patrol network throughout the whole southern naval flank of the EU and beyond, from the shores of Mauritania and Senegal in north western Africa to the river Evros in Greece and the north-eastern border-wall with Turkey, where the latest ‘war’ on immigration battle is currently being fought in the name of the EU. FRONTEX, which has been granted a budget of 676 million Euros for the period 2008–2013 (a budget that was at 6 million in 2005), has planned since 2011 to organise and finance between 30 and 40 charters to repatriate migrants on its own operational mandate.\textsuperscript{46} Furthermore, the new regulation No 2010/0039 recently amending the powers of FRONTEX provides among other things the following wide-ranging extensions making this agency a leading agent in the emerging European homeland security sector. It is to collect and process personal data of suspects for involvement in illicit border activities; to deploy liaison officers in third countries; to develop and operate an information system capable of exchanging classified information and to integrate common core curricula in the training of national border guards.\textsuperscript{47} As Fischer-Lescano and Tohibidur write: “All in all the spin-off of agencies leads to a spin-off of administrative apparatuses and consequently means an increasing independence of the agencies from the political influence of the Council and the Commission -and parliamentary contribution... The new agencies, at least the agencies concerning


\textsuperscript{47} This needs to be seen in conjunction with the integrated European Borders Surveillance System (EUROSUR), the policy objectives of which are influenced extensively by FRONTEX’s research on security issues, has resulted in increased business for producers of security equipment like Unmanned Aviation Vehicles, also known as ‘Drone Planes’ (already used in Latin America by the U.S. for the same purpose). EUROSUR is backed by a plethora of security research projects funded by the EU which involve big defence companies (i.e., OPERAMAR led by Thales Underwater Systems and Selex, the STABORSEC consortium, Sagem D.S. etc.). Agencies such as FRONTEX, thus, acquire more and more decision making and agenda-setting powers.
internal security and border patrol, have grown out of their mere technical-regulatory garment.”

9. Bureaucratic Management is Datacide

Closely linked to surveillance and pre-emption, as well as criminalization and terrorization, the assault on social spaces by the formation of informed spaces centered on the ‘bureaucratic production of knowledge about suspect populations’ closely associates the dangerous individuals or masses with the *de facto* assembling of national and international databases (such as biometric banks) facilitating enhanced and potentially universal social and economic sorting that is by inception operating under an exclusionary logic. The devolution and off-shoring of matters that effectively amount to due process decision-making, sensitive and personal data collection, the use of extensive surveillance techniques as a form of identification and as an everyday bureaucratic micro-management of migrants’ and asylum seekers’ lives (but also today of poor working citizens, or the homeless in particular) reveals that if, as Agamben suggested, the camp is the *nomos* of the modern (forming the topology of exceptional powers), then bureaucratic databases and administrative discourses are the *datacidal logic* of the modern, thus forming the linguistic and ontological administrative formalism that is racist, violent and unaccountable.

Visa requirements, for example, have long existed and are racist at their very core targeting both citizens and denizens. For example EU Regulation

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539/2001 (as amended) provides that certain nationals must obtain visas to enter the EU for even short stays. A cursory examination of the countries on that black list indicates that if one is Muslim, poor and non-white one is required to apply for a visa. Other examples include the criminalization of the foreigner claimant achieved through Section 35 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, which creates the offence of failing to comply with actions that the Secretary of State requires, or the 2007 UK Borders Act which allowed the Secretary of State to require everyone in the immigration system to have a biometric document, where refusal would lead possibly to dismissal.

Biometric documents and highly sensitive personal data are all the time being expanded and recorded in a web of databases. Within the EU alone there are three key databases: the Schengen Information System listing people prohibited from entry in the EU with highly questionable accuracy; the EURODAC which contains the fingerprints of all persons who have applied for asylum or who have ‘irregularly’ crossed external frontiers of a member State; and the new Visa Information System (VIS) listing every visa applicant. When claims and rights begin to be ungrounded through the pre-determination of bureaucratic processes based entirely on neutralized data of questionable accuracy and ethical vacuity, then the agents of immigration control proliferate uncontrollably. Thus, such agents or potentially penalised groups of direct or indirect immigration control include carriers’ liability penalties, persons who assist someone in breach of immigration laws, employer sanctions, humanitarian assistance, activist assistance, university academics, school and kindergarten teachers, marriage registrars, social workers, the clergy, nuns, hotel receptionists, health providers, property owners, journalists and so forth. Such proliferation of para-agency, along with the privatization of enforcement mechanisms presupposes the enhancement of what could be called the cyber-technological management of migrational flows, the required virtualisation of borders and the cyber-pre-emption of asylum seeking and in effect a cyber-deportability.

55 Under Regulation 2725/2000 EC.
Detention was once, at least purportedly, used in response to specific events and situations, while today detention and other related policies such as deportation and dispersal are normalised exceptions or situations of increased longevity and coercive intensity. Detention as a policy and practice is, in fact, a good example of an exceptional measure that in the UK (and elsewhere, applied to visitors, workers and students) became normalised and commonplace within a period of only ten years, from the 1980s to the 1990s. The growing number of detained asylum seekers since the early 1990s to the thousands of today, who are not charged with any offence and are even stripped key legal safeguards of suspected criminals and are routinely incarcerated in the names of justice and security are a natural extension of the highly profitable (for private security companies which have operated immigration detention centres since the 1970s) and the highly redundant (for all major academic studies) custodial incarceration sector. No data of any kind have ever been presented to suggest that detention centres are effective as a deterrent, while the cost of detention is extremely high as we witness accelerated imprisonment and detention rates.

The detrimental effects of detention are evident and obvious, and it is further important to note that such practices are presented and performed not in the name of punitive principles, but in the name of administrative logistics matching the so-called administrative discretion, in the UK, to detain or not delegated to Chief Immigration Officers as well as Immigration Officers and Home Office caseworkers with the least judicial supervision possible. In the US 350 immigrant detention centres form

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spaces of ‘in-betweeness’ in terms of constitutional protections since access to legal representation is not often observed, transfers often take place without notification to family members or attorneys and privatized sub-contracted centres are not required to maintain a registration system. As a result of the proliferation of such in-betweeness it is useful to consider that national frontiers can and have been extended extra-territorially but also can be contracted by controlling certain areas declared as under international jurisdiction or as nebulous zones or non-places. Hence the liminal spatiality of control mechanisms can turn the banal into a place of movement management so that terminals can ‘flow’ into hotel lounges, hospitality lobbies and so-called transition areas of interdiction.

Furthermore, the practice of the dispersal of asylum seekers was implemented in the 1999 Immigration and Asylum Act in the UK and its clearly stated justification was to ‘spread the burden’, i.e., to discourage settlement in the South and to redistribute related costs among local authorities. The fact that dispersal is a managerial tool to balance logistical concerns cannot deter the observation that such a policy enhances the marginalisation of refugees and also burdens considerably the poorest regions of the country, as well as raises significant questions as to the way refugee displacement is met by yet another displacement within an isolated, sterilised, of minimal legal protection temporary accommodation. In addition, the phenomenon of island detentions is particularly

important to note as it represents an example of the enforcement of criminalization and securitization where the off-shoring of accountability and legal processing of asylum seekers renders the field of nisology into a nissonomy by establishing an archipelago of exclusion and legally shrinks the spaces of asylum.\textsuperscript{68} The use of liminal locations of sub-national jurisdictions such as Guam, the Canary islands, Mayotte, Tinian and Lampedusa are utilised in order to subvert international refugee law and diminish the possibility of claiming asylum. The practice of off-shoring asylum follows, interestingly, the logic of off-shoring banks, which form not exceptions to state action and legislation, but necessary presuppositions for its existence where the civilian mainland produces and requires a carceral archipelago.\textsuperscript{69}

11. Marketization and Privatization as Asylum Off-shoring

During the 1970s, the privatization of security services, detention and prison institutions in the U.K. and the U.S. established a geometrically growing tendency of liberal states to multiply the number of law enforcers ‘without adding significant costs’ effectively in complicity with the growing market of private security services.\textsuperscript{70} The marketization of immigration risk wherein insurance companies assume the role of optimally managing, and hence governing, risks of immigration\textsuperscript{71} is closely linked to the rationality of late liberalism-capitalism, as well as to the industrial production of securitization and a self-perpetuating crisis mechanism that are no longer controlled by any public authority in any meaningful way, but instead lie in the hands of private actors acting for profit and becoming responsible for risk management and communication across a wide


\textsuperscript{71} See Richard, Ericson, Aaron Doyle and Dean Barry, \textit{Insurance as Governance} (Toronto: University of Toronto Press, 2003).
variety of forcibly linked matters: economic crises, terror crises and immigration and asylum crises.\(^{72}\)

In more general terms, Kritzman-Amir outlines three tiers of privatization or delegation to the private sector aiming at the reduction of management costs in the U.S. in particular. These relate to admission at points of entry, status determination and integration-related matters such as the provision of social and economic rights and benefits.\(^{73}\) For example through the imposition of carrier sanctions to airlines, shipping companies and ground transportation carriers they are expected to determine whether someone who is travelling across borders has adequate documentation. Yet, this can be arguably a potential violation of the principle of off-shore non-refoulment since such parties can effectively deny the opportunity for people to actually travel.\(^{74}\) Such privatization could be compared to the related privatization which has been taking place in relation to development, rendering in effect the asylum-development nexus problematic in this regard, among others.\(^{75}\) The latter includes also the role of NGOs. As Boas writes with regard to the involvement of NGOs in the U.S. who often testify before Congress and can thus influence policy, given that: “NGOs are involved in both the pre-screening and camp management of overseas refugees and in the reception and resettlement process for newly-arrived refugees in the United States.”\(^{76}\)

In the U.S. during the 1970s crime was perceived as an ‘unlimited natural resource’.\(^{77}\) In the U.S. the private enforcement of immigration laws is a


\(^{74}\) Ibid.; 203. See also R v Immigration Officer at Prague Airport and another (Respondents) ex parte European Roman Rights Centre and others (Appelants), [2004] UKHL 55.


fairly recent phenomenon, starting with the federal employer sanctions laws of 1986. Pham explains that this is a process that began indirectly, since federal law has long threatened with criminal penalties anyone who “knowing or in reckless disregard” of an immigrant's undocumented status “conceals, harbors, or shields [the immigrant] from detection.” The advancing of the corporate interests by big financial backers such as Wackenhut, CCA and Sodexho-Marriott by in regard to the U.S. Federal Government could be indicated by the fact that between 1995 and 1996 the influential American Legislative Exchange Council’s (ALEC) model legislation, as Richard Payne writes: ‘resulted in 1,647 bills, out of which 365 became laws. Its successes include “Truth in Sentencing” legislation, where offenders serve at least 85% of their sentence, and “three strikes” legislation, where third offenses result in mandatory life imprisonment.’ Payne adds that the interests are served mutually since “in addition to supporting organizations like ALEC, private prison corporations made 645 contributions, amounting to $540,000, to 361 candidates in twenty-five states.” Corrections Corporation of America (CCA), in Tennessee, and the GEO Group, in Florida are the nation's two largest prison companies.


See Ted Richmond and John Shields, “NGO-government relations and immigrant services:


81 Ibid.
Cervantes-Gautschi writes that: “Seeking Alpha, a website of actionable stock market opinion and analysis popular on Wall Street, reported that GEO’s income from prison health care services ending in March of 2009 topped $1.0 billion, a 5.8% profit. Seeking Alpha also stated that CCA’s profit for the same period in 19 states was over $1.6 billion, with a profit margin of 9.4%.”82 Goldman Sachs, Smith Barney Shearson and Merrill Lynch, invested three billion dollars per year into the CCA during the 1990s.83 Cervantes-Gautschi reports that:

The most influential investor in CCA is a hedge fund, Pershing Square, which is run by Wall Street investment guru activist investor, Bill Ackman. Ackman also plays a powerful role in Target Corporation and Kraft Foods. Wells Fargo is the most powerful investor in GEO. Other major investors with the power to influence management in one or the other of the two companies are Vanguard, Lazard, Scopia, Wellington Management, FMR (Fidelity), BlackRock and Bank of America.84

Payne exposes the close link between the US Private Prisons Industry and the private sector in the UK. Campsfield House, the ‘refugee prison’, opened in 1993 and was run by Group 4 which had already invested in the sector. In 1992 the privately run HMP Wolds was run by Premier Custodial Group Ltd, a subsidiary of Wackenhut Corrections Corporation.85 Group 4 since then has run a number of other centers such the infamous Oakington Reception Centre, the Yarl’s Wood Removal Centre and the Harmondworth Removal Centre. Group 4, now G4S, has effectively become the largest international private security company operating in over 80 countries. In the UK the close tie between the private sector and the political elite is but thinly veiled.86 Bacon in her 2005 Report On The Evolution of Immigration Detention in the UK, suggests as a result that:

84 Op.cit. n. 81.
The legitimacy of detention services being provided by a private industry which is incentivised by expanding its profits and therefore its operational scope, needs to be challenged. [...] Indeed, legislators and policy makers would not be able commit to increasing detention spaces without the cooperation, capacity and methods of the private sector, the involvement of which has given momentum to the growth of a detention regime.87

It is now a matter of fact that the largest number of immigration detention centres are run by Global Solutions Ltd led by venture capitalists.88 The further complexity of the private security sector in the UK is well illustrated by Stephen Nathan in the following:

In 2002 Group 4 bought the Wackenhut Corporation and acquired a 57 per cent stake in Wackenhut Corrections Corporation (WCC). As well as its other international interests WCC owned 50 per cent of Premier Prisons, the largest private prison operator in the UK and so Group 4 also acquired that stake. However, following a legal challenge, Serco—which owned the other 50 per cent of Premier—eventually won the right to sole ownership. Also in 2003 WCC bought back the 57 per cent of the company that Group 4 had acquired. To add to the confusion WCC recently changed its name to CEO Group Inc.89

Thus, it is urgent that we examine in detail the contracts of such arrangements and ventures and further expose the lack of accountability in such outsourcing and off-shoring in terms of asylum protection and international law. Readmission agreements facilitating the return to so-called safe third countries and countries of first asylum, the delocalisation of asylum applications processing, accelerated procedures, the creation of exceptional categories more generally, collective expulsions diminish if not extinguish accountability, along with increasing privatizations, and


87 2005: 27.

88 See Ibid.

manipulate the provisions of the International Convention in order to deterritorialize and de-normalise the field of international protection.90

12. BETWEEN CITIZENSHIP AND DENIZENSHIP: THE APPARATUS OF SURVIVAL

We therefore need to reconsider the starting point of an inquiry into the field of immigration, asylum and refugee laws. The point in question is simple: historically, statistically and geopolitically fewer people are now granted a status that comes with rights. The legal subordination of rightless subjects or subjects with lesser rights than citizens is a legal production, it is a legal lawlessness. Yet we need to further interrogate how the production of a predominantly western conception of rights as such presupposes the production of the rightless or gradations of righthood in the first place. This situation affects not only the rightless, but also those with rights; and there is a point of secret coincidence that needs to be exposed for what it is. As Moore writes: “Every person their own norm, on condition that this norm is always the abstracted, non-liveable version of themselves –the dream version, the version one has a right to and that, in the frustration of this right, victimises one again and again.”91 The non-liveability of the rightless meets here the non-liveability of the rightful in the differential but functional gradation of a legal in/capacitation of livelihood. Gathered around the administrative totem of the so-called civility or society in which we can no longer believe, citizens are forced to indefinitely self-manage the unlivable dogma of a disappearing social relation. Meanwhile denizens are abandoned to their indefinite disintegration. We therefore need observations and descriptions against the evasive reliance on principles that do not describe the actual field. This differential functionalism however, is but an empty variation of dream-like inceptions in the degrees of neutralization that affects both citizens and denizens. A neutralization or varied keness that is, nonetheless, an experience of everyday life for the vast majority of the planet’s population. That one can be socially defected, ejected, abandoned at any point


on the threshold of capture that is drawn (and constantly redrawn) between citizenship and denizenship and yet still remain within the spinning of the spectacle of society, of the filtering of the market, the legitimation of the law and so forth, is by now a banal seizure experienced as an increasingly constant bodily state.

The denizen's port of non-arrival is reproduced as the citizen's land of opportunity, until port of non-arrival and land of opportunity cross their secret functional governmentality. To oppose the mere mapping and commentary of the archipelagos of ‘islands’ (inner or outer to the territory of the nation state) of human waste and the separation of porous portals that the controls of movement attempt to globally impose despite constant failures to do so (or rather precisely through the logic of constant failures, the logic of perpetual crises) is not any longer sufficient. This love-affair with the intolerable and with failure, in stomach-turning complicity, was given the name or digestive of a juridico-political category, of the Great State which set itself in a presupposed opposition to the so-called Great Outside (disorder, contingency, criminality, exile, exception, denizenship etc.). The Great State within its great triad of fatal attractions -Territorial Order, Law and Security- undertook transformations in the name of the Absolutist State, the Liberal State and the Welfare State which have converged in the severe everyday banality of interminable economic, political and ethical crises which form the horizon of operation for the control-management of movement.

Each time the failure is as interminable as its presented triumph in the name of perfectibility, and this is its secret complicity with the normalized-exceptional neutralization of bodies reduced to being mere nuances of a limitless management process of integration-disintegration. In this state, the lives of citizens and denizens alike are reduced to the infinite production of mere survival albeit to differing degrees of (social) deduction. Survival tactics reproduced as policies and laws through this international civil war machine presupposes itself as able to be self-perpetuating in light of a crisis that can know no absolute end but only temporarily manageable (but ultimately unachievable) ends.

Survival, as a result, becomes the mode and condition for the included and the excluded in a generalized precarious inclusion that excludes and vice versa within the biopolitical continuum of a global civil

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management economy.\textsuperscript{93} When only survival remains at stake for the majority of the planet’s population, post-sovereign biopolitics and administration no longer attempt to manage life in order to better it or simply to exclude its more undesirable parts, but aim to reduce both the included and the excluded to their respective degrees of a seemingly-differentiated image of a bare minimum of humanity and civility.\textsuperscript{94} Today, we confront on the one hand the hypocritical restrictive application of human, social and welfare rights as dream-like inceptions within, what Bauman has called, the \textit{liquid} city; and on the other hand we confront the equally hypocritical restrictive application of minimum standards of entry/non-entry into the decivilized porous hubs of survival at the \textit{liquid} frontier, the extra-territory, the para-urban slums and the poorest regions of the world.\textsuperscript{95} As ever, the first that the dream puts to sleep is the dreamer and the first that exclusion kills is the poor.

Immigration controls and laws are then productive rather than neutral apparatuses and what has been called ‘porocratic regulation’ is inherently undemocratic, unjust and violently coercive and repressive.\textsuperscript{96} We need to be able to conceive of immigration law and asylum law anew as laws that put first the understanding of capacity, contingency and multiplicity. In this sense, among else, a new International Convention for the Common Rights of People on the Move appears necessary. The move to make the controls better, fairer, more efficient, more humane or just is to reinforce the status quo of domination, subordination and exploitation. When mobility is seen as always-already a problem that needs to be ‘dealt with’, mobility is seen as driven by crisis, which then is responded to by crisis-management ever-producing more crises. Nor should we be misguided by the current partial success of a humanitarian logic that characterises anti-trafficking discourse, since borders are yet again to be promoted as reinforced control grids in the name -not this time of the protection of refugees but- primarily of humanitarian concerns. Whether intentionally or not


anti-trafficking discourse can be seen to accept the logic of pre-emptive criminalization in that: “The drafting of controls and their restrictive premises are increasingly anticipatory. They are aimed less at hindering existing immigration and more at collecting information which will help to identify points where there may be some future loss of control over cross-border transit routes and migration flows, and not least uncontrolled repatriation.”97 Collateral effects following the introduction of a particular policy or mindset (securitization, criminalization, anti-trafficking etc) lead inevitably to new forms of managerial practice and governmental mechanisms. In other words governmental policing and control produces and presupposes the secondary government and regulation of its own collateral effects, creating effectively a fusion (that it fights to maintain as invisible) between sovereign policy and collateral managerialism or government. While these two modalities of political regulation may seem as unrelated or as merely contingent to each other, they should instead be understood as two polarities of the paradigm of control that has prevailed worldwide and that presuppose each other.

Control of movement is therefore a governmental machine that functionally relates to the image-suffused sovereignty of the dogma of the nation-state of which only the spectacular image remains. It is thus separated but also depended on the image-suffused dogma of sovereignty and the relationship is mutual. If critique, research, teaching and activism has devoted too much attention this far on the image of sovereignty and its exposure, it needs to turn now more decisively against the managers who have to a large extent displaced the so-called sovereign decision maker from the throne of sovereignty. Management is government and it now claims for itself the higher standard of this new un-ethics of control where factuality and accountability are neutralized into micro- or macro-logistics of policing, administration and exceptionalism in order to aid the reconstruction of what Bauman has called a ‘global hierarchy of mobility.’98 What it seems is always missing is the radical empiricism of the active subjectivity of immigrants, the sans-papiers, the asylum seekers and refugees before and after processing by control regimes that capture the mobilities of people worldwide. As Papadopoulos, Stephenson and Tsianos write: “what is absent is their [the peoples’] actual movement, what people become as they navigate the fissures of nation states and borders. The absences of the inappropriate/d migrants and their desire

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97 Ibid.: 200.
constitute a void, a void around which this situation is organized”99 and we can add around which the law remains unable to respond to with any new and more radical juridical ideas against such a self-defeating, racist and in any case ever-temporary managerialist-policing logic.

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HUMAN RIGHTS OF REFUGEES

Archana Parashar*

INTRODUCTION

The title of this chapter should alert us to two issues – who is classified as a refugee and why is a separate category necessary? Other chapters in this book have discussed the evolution of the concept of refugee and their rights in international and domestic laws. This chapter will therefore, focus on the narrower issue of the relationship between the status of a refugee and their entitlement to human rights. For that purpose it is necessary to state briefly the interconnections between the state, citizens and human rights.

The status of being a refugee is a sub set of other persons described as non-citizens or forced migrants. At the very fundamental level these status markers invoke the political status of the person, that is a person who feels the need to get away from his or her state and thus challenges the usual conception of the state as a protector of its citizens. At the same time it invokes the beneficence of another state. The two central figures in both instances are the state and the individual whether a citizen or non-citizen.

Human rights discourse is about the limits of the state’s power vis-à-vis individuals, mostly citizens but also the broader human population. International law has been the main site for the articulation of these norms. If these two ideas, e.g. the relationship between the state and individuals and the connection between the state and human rights, are put together, the question should not even arise whether refugees have human rights, yet it is a question widely discussed.

This is primarily because the discourse of the sovereignty of the state is invoked to limit the claims of refugees. However, the issue is whether a claim of sovereignty trumps human rights? As said above, the human rights discourse puts real limits on the powers of the state vis-à-vis the individual citizen but not only of the citizens. It will be argued below that

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the universality of human rights is meant to safeguard against political institutions imposing this kind of limits on basic or fundamental rights of some humans. However, the states can and do argue that there are practical limits to their obligations to non-citizens. If the original state is not looking after the interests of its citizens who should the responsibility fall on? Answers to this human problem of refugees are found in the international norms enunciated in the Refugee Convention and other human rights related documents some of which are analyzed below. One of the issues is whether this could be the exclusive responsibility of an individual state or should be shared by the international community as a whole.

The chapter is divided into three broad parts. The first part discusses the international instruments that are designed to safeguard the human rights of non-citizens or forced migrants. In the second part a brief analysis of the human rights literature is undertaken to ask whether human rights can effectively restrain state power in respect of refugees. In the third part, relying on the examples of the practice of mandatory detention and denial of access to courts, a closer analysis of the two major devices for denying human rights to refugees is conducted.

**PART ONE: INTERNATIONAL NORMS FOR THE RIGHTS OF REFUGEES**

Refugees are outsiders who form a sub group of the wider category of non-citizens that may include asylum seekers, migrant workers, trafficked persons, other immigrants and even stateless persons. The distinctive attribute of their status as a refugee is that they are involuntary migrants or asylum seekers. Historically human populations have migrated en masse to avoid persecution of various kinds and often faced hostility of the settled populations but were given refuge under the broad principles of aliens' law. The contemporary norms of international law that are designed to give some protections to the refugees are no doubt a development of these trends but more accurately, even if loosely, are traced to the developments after the first and second world wars. The League of Nations’ High Commission for Refugees was created in 1921 and it helped in the creation of the first multilateral treaty dealing with refugees, the Arrangement with regard to the Issue of Certificates of Identity to Russian Refugees.1 This treaty was followed by a number of other arrangements,

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viz the Arrangement Relating to the Legal Status of Russian and Armenian Refugees, the Convention Relating to the International Status of Refugees and the Convention Concerning the Status of Refugees Coming From Germany.²

The Arrangement Relating to the Legal Status of Russian and Armenian Refugees of 1928 formulated as recommendations, specific principles about the refugees’ access to courts, the right to work, protection against expulsion, equal liability to taxation. In doing so it departed from the earlier practices of not expecting the states to have specific responsibilities towards refugees.³ This was followed by the Refugee Convention of 1933, which added a number of obligations on the states. These included an obligation to not expel authorized refugees and to avoid refoulement. It added a number of rights to the 1928 list including greater access to employment, welfare and relief systems, medical care and worker’s compensation as well as greater access to education.⁴ However, this treaty was ratified only by eight states and the subsequent Convention Concerning the Status of Refugees Coming From Germany in 1938 was also not taken up by many states. Nevertheless according to Hathaway the 1933 Convention provided the model for two conceptual transitions in modern refugee rights regimes, e.g. the principle that states will accept international supervision of their compliance with human rights and that the states would guarantee basic civil and economic rights of refugees rather than simply give them alien’s rights.

The League was replaced with the United Nations after the Second World War and the United Nations Charter in its preamble reaffirmed faith in fundamental human rights and the worth of the human person.⁵ This was followed by the adoption of the Universal Declaration of Human Rights in 1948, and the drafting of the International Bill of Human Rights that includes the International Covenant on Civil and Political Rights, as well as the Optional Protocol to the Civil and Political Covenant and the

² Ibid; he cites respectively ‘Arrangement Relating to the Legal Status of Russian and Armenian Refugees’, 30 June 1928, 89 LNTS 55; ‘Convention Relating to the International Status of Refugees’, 28 October 1933, 159 LNTS 3663; and the ‘Convention Concerning the Status of Refugees Coming From Germany’ 10 February 1938, 191 LNTS No 4461.
⁴ Ibid 87–88; Hathaway also quotes a comment in ‘Work of the Inter-Governmental Advisory Commission for Refugees during its Eighth Session’ LN Doc. C.17.1936.XII (1936), at 156 that this enumeration of rights conferred on the refugees the maximum legal advantages that were possible at the time.
International Covenant on Economic, Social and Cultural Rights. Even though the rights included in these declarations and covenants are universal and must be available to the citizens and non-citizens equally, the UN specifically created the Convention Relating to the Status of Refugees in 1951 (Refugee Convention). It also established the United Nations High Commissioner for Refugees (UNHCR). The Refugee Convention used the 1933 Convention as its model in enumerating the rights of the refugees that was supplemented with the 1948 Universal Declaration of Human Rights.

The Refugee Convention was designed to deal with the specific historical and geographical context of refugees in Europe after the Second World War. It defined refugee in Article 1A (2), as a person who had an individual but well-founded fear of persecution as a result of events occurring before 1 January 1951. Most nations interpreted this provision as referring to events in Europe. The limitations on this definition of a refugee had to be removed in the changing geo-political context of the post war world and the 1967 Refugee Protocol did that by deleting the limitations about the time and place in the Convention. The Protocol was meant to enable the international community to deal with the increasing numbers of refugees in all parts of the world but it stopped short of giving the UNHCR increased powers to handle the novel situations. One consequence of this was that a number of regional arrangements were made, e.g. 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, and 1984 Cartagena Declaration on Refugees that extended the scope of protection afforded to refugees.

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6 Convention Relating to the Status of Refugees, 189 UNTS 150; in the intervening period the International Refugee Organization (IRO) worked to resettle more than one million Europeans.
7 Hathaway, The Rights of Refugees, note above, 94.
As a result the contemporary situation is that under international law refugees have a number of substantive rights. The main source of these rights is the Refugee Convention, which is supplemented by various human rights documents of the UN and at times by regional agreements. Under the Refugee Convention, according to Hathaway a number of basic rights of survival and dignity are supplemented by more expansive range of civil and socioeconomic rights. However, refugees are only one sub group of forced migrants that require protection. It is an increasingly common occurrence that people are forced to flee their homes by extreme poverty, famine, environmental disasters et al and since the Refugee Convention provisions of right to asylum and non-refoulement do not protect them it is necessary to conceptualize measures that may assist them.

The following discussion focuses on the narrower issues of whether the Refugee Convention was designed to safeguard human rights of refugees? The second issue is the relationship between the Refugee Convention and the other Human Rights instruments.

Hathaway argues that the rights of refugees derive from the two primary sources of the general standards of international human rights law and the Refugee Convention. The development of international human rights law is useful but the rights in the Refugee Convention are more specifically tailored for the needs of refugees. The Codification of rights in

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12 In addition to the international conventions (e.g. The Convention against torture and other cruel, inhuman or degrading treatment or punishment, The Convention relating to the status of stateless persons, The Convention on the prevention and punishment of the crime of genocide, The International Convention on the elimination of all forms of racial discrimination, The Convention on the elimination of all forms of discrimination against women, The Convention on the rights of the child) and regional instruments upholding basic human rights of all human beings there exists a body of ‘soft’ international law like declarations, guidelines and principles. These are supplemented by the international humanitarian law that specifically mentions certain rights of refugees (e.g. the Geneva Convention, Article 44); see Elizabeth Ferris, “Protracted Refugee Situations, Human Rights and Civil Society,” in Protracted Refugee Situations: Political, Human Rights and Security Implications, eds. Gill Loescher, James Milner, Edward Newman and Gary Troeller, (New York: United Nations University Press, 2008), 85 at 86–7.

13 Hathaway, Rights of Refugees, note above, 94; see also Weissbrodt, The Human Rights of Non-Citizens, note above, 71 where he lists the five UN instruments that form the basis of the rights of refugees in international human rights law: (1) 1951 Refugee Convention; (2) its 1967 Protocol; (3) The Statute of the Office of the High Commissioner of Refugees; (4) The Declaration on Territorial Asylum; and (5) the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status.

the Convention is fairly intricate as the rights differ on the basis of the degree of attachment to the state. There are a number of basic rights available to all refugees as soon as they are under a state’s jurisdiction, whether de jure or de facto, a second of set of rights applies when they enter the territory of a state and other rights apply when they are lawfully staying in the state. The two most commonly invoked rights are the right to seek asylum and the right against refoulement that are discussed below. The concept of rights being linked to the degree of attachment to the host state makes the right to seek asylum seem like a relatively tenuous right. Yet the entire regime of refugee protection depends on this basic right and without controversy it may be described as the fundamental human right that anyone should have. The more specific issue is whether this right is available to an asylum seeker or only to a refugee. The implicit question here is when is an asylum seeker a refugee?

The context of this question is that in the literature on the rights of refugees, the term refugee is used as a generic term but it is necessary to make a distinction between asylum seekers, refugees and IDPs. Asylum seekers are persons who have left their country and are seeking asylum or refuge in another country. Most international Conventions and treaties however do not define the term. The usage of the term therefore differs from one state to another. The major difference between the term asylum seeker and a refugee is that the former has not yet been granted protected status while a refugee has been granted such status. This distinction has a significant bearing for the issue of how the relationship of Refugee Convention and the Human Rights Regimes is conceptualized. Whether the asylum seeker can expect their human rights to be upheld is becoming an increasingly difficult question as increasingly many states are adopting policies denying access to their shores.

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15 Hathaway, Rights of Refugees, note above, 154.
17 Therefore in the following discussion this issue is elaborated even though other chapters in this collection deal with these topics.
18 An additional category is that of persons in the protracted refugee situations and they have found themselves in these situations due to mass movements of people. Generally in the literature it is suggested that they require durable solutions that may include political and economic development; see Loescher et al, eds. Protracted Refugee Situations, note above.
The Refugee Convention defines a refugee as some one meeting four requirements of (1) the person has a well founded fear of persecution, (2) such fear of persecution is on one of the five specified grounds of race, religion, nationality, membership of a particular social group, or political opinion, (3) the person must be outside their country of nationality, or if stateless then outside the country of their habitual residence, and (4) the person is unable to return to their country or fears returning. Significantly this Convention does not give any person a right to seek asylum but it is assumed to operate in the context of other Human Rights instruments. The preamble of the Convention mentions that it is enacted in the context of the fact that ‘... the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination.’ Article 14 of the Universal Declaration of Human Rights provides that ‘everyone has a right to seek and to enjoy in other countries asylum from persecution.’ However it also places no obligation on the states to grant asylum. Therefore, individual states are adopting policies of their choosing and denying protection to asylum seekers, including denying access to territory and refugee status determination procedures. This is despite the fact that UNHCR has clearly articulated its position that if asylum seekers are denied protection because their status as a refugee is yet to be ascertained it would negate the principle of non-refoulement as individuals could be refused entry or sent back to persecuting states.

Article 33 of the Refugee Convention says that no contracting state shall expel or return a refugee in any manner where they may face persecution on the specified grounds. If this guarantee is to have any effect at the very least it cannot be available only to those whose status has been ascertained in accordance with the Convention. The basic idea of protection of refugees therefore demands that the asylum seekers should be protected pending the formal ascertainment of their refugee status. Otherwise the formal rights that apply to asylum seekers will not be of any use. There are

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20 The receiving states or the UNHCR primarily carry the responsibility of determining whether some one is a refugee or not. The involvement of UNHCR varies across different countries and is in part dependent on the domestic legal provisions, see Weissbrodt, *The Human Rights of Non-Citizens*, 112.
a number of documents that mention these rights or injunctions to the states, for example that asylum seekers should not be left in a destitute condition while their asylum claims are ascertained or that procedure for determining the refugee status should not be slow or that states should ensure that applicants are given adequate legal assistance.\textsuperscript{25}

Certain convention rights are available once a person fulfills all the elements of the convention definition of a refugee. For this it is not necessarily the case that a positive status determination has been made as it is said that the convention rights arise from and reflect the needs of the asylum seekers rather than depend on the formal determination of their status. However, for these rights to become available the refugee must be lawfully under the jurisdiction of the particular state that is a party to the convention.\textsuperscript{26} These rights include the right to employment, education, and housing and property.\textsuperscript{27} It is unfortunately also a reality that despite the right to work being a convention right it is denied to the refugees by many strategies. In the less developed countries formal bans are often imposed on refugees gaining employment but even more frequently refugees tend to work in the informal sector with the attendant drawbacks of lack of enforcement of legal rules. Most developed states tend not to impose formal bans on employment but practices vary. For example, even within the EU, countries like France, Germany, Italy and the United Kingdom all deny the right to seek employment to persons whose claim for refugee status is under consideration.\textsuperscript{28} Moreover, the members of EU have agreed that they will specify the time periods when the asylum seekers will not be able to seek employment.

Similarly the right to housing while acknowledged in article 21, is restricted in practice to those refugees who are able to invoke the guarantee of article 13 for property ownership.\textsuperscript{29} Moreover for en-masse movement of refugees this right to housing amounts to being put up in camps with temporary shelter rather than housing in the usual sense. The right to housing is in turn necessarily affected by a realistic access to health services. It has been said that it is not so much hunger or lack of food that kills people but a combination of disease and deprivation. In the first instance access to health care primarily requires basic hygiene and disease

\textsuperscript{25} Weissbrodt, \textit{The Human Rights of Non-Citizens}, note above, 72 where he lists a number of regional documents and reports.

\textsuperscript{26} Hathaway, \textit{Rights of Refugees}, note above, 278.

\textsuperscript{27} Articles 13, 17, 21, 22 and 24.

\textsuperscript{28} Hathaway, \textit{Rights of Refugees}, note above, 735.

\textsuperscript{29} Ibid, 825.
More formal access to health care is part of the social security measures and invariably refugees have more restricted access than the citizens. Furthermore, the more vulnerable sections of the refugee populations suffer additional discrimination. For example, it is widely acknowledged that race and gender create complex relations of discrimination for women refugees.

It is also a reality of contemporary times that most asylum seekers would enter another country as illegal entrants and if they are denied protection of international law and subjected to the rules of domestic migration law it would be defeating the purpose of having a separate refugee law. Hathaway argues that refugee law rather than being an aspect of migration law is a system for substitute protection of Human Rights.

Doubts about the obligations of the states to make these protections available to asylum seekers are a replay of the broader arguments about the binding nature of international law and state sovereignty. I will return to this issue but for now examine whether and to what extent the asylum seeker is entitled to the protections of human rights enshrined in various UN and other international bodies’ documents as they are not dependent on the determination of the status of refugee.

PART TWO: HUMAN RIGHTS OF REFUGEES

The Universal Declaration of Human Rights (UDHR) is the foundational document that articulates the rights that should be enjoyed by everyone. In Article 2 it says unambiguously that ‘Everyone is entitled to all the rights and freedoms set forth in this declaration...’ but the treatment of refugees, among other non-citizens, seems to fall short of this standard. It is therefore, worthwhile to ask whether the drafters intended to cover both citizens and non-citizens under this phrase. Grant argues that there are at least three reasons why the answer is affirmative. First, the language used is universal, which affirmatively includes ‘everyone’ and negatively
prohibits the states that ‘no one’ shall be subjected to deprivations. Second, the drafting history of the UDHR indicates that at the earlier stages in the deliberations the draft Article 2 (a) asked each state to give equal protection to ‘all persons under its jurisdiction, whether citizens, persons of foreign nationality or stateless, the enjoyment of human rights...’.34 Even though the final draft did not use these words a number of delegates were of the view that the Declaration included all human beings. Third, when the UDHR was adopted, the prevailing international law principles already accorded some protection to aliens. Although these rights were diplomatic rights of states to insist on the protection of their citizens and were thus an attribute of sovereignty they were available to individuals as aliens.35 Moreover, as Article 1 states that ‘All human beings are born equal in dignity and rights...’ it indicates that human rights are derived from human dignity and not given by the state therefore, they cannot be taken away and belong to every person.36

The broad principles contained in the UDHR gradually led to the UN treaties on many aspects of human rights of various vulnerable groups including the refugees as detailed above. The universal human rights principles were developed in the International Bill of Rights, consisting of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).37 The Human Rights Committee had early on explicitly said that almost all rights protected by the ICCPR should be available equally to citizens and non-citizens.38 It has elaborated further and held that rights must be available to all individuals, regardless of nationality or statelessness, such as asylum seekers and refugees.39 It is thus suggested that ICCPR is a source of rights for refugees that are not expressly

34 Ibid 26–27; she also cites UN Doc E/CN.4/AC.1/SR.1.
37 There are a number of other treaties, declarations and instruments that are also described as human rights instruments and address issues of genocide, racial discrimination, discrimination against women, religious intolerance, rights of the disabled persons, the right to development and the rights of children, see Weissbrodt, The Human Rights of Non-Citizens, note above, 34.
mentioned in the Refugee Convention and may include rights to life and family, freedoms of opinion and expression, protection from torture, inhuman or degrading treatment or slavery.\textsuperscript{40} Similarly the ICESCR protects the right to work, an adequate standard of living, education and other economic, social and cultural rights. However, it gives the developing nations the option of deciding how far they can accommodate these rights. It also allows the states to take steps progressively to realize the rights within the limits of their resources.\textsuperscript{41}

Legal scholars however, differ about the relative importance of general human rights or specific rights for refugees. It has been argued that the existence of treaties on various sub-groups of non-citizens, e.g. refugees, asylum seekers, migrant workers has created the illusion that their human rights are somehow different from the general body of human rights.\textsuperscript{42} It is therefore, necessary to create international instruments and legal precedents that recognize that existing human rights are the rights of everyone. Hathaway argues against this view and says that the assumptions underlying the ICCPR are inappropriate for refugees who are not residing in their state of citizenship. For example, the guarantee of fair judicial proceedings does not mean much in the absence of a guaranteed access to the courts. It also does not deal with other issues relevant to refugees, e.g. recognition of personal status, access to naturalization, immunity from criminal penalties for illegal entry, need for travel and other documents etc.\textsuperscript{43} He argues that despite the existence of broad ranging international human rights law the continuance of refugee specific rights is even more necessary in the area of socio-economic rights.

The other major hurdle in realizing the protections of international law, whether in general human rights documents or specific conventions, treaties etc. is the difficulty of enforcement of international law norms. There are three interrelated issues that will be discussed below: first, there is the question of interpreting the international rules and enforcing them as international legal rules, second issue relates to the critique of rights generally and human rights specifically as effective means of justice and third

\textsuperscript{40} Ibid.

\textsuperscript{41} See also Dejo Olowu, “Human Rights and the Avoidance of Domestic Implementation: The Phenomenon of Non-Justiciable Constitutional Guarantees,” Saskatchewan Law Review 69 (2006): 39 where it is argued that this distinction is translated into national constitutions and a distinction is made between justiciable and non-justiciable rights, usually described as fundamental rights and directive principles.

\textsuperscript{42} Weissbrodt, The Human Rights of Non-Citizens, note above, 38.

\textsuperscript{43} Hathaway, Rights of Refugees, note above, 121.
there exist differing national practices at the level of translating international norms into national laws.

Well-rehearsed arguments exist about the binding or not binding nature of international norms but I will not discuss them here.\textsuperscript{44} If one was to examine the ICPPR as the basic human rights instrument it is clear that any state, member of the UN, is bound to accept to uphold these rights.\textsuperscript{45} It is widely accepted that Article 26 of the ICCPR imposes a duty on the states to guarantee equality or non-discrimination as it states that ‘All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.’ The UN Human Rights Committee has explained that the scope of this guarantee is very wide. The guarantee in Article 26 does not simply replicate that in Article 2 and is not restricted to rights that are provided in the ICPPR. Instead it is directed at the states to make and apply all their laws in a non-discriminatory manner.\textsuperscript{46}

It follows that the states should treat its citizens and non-citizens equally.\textsuperscript{47} This was after all the driving force behind the articulation of universal human rights. The practice as we know is very different and needs explanation. The direction to treat all persons equally and not discriminate, like any other legal phrase, remains to be interpreted.\textsuperscript{48} The relevant jurisprudential issue here is whether equality principle can co-exist with differential treatment of individuals or does it demand same treatment in every instance. Extensive jurisprudence of equality exists that is devoted to this issue but for now it will be enough to say that the legal principle of equality and classification are accepted as mutually

\textsuperscript{44} Rules of Treaty interpretation are used widely and are codified in the Vienna Convention. Hathaway demonstrates how they can be applied to secure the human rights of refugees, Hathaway, \textit{Rights of Refugees}, note above, 48–74.

\textsuperscript{45} The ICESCR however, gives a way out to the states as explained above; Hathaway argues that the Refugee Convention treats socioeconomic rights on par with the civil and political rights, at 123; See also Carmen Tiburcio, \textit{The Human Rights of Aliens under International and Comparative Law}, (The Hague: Kluwer Law, 2001), 145–7.

\textsuperscript{46} UN Human Rights Committee, ‘General Comment No 18: Non-discrimination’ 1989, UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 146, para 12.

\textsuperscript{47} See Articles 25 and 12(1) discussed below.

\textsuperscript{48} Although Dembour and Kelly argue that national discrimination in the form of preventing people from moving across countries is itself a denial of human rights and may in time come to be seen as discrimination, see M-B Dembour and T Kelly, “Introduction,” in their edited \textit{Are Human Rights for Migrants}, above note, 5.
compatible. That is, it is not contrary to the principle of equality that different people are given different rights on justifiable grounds. There is more disagreement about which grounds of classification are acceptable as non-discriminatory and often the test used is whether the basis of classification is reasonable and objective. Whether the states can make a distinction between citizens and non-citizens in granting legal rights would therefore depend on the purpose of the law and a rational connection between the grounds of classification and the purpose sought to be achieved.

Moreover the ICPPR itself allows the states to make distinctions between the rights of citizens and non-citizens in two instances, e.g. political rights explicitly guaranteed to citizens and freedom of movement. For instance Article 25 is addressed to every citizen rather than everyone. Article 12(1) addresses everyone who is lawfully within the country. It is therefore arguable that this guarantee is not available to irregular asylum seekers who have as yet not been granted the refugee status. This leads to the entrenched problem of mandatory detention policies discussed later in the chapter.

One of the biggest hurdles in realizing the international human rights is that there are the entrenched differences of how and when international law norms take effect in the national legal systems. The two schools of thought on this issue are characterized as the dualism and monism schools. In the Dualism view the rules on international law and those of the national legal systems are distinct systems. The international norms and rules are incorporated into the national legal systems through specified mechanisms and before such incorporation they have no effect in the national legal system. In the monist view the international and national legal systems are part of the one unified system and therefore rules of international law are applicable in the national systems without the need

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50 Article 25 states “Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) To have access, on general terms of equality, to public service in his country.”

51 Article 12(1) states “Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.”
of any further action. Most of the nation states however adopt the dualist view and even when they are signatories to various human rights and other international conventions etc. they are not automatically bound by those standards. Even more difficult situation is that the international obligations are translated into domestic law but in a less than enthusiastic manner. Thus for example, in many countries the domestic laws seek to limit the protections accorded to refugees in international law by a number of indirect means. The notorious compulsory detention provisions or lack of access by the asylum seekers to the legal system are two such measures discussed below.

Another kind of argument regarding the ineffectiveness of the safeguards provided by the guarantee of human rights is related to different theoretical understandings of international law. There is extensive debate in the legal theory literature on the capacity of human rights to deliver a fair society. This is an extension of the more general critique of rights to the specific instance of human rights. Very briefly the arguments include the charge that the fundamental (or human) rights are guarantees available against the state and by their very nature will not protect non-citizens. Another argument is that like all other rights, human rights are individualistic and capitalist that they cannot address the structural inequalities produced in a capitalist society which are the fundamental causes of people forced to flee their countries.

However Dembour argues that one’s response to the critique of human rights is linked to how human rights are conceptualized in four overlapping orientations.\textsuperscript{52} He provides a four-school model primarily to clarify how to understand very different arguments about the desirability or even the effectiveness of human rights. For example, in the natural law jurisprudence or school of thought human rights are a ‘given’; in the deliberative school they are what is ‘agreed upon; in the protest school they are seen as ‘fought for’ and in the discourse school they are ‘talked about’. Thus for natural law thinkers human rights are universal because they are an expression of natural morality, rather than a result of human construction.

The deliberative school thinkers acknowledge that in an increasingly diverse world there will always be differences of opinion as to moral

values or principles. Human rights in this understanding are political values that liberal societies choose to adopt. Thus they value human rights as an expression of social agreement that this is the best way of organizing society. The protest scholars claim that the human rights arguments are a way of challenging the status quo in favor of the marginalized and oppressed sections of society. The human rights ideal in this understanding is transcendental but the rights have to be fought for in social struggles.

The discourse scholars argue that human rights are neither pre-given nor do they constitute the right answer for all problems that human beings encounter in present day societies. Human rights discourse is constructed and human rights law like all other laws must be assessed in each specific situation. Moreover human rights discourse repeatedly fails to deliver on its promise of equality and should be seen for what it is. She and Kelly however caution that the fourorientations overlap and the concerns of all schools need to be addressed if human rights are to be realized. With this aim of realizing human rights it is important to examine the actual practices and explore how the states avoid their responsibilities and what, if anything can be done to change such practices.

**Part Three: Denial of Human Rights**

The disjuncture between the states accepting international obligations and implementing them as laws within the national systems is partly the explanation of how the states are increasingly using policies of denying assistance to refugees. The two glaring examples in this regard are the denial of access to the legal system and courts for the irregular migrants or asylum seekers; the second is mandatory detention of asylum seekers. National legal systems in more and more industrialized countries are taking recourse to a combination of policy measures and laws to make the right to seek asylum almost inaccessible to people variously described as boat people or queue jumpers or irregular entrants. The following discussion proceeds without going into the various justifications put forth by the states for these measures and asserts that such state practices are contrary to the protections of international law.53

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Many industrialized states have adopted a combination of measures that deny the protection of law to the asylum seekers and include interdiction, offshore processing of claims and denial of access to the judicial system. If however, the asylum seekers manage to reach the country they can be put in mandatory detention. For example, the USA has adopted policies of creating off shore temporary refuges for Cubans in Panama and Haitians in Guantanamo Bay since 1994. More recently it has increased its use of prison like detention of asylum seekers without access to prompt court review of detention. Similarly Australia has adopted the policies of mandatory detention of asylum seekers with varying degrees of harshness. It is in response to the rhetoric of sovereignty and national security that the UN General Assembly in a resolution in 2009 has reminded the states that they have obligations under international law, including international human rights law even when they are exercising their sovereign right to enact border security measures and migration laws. The following discussion uses the example of Australian legislation to illustrate the argument about restrictive domestic laws but similar examples can no doubt be found in many other national legal systems.

In Australia the practice of mandatory detention was combined with the offshore processing of refugee claims and modifications in the Migration laws to restrict access to judicial review of the decisions made. These measures were adopted by the conservative government of the time with the rhetoric of protecting Australia’s borders in times of heightened terrorism fears around the globe. Thus the right of the state to exclude certain people was combined with a claim of the state’s responsibility to provide security for its inhabitants.

57 It has also been said that administrative law has developed in response to the challenges mounted under Migration laws; see for example, Stephen Gaegler, “Impact of Migration Law on the Development of Australian Administrative Law,” *Australian Journal of Administrative Law* 17 (2010): 92 where he shows how the development of administrative law in Australia is driven by migration litigation and the role the High court has played in keeping the legislative measures in sink with constitutional requirements.
Under the Migration Act 1958 (Cth) any non-citizen person without a valid visa is classified as an unlawful non-citizen and it is mandatory that they be detained. The Minister has a duty to do so and has no discretion in the matter. Such a person can be released from mandatory detention only if they are granted a visa or removed from Australia. It is common to describe such mandatory detention regimes as administrative detention, that is it does not require a criminal conviction and the consequent implication is that it is non-punitive. There is increasing evidence of the ineffectiveness and expensive nature of these measures but they are being deployed increasingly across the globe. It has been suggested that the functions of such measures are also symbolic as governments try to demonstrate that they are in control over unwanted immigration.

Under core international law the rights to liberty and freedom from arbitrary detention are foundational human rights. The UN Working Group on Arbitrary Detention has said that when migrants are detained the states must clearly enumerate the criteria in legislation and there must be strict legal limitations on such detention. Yet the states find reasons for administrative detention of refugees. In the context of domestic law it is suggested that such measures are manifestations of the tussle for supremacy of the executive vis-à-vis other branches of government in the area of border protection. However, the issue remains whether such measures are in contravention of Australia’s international obligations.

Denial of access to the legal system is similarly in contravention of international law norms. The right to judicial review of a decision to detain is generally undisputed in human rights law. For example, Article 9(4) of the ICCPR states that “Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court...” in order that the court may decide on the lawfulness of the detention. Similar guarantees exist in regional and issue-specific human rights

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59 It is estimated that since 2000 it has cost the Australian government $2.4 billion to deter and detain the so called boat people, that is asylum seekers arriving by boats, see http://www.crikey.com.au/2011/08/17/detention-centre-cost-of-asylum-seekers, (accessed 15 August 2012).


conventions. Furthermore the UNHCR has emphasized that such a review must not only be effective but must include the authority to order release.

Nevertheless governments have found ways of negating these international law norms in domestic laws. One such device is the so-called ‘privative clauses’ in legislation. For example, in Australia it has been argued that public law, whether in the form of Constitutional law or administrative law has been used by asylum seekers that has pitched the legislature and the executive on one side against the judiciary on the other. The use of privative clauses in legislation is permitted by the High Court. Privative clauses seek to make certain executive actions immune from judicial review by inserting a clause to that effect in the legislation. In the context of the migration law they have the effect of denying the most disempowered people from the opportunity to get adverse decisions affecting their rights being reviewed by the judiciary. For example, in the wake of the Tampa affair the Australian federal statute, Migration Legislation Amendment (Judicial Review) Act 2001 (Cth) was enacted to prevent an appeal to the Federal Court from administrative decisions about a person’s right to stay in Australia as a legitimate asylum seeker. The decisions could be the ones made by the Minister of Immigration, Attorney General or the Migration Review Tribunal. The so-called privative clauses were meant to oust the jurisdiction of all courts, including the High Court from examining the executive decisions in this regard. This legislation was challenged in the High Court but it has been argued that the court did not take up the opportunity to compel the federal parliament to uphold its international law obligations and a number of issues about the extent of executive power remain unanswered.

Similarly, the subsequent enactment of the Migration Amendment (Exclusion from Migration Zone) Act 2001 (Cth) and the Migration
Amendment (Exclusion from Migration Zone) (Consequential Provisions) Act 2001 (Cth) were aimed at strengthening the procedures for removing illegal immigrants from Australian territory and waters. Popularly known as measures for ‘excised territories’ and the consequent offshore processing, these provisions were designed to deny asylum seekers the ‘right’ to seek protection of the Australian legal system.

Cumulative effect of these Amendment Acts was that certain islands were declared as not part of the Australian migration zone, any person landing on these excised territories without a valid visa or authority was declared as ‘offshore entry person’, such an ‘offshore entry person’ could be sent to a ‘declared country’, and such a person was barred from applying for an entry visa to Australia. The Immigration minister was given the public interest discretion to lift the bar against applying for a visa but could not be compelled to exercise the discretion. In actual practice such asylum seekers were allowed to lodge refugee claims and procedures were established to assess for refugee status assessment and an independent merits review of negative rulings. An officer of the relevant government department conducted the former, while a private contractor processed the latter.

Crock and Ghezelbash argue that cumulatively the intention of the government was to enable the offshore processing of the refugee status without the constraints of Australian administrative and refugee law and judicial review by Australian courts. The incoming labor government had reversed these changes but in August 2012 it has reinstated offshore processing by passing the Migration Legislation Amendment (Offshore Processing and Other Measures) Bill 2011 in the lower house. It is likely to pass in the senate as well. In doing so the Australian parliament has reconfirmed the global trend of denying the basic right of refuge to the asylum seekers.

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68 Ibid. Although they go on to argue that the effect of the High Court decisions in the case of *Plaintiffs M61/M69* [2010] HCA 41 (11 November 2010) has been that the offshore applicants have more protection than the applicants on the mainland because of the other decisions of the High court.

In conclusion it is clear from the above discussion that international law norms about the sanctity of refugees’ human rights are well established but it is also evident that the states find ways of not honoring these rights. It is in this context that Hathaway’s\textsuperscript{70} argument becomes poignant when he says that it is important to understand refugees’ human rights as a matter of binding legal obligations rather than as general human rights principles that are good aspirations but not enforceable. The distinctions made between the rights of asylum seekers and refugees are particularly problematic for safeguarding the human rights of some of the most vulnerable members of human society. Moreover, with the changing geopolitical realities it is necessary to extend the safeguards to a wider section of forced migrants and internally displaced persons who may or may not be covered under the conventional definition of refugees. Only after that there can be any realistic hope that the international actors will address the issue of discrimination against some sections of refugees.

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INTRODUCTION

This chapter focuses on the protection of women refugees under the 1951 United Nations Convention relating to the Status of Refugees (the Refugee Convention) and other international instruments. There exists a framework of law and standards directed towards the international protection of refugees. Traditionally, gender has not, on its own, served to merit eligibility for protection as a refugee. This is due to the fact that women's rights were under-appreciated at the historical moment that the Refugee Convention came into effect. Over time, however, women's rights have received greater recognition, and this has been reflected in the granting of refugee status. This has been an appropriate development – necessitated by the realities of greater discrimination, poverty and unemployment among women (as compared with men), as well as the particular challenges – from a human rights perspective – which hamper the ability of marginalised women to enjoy full recognition in society. Women have now been singled out for attention as a “group” of persons deserving special protection. In fact, the various forms of violence perpetrated against women in the international human rights context have resulted in the emergence of a body of law which affects the granting of refugee status. Several forms of violence against women have helped to build this body of “gender asylum law”. This includes rape / sexual violence, female genital surgery and domestic violence. The link between refugee status and socio-economic considerations is particularly interesting and important.

The first part of the contribution deals with the broad legal framework for refugee protection in international law. This is followed, secondly, by
a discussion on women's rights and the rights of women as refugees. The third part of the paper focuses on the intersection between refugee law and gender in the context of international human rights law. The final part of the contribution contains various concluding observations. In particular, it is suggested that there remain significant practical obstacles relating to the implementation of women refugees' rights. To counter this, countries should be encouraged to ratify instruments such as the Refugee Convention. This may form the bedrock for these countries taking active steps to domesticate into their own national law the key principles contained therein. Women refugees must themselves be closely involved in the planning and implementation stages of national policy and legislative developments in this regard. Such interventions, coupled with proper governmental recognition of the plight of, in particular, women and children refugees and asylum-seekers, should have greater probabilities of success. There are also important roles to be played by the judiciary, civil society and advocacy groups in translating the enhanced international protection of women refugees into meaningful and real change in the experiences of this doubly-disadvantaged group in society.

The Legal Framework for “Refugee” Protection

There exists a framework of international law and standards which seek to protect refugees. This framework includes the 1948 Universal Declaration of Human Rights and the four Geneva Conventions (1949) on international humanitarian law, as well as a body of international and regional treaties and declarations, both binding and non-binding, that specifically address the needs of refugees.\(^1\)

The following section provides a brief overview of the definition of “refugee” as contained in the 1951 United Nations Convention relating to the Status of Refugees, the Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa and the Optional Protocol to the 1951 Refugee Convention.

The 1951 Refugee Convention is the key international legal document defining who qualifies as a “refugee”, determining refugees' rights and the legal obligations of states. As such, it is the “foundation of international

refugee law”. By ratifying the Refugee Convention, countries accept various obligations to grant refugees equal treatment to that enjoyed by nationals of the State. This Convention is the central feature in today’s international regime of refugee protection, and some 144 States (out of a total United Nations membership of 192) have now ratified either one or both the Convention and associated Protocol. As such, the Convention is by far the most widely ratified refugee treaty.

According to the Refugee Convention, a refugee is someone who:

a) Has a well-founded fear of persecution because of his / her:
   • race,
   • religion,
   • nationality,
   • membership of a particular social group, or
   • political opinion.

b) Is outside his / her country of origin; and

c) Is unable or unwilling to avail him / herself of the protection of that country, or to return there, for fear of persecution.

It is clear that gender, on its own, does not appear to merit eligibility for protection as a refugee, due to the fact that women’s rights were improperly appreciated at the time that the Refugees’ Convention came into operation. As will be indicated below, the international community has, over time, developed and expanded this definition in practice. Developed countries, in particular, have involved themselves in this area in a fashion which has resulted in greater protection for women refugees.

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2 Ibid.
5 The progression of the principle that women should fall under a specific social group category dates back to the 1984 European Parliament’s resolution to recognise that women who face “harsh and inhumane treatment” because they go against the social mores of their societies are a “particular social group” which falls under the meaning of Article 1 of the Refugee Convention: Kronenberger, “Refugee Women: Establishing a Prima Facie Case Under the Refugee Convention,” International Law Students Association Journal of International and Comparative Law 15 (1992): 62–63.
6 Ibid.
However, with a widened scope of who constitutes an asylum-seeker has come caution on the part of some nations, who fear an “opening of the floodgates” regarding refugee-status recognition.

The Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa is a regional treaty adopted in 1969. This Convention added to the Refugee Convention’s definition of a refugee, to include the following, more objectively-based, consideration:7

Any person compelled to leave his / her country 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.

This implies that persons fleeing civil disturbances, widespread violence and war are entitled to claim the status of refugee in states that are parties to this Convention. This is irrespective of whether such persons have a “well-founded fear of persecution”.8

The 1967 Refugee Protocol is independent of, though inextricably linked to, the 1951 Convention. It lifts the temporal and geographic limits from the definition contained in the Refugee Convention.9 States which accede to the Refugee Protocol are required to apply the Convention’s substantive provisions “without temporal or geographical limitations”.10

Women’s Rights and the Rights of Women as Refugees

There is indeed great debate when it comes to separating women’s rights from universal human rights. Women are, of course, entitled to enjoy all universal human rights; those relating to inequality, family rights and violence against women are particularly important. International instruments which protect refugees do not distinguish between “male refugees” and “female refugees”.11 For example, article 2 of the Universal Declaration of Human Rights (UDHR) states:

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8 Ibid, 13.
9 The provisions of the Convention relating to the Status of Stateless Persons (1954) and the Convention on the Reduction of Statelessness (1961) may also afford protection in certain situations.
10 See Kronenberger, “Refugee Women”, noted above, 64.
Everyone is entitled to all the rights and freedoms set forth in this declaration 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.

It is clear from a number of conventions, however, that those who drafted them had only male refugees in mind. In fact, decades of refugee-orientated treaty-making have been exclusively male-focussed, a trend which has been extended to African instruments concerned with the status of refugees.

Statistics illustrate that women constitute the majority of the world's poor and illiterate. Women also earn far less than men, in general, and often work without pay. Even more seriously, women are frequently subjected to abuse and torture on account of their gender. Women have now been singled out for attention as a “group” of persons deserving special protection. This is partly as a result of the degree of discrimination that women experience in some cultures and practices, thereby inhibiting true equality. As Article 1 of the Declaration on the Elimination of Discrimination against Women, 1967, notes:

Discrimination against women, denying or limiting, as it does, their equality of rights with men, is fundamentally unjust and constitutes an offence against human dignity.

The situation is aggravated when one considers the doubly-disadvantaged situation pertaining to women refugees. Refugees are, of course, also subject to discrimination and have borne the brunt of numerous atrocities over long periods of time.

12 Smith, *International Human Rights*, noted above, 197.
13 Ibid, 359. As Smith notes, international human rights law is moving towards a focus on “categories” of persons and on providing protection for such persons. The United Nations (UN), in particular, has made great efforts in creating a suitable legal framework for the protection of women.
14 Other international instruments / documents which protect women's rights, in general, include: the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (1962), the 1957 UN Convention on the Nationality of Women, the 1993 Declaration on the Elimination of Violence against Women, discussed briefly, below, and the Beijing Platform for Action.
15 There are now over 20 million estimated refugees which fall within the UN High Commissioner for Refugees' remit today: Smith, *International Human Rights*, noted above, 377. There are also numerous “internally displaced persons” who are forced to abandon their homes, although they still live within their own countries.
Not until 1985 did the United Nations begin to discuss the need for particular protection to women refugees. That year saw the adoption of a landmark conclusion on the global protection of refugee women. In May 1985 the *International Seminar on Refugee Women* was held in Soesterberg, in which sexual violence against refugee women and asylum policies were discussed. 37 delegates from 23 European and international refugee relief organisations attended and made a number of recommendations which were handed to Hedy D’Ancona, member of the European Parliament at the time. These recommendations include the following:

- Social and institutionalised forms of women’s oppression (which violate international legal standards and the contents of human rights) serve governments as forms of persecution, which may lead to the granting of refugee status to be recognised.
- In line with the resolution adopted by the European Parliament on 13 April 1984, the governments’ oppression of women that takes place under the above recommendation is defined as persecution within the meaning of the Refugee Convention; also, governments should recognise that persecution for membership of a particular social group may also include persecution of social status on the basis of sex.

These recommendations were brought to the attention of governments and organisations. An international network was also established to promote the above recommendations. According to the seminar, women refugees can be categorised as follows (which are not mutually exclusive or exhaustive):

1. Women who fear persecution on the same Convention grounds, and in similar circumstances, as men. That is, the risk factor is not their sexual status, *per se*, but rather their particular identity (i.e. racial, national or social) or what they believe in, or are perceived to believe in (i.e. religion or political opinion).
2. Women who fear persecution solely for reasons pertaining to kinship, i.e. because of the status, activities or views of their spouses, parents, and siblings, or other family members.

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18 Ibid, 273.
19 It was planned that this would be presented at the World Conference on Women in Nairobi during July 1985 and that progress would also be discussed at a later event in Frankfurt. Ibid, 274.
3. Women who fear persecution resulting from certain circumstances of severe discrimination on grounds of gender or acts of violence either by public authorities or at the hands of private citizens from whose actions the state is unwilling or unable to adequately protect the concerned persons.

4. Women who fear persecution as the consequence of failing to conform to, or for transgressing, certain gender-discriminating religious or customary laws and practices in their country of origin.

The United Nations High Commissioner for Refugees (UNHCR) has issued guidelines on how to examine women’s asylum requests, including gender-related claims. In fact, there is a growing body of jurisprudence on such cases and many states have expressed an interest in incorporating this thinking into their protection framework.

In addition to the general body of international human rights law applicable to everyone, there are a number of human rights standards that directly address the situation of women refugees and asylum-seekers. The pre-eminent international legal instrument is the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and its Optional Protocol. This Convention establishes standards for states in a number of areas that are important to women refugees, including suppression of all forms of traffic in women and exploitation by prostitution.

Parties to the CEDAW condemn all discrimination against women and agree to institute policies to eliminate this behaviour. In fact, signatories agree to embody the principle of equality in their constitutions and to adopt laws with sanctions which prohibit discrimination against women, to create legal systems for securing equal rights and to eliminate all discriminatory practices. States also aim to promote the advancement of women positively. The CEDAW, which serves as a Bill of Rights for women across the world, also resulted in the establishment of the Committee on the Elimination of Discrimination against Women to monitor its implementation.

Other relevant international standards include the UN General Assembly Declaration on the Elimination of Violence against Women, which recognizes refugee women as one of the groups especially vulnerable to violence and calls upon states to adopt measures directed toward the elimination of violence against women. The International Labour Organization (ILO) has also adopted landmark conventions for the

21 Smith International Human Rights, noted above, 201.
23 Ibid, 200.
promotion of the rights of women in general.\textsuperscript{24} From a regional perspective, the Inter-American Commission of Women (CIM) for the Americas and the European Union for Europe have been instrumental in the adoption of a number of relevant conventions.\textsuperscript{25}


\textit{UNHCR Policy on Refugee Women (1990)}

Becoming a refugee affects men and women differently.\textsuperscript{26} Refugee women must be involved in planning and implementing projects. This policy recognises that women should not necessarily constitute mere passive recipients of shelter or food aid.\textsuperscript{27} Providing goods and services for refugee women may, however, form part of a project/programme which integrates them. The UNHCR is intended to integrate the needs and resources of women refugees in all the aspects relating to programme planning and execution.

For example, if women as well as men are consulted on the type of basic shelter required and the resources available to set up and maintain this shelter, then they have been integrated in the overall project. In other words, women should be taught, informed and assisted in order to achieve their proper integration. By interpreting the UNHCR’s policies and objectives, the meaning of such mainstreaming in projects is clear.\textsuperscript{28}

Projects may:

\textsuperscript{24} See, for example, Convention 3 of 1919 and Convention 4 of 1919, dealing with maternity protection and women’s night work, respectively.

\textsuperscript{25} These include the Convention on the Nationality of Women (1933); the Inter-American Convention on the Granting of Civil Rights to Women (1948); as well as the Inter-American Convention on the Granting of Political Rights to Women (1948). In 1994, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women was also adopted. One of the early acts of the African Union was the adoption of a Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa. This promises the elimination of discrimination against women, together with the elimination of harmful practices which negatively affect women’s rights. The Convention Governing the Specific Aspects of Refugee Problems in Africa (1969) was adopted by the OAU as an instrument to complement the UN Convention and all African states are encouraged to collaborate with the UN and to use the UN Convention as the basic, universal instrument for affording refugee protection.

\textsuperscript{26} UNHCR Policy on Refugee Women (1990), 5.

\textsuperscript{27} Ibid, 6.

\textsuperscript{28} Ibid.
identify constraints to women's participation related to project delivery procedures;
respond to the initiatives of refugee women to improve their own situation;
make available appropriate technologies that alleviate time and energy demands on refugee women; or
collect statistics indicating the male/female breakdown of the population and prepare baseline case studies in order to identify and to eliminate unintentional discrimination in delivering goods and services and thereby improve planning of future activities.

In the broad sense a UNHCR programme or project which mainstreams women should try to achieve greater involvement from women refugees, increase their status and participation in the community, provide a “catalyst” which they can use to gain access to employment and education opportunities, and take into account the relationship between women and their families. Women refugees should participate at all levels of the project and program development.


These Guidelines support the call for “integrating the resources and needs of refugee women into all aspects of programming so as to assure equitable protection and assistance activities.” The Guidelines review legal and physical protection needs of women refugees, and took note of areas of protection that require particular attention and response as well as the actions that should be taken.

The Guidelines illustrated the protection standard which the UNHCR set for refugee women and girls. They were important in raising awareness and served as a programming tool for works in the field, including guidelines on reproductive health and on gender-based violence. Examples of enhanced protection noted include:

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29 Ibid, 7.
30 Ibid.
32 Ibid.
33 Ibid, 2.
improved capacities for gender-sensitive refugee status determinations;
more vigorous use of national laws for enforcing protection and human rights;
improved registration mechanisms that allow each individual to obtain his or her own card;
Successful assistance efforts that promote protection include:
• increased enrolment of girls in schools;
• measures to organize refugee women and include them in camp management;
• direct involvement of women in food distribution;
• incentives to employ more female staff in health and education programs;
• wider availability of reproductive health services and
• safe houses and counselling services for victims of trauma or violence.


The UNHCR Guidelines on Preventing and Responding to Sexual Violence against Refugees provide information on the occurrence of sexual violence of refugees as well as the physical, psychological and social effects it has on them. They highlight the fact that many incidents go unreported for reasons including shame, social stigma and fear of reprisal. The Guidelines address ways to prevent sexual violence and suggest appropriate responses when incidents of sexual violence occur. Emphasis is placed on the need for education, training and information campaigns. They underline the need for women refugees to receive training on legal awareness, leadership guidance, skills training and education.

**The Intersection between Refugee Law and Gender in International Human Rights Law**

The various forms of violence against women in the context of international human rights have resulted in the emergence of a body of law which

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affects the granting of refugee status. This is particularly relevant for purposes of developing a proper understanding of the term "persecution" in the Convention Relating to the Status of Refugees. This term, which is undefined in the Convention, has now been afforded a broad(er) meaning along the lines of a “sustained or systemic violation of basic human rights demonstrative of a failure of state protection”.

Women may be persecuted for political, ethnic or religious reasons, on the basis of their race or membership of various kinds of social groups. The UNHCR considers that a person who is fleeing severe discrimination or other inhumane treatment (amounting to persecution) for her failure to conform to strict social codes does have grounds to be considered for refugee status. Such persecution may emanate from a government authority or from non-state actors in cases where there is an absence of adequate government protection.

Anker has noted that several forms of violence against women have helped to build this body of “gender asylum law”. This includes rape / sexual violence, female genital surgery and domestic violence. The link between refugee status and socio-economic considerations is particularly complex, and is examined below.

Rape / Sexual Violence and Persecution due to Sexual Orientation

Large-scale refugee emergencies create chaotic conditions in terms of which women, in particular, are precariously exposed to sexual and other forms of violence. This situation is aggravated by the fact that it is often these women who bear responsibility for other vulnerable family members, including children and the elderly. It has been noted that camp situations disrupt traditional patterns of decision-making in a way which exposes women. For example, men who control the distribution of aid may force women to exchange sexual favours for food. Women may also be at risk of sexual violence from other refugees, the local population, nearby

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39 For example, a woman who fears an attack from the public for her refusal to wear restrictive clothing, or because of her desire to choose her own spouse and live an independent life, may indeed qualify as a refugee: Ibid.
40 Ibid.
combatants and the police or security forces in the country in which they have taken asylum.\textsuperscript{41}

Initially, rape was a privatised affair in terms of refugee law, and as such, was not deemed worthy of awarding refugee status, but was protected against in terms of various international statutes.\textsuperscript{42} However, in the light of various cases, there has been a large shift towards reversing this state of affairs.\textsuperscript{43}

Several leading states and juridical bodies specialising in refugee rights fraternity have deemed sexual violence as impinging on the core rights of bodily integrity and inhuman / degrading, and even torturous (in some cases) treatment.\textsuperscript{44}

A key development that has led to the above legal standpoint is the creation of ‘Gender Asylum Guidelines’. Individual states, such as the United States of America and Australia, have created these documents to outline and enforce women’s asylum rights in terms of the international human rights sphere: in essence, codifying this unique branch of law.\textsuperscript{45} In many juridical decisions (pertaining to gender asylum law) that have utilised the aforementioned guidelines in conjunction with international and regional legal documents, refugee law (i.e. the interpretation of the key convention) has had a large impact on international human rights development.\textsuperscript{46}

Homosexuals may be eligible for refugee status on the basis of persecution because of their membership of a particular social group. It is the policy of the UNHCR that persons facing attack, inhumane treatment, or serious discrimination because of their homosexuality, and whose governments are unable or unwilling to protect them, should be recognised as refugees.\textsuperscript{47}

\textsuperscript{41} Ibid, 69. Such acts may even be classified as torture under Article 1(1) of the 1984 UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment and Punishment. Also see Johnsson, “The International Protection of Women Refugees”, noted above, 223.

\textsuperscript{42} Olimpia Lazo-Majano v Immigration and Naturalization Service A 24 345 083 United States Court of Appeals for the Ninth Circuit 1987; Sofia Campos-Guardado v Immigration and Naturalization Service 809 F 2d 285 United States Court of Appeals for the Fifth Circuit 1987.

\textsuperscript{43} Anker, “Refugee law, gender, and the human rights paradigm”, noted above, 140–141.

\textsuperscript{44} E.g. States such as New Zealand, Canada and Australia. See supra 141.

\textsuperscript{45} E.g., the USA guidelines (note 18 on page 75) state, “[s]evere sexual abuse does not differ analytically from...other forms of physical violence that are commonly held to amount to persecution”.


Female Genital Surgery (FGS)

This is a traditional practice that involves either the removing of parts of the female genital organs or stitching together of the two sides of the vulva, usually without anaesthesia or within clinical standards of cleanliness. The range of rationalisations for this practice are wide and vary from place to place, but in general, all of them have always been sources of controversy within the domain of international human rights. The main issue lying with the outright acceptance or rejection of this practice is the conflict that exists between the rights to individual autonomy, and group cultural enfranchisement. As indicated above, refugee law offers one who wishes to alleviate themselves from such a culturally-imposed burden the opportunity to do so.

A few human-rights bodies have deemed FGS as an infringement of non-core human rights, but an equally large number of individuals have linked it to mainstream human rights infringements, worthy of granting refugee status. In the latter instances, FGS has been deemed to be a form of torture, degrading, or as disregarding of human dignity. In France, Canada and the United States, it has been officially recognised that genital mutilation represents a form of persecution and that women who fear genital mutilation in their countries have a real claim to refugee status. In a recent case, a woman who feared persecution in her country because of her refusal to inflict genital mutilation on her infant daughter was recognised as a refugee.

Domestic/Family Violence

Owing to the fact that this form of violence towards women is the most pervasive, it should come as no surprise that a prolific amount of refugee
rights litigation has arisen from this area.56 One key example of the interplay between human rights (specifically, gender rights) and refugee law, as explained by Anker, is in the landmark Shah case.57 Here, the court had to determine whether an appeal for refugee status could be granted on the basis that the applicant feared persecution, one of the key requirements of the Convention Relating to the Status of Refugees, in the form of discriminatory treatment founded in anti-adultery laws and spousal violence (threatened as well as actualised).

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment58 has also served as a tie between refugee law and international human rights law as some refugee status appeals have been successfully accomplished based on the use of the articles of the aforementioned convention, to interpret the term “persecution” in the refugee charter to include domestic/family violence.59

Socio-Economic Rights60

While violation of socio-economic rights, or “soft rights” do not often make solid ground for arguments for refugee status in terms of the charter, Spijkerboer has stated that an exception should be made in the case of women, due to the fact that they hold a ‘compromised’ position in society.61 This position has been supported in refugee case law.62 The Committee on Economic Social and Cultural Rights (“the Committee”) has accentuated this position in the following statement:

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56 Anker, “Refugee law, gender, and the human rights paradigm,” noted above, 147.
57 R v Immigration Appeal Tribunal and Another Ex Parte Shah [1999] 2 All ER 545 (HL) (UK).
58 Opened for signature Feb 4 1985 S TREATY DOC No. 100-20 1465 UNTS 85 Art 3.
59 Read In re Kuna A76491421 (unpublished) (US BIA Apr 25 2000) with Kuna v Ashcroft No. 01-3120 (3rd Cir Feb 5 2002).
62 Refugee Appeal No. 71427/99 RSAA 16 August 2000 para 53; R. Haines “Gender-Related Persecution,” in Refugee Protection in International Law: Global Consultations on International Protection, ed. E. Feller, V. Türk and F. Nicholson (Cambridge: Cambridge University Press, 2003), 331: “[D]iscrimination can affect individuals to different degrees and it is necessary to give proper weight to the impact of discriminatory measures on women. Various acts of discrimination, in their cumulative effect, can deny human dignity in key ways and should properly be recognized as persecution for the purposes of the Refugee Convention.”
Any discrimination in access to food, as well as to means and entitlements for its procurement, on the grounds of race, sex or other status with the purpose or effect of nullifying or impairing the equal enjoyment or exercise of economic, social and cultural rights constitutes a violation of the [International Economic, Social, and Cultural Rights] Covenant.63

The main obstacle for the successful use of socio-economic rights in an application for refugee status is the principle of a “hierarchy of rights”, which has been favoured by refugee tribunals.64 This system categorizes a large majority of socio-economic rights as “third and fourth level rights”, whose possible contravention would not constitute Convention grounds for the awarding of refugee status.65

What follows is a brief description of instances where the Refugee Convention (through interpretation of its provisions by various bodies) has been utilised to address issues affecting women refugees.

Health

The health needs of women refugees are perhaps the most frequently neglected. For example, it can be argued that poor sanitation in overcrowded refugee camps affect women the most “because they have to cope with frequent pregnancies and with children’s illnesses.”66 The Committee has established and confirmed that the following are obligations of comparable priority:

· To ensure reproductive, maternal and child health care;
· To provide immunization against major infectious diseases occurring in the community; and
· To provide education and access to education and access to information concerning the main health problems in that community.67

63 UN Committee on Economic, Social and Cultural Rights, General Comment No. 12: The Right to Adequate Food, (Geneva: UNHCR, 1999), 63; In its most recent explanation of Article 11 of the International Covenant on Economic, Social, and Cultural Rights, the Committee has stated that states have a duty to meet the needs of refugees on terms of equality with those of citizens: UN Committee on Economic, Social and Cultural Rights, General Comment No. 15: The Right to Water (Geneva: UNHCR, 2002), 106.
Non-implementation can only be justified based on a true resource insufficiency. Therefore, Sudan’s failure to immunize refugees against a major measles outbreak was presumptively in breach of the Economic Covenant. The same can be said for states such as Nigeria and Zambia for their failure to meet the requirements stipulated by the Committee.\textsuperscript{68}

\textit{Education}

In terms of education, the situation for refugee girls is worse than that of boys. Obstacles such as family responsibilities and traditional values have lead to lower attendance of girls in schools and relatively higher drop-out rates. This is significant among Afghan refugees in Pakistan,\textsuperscript{69} for example, where girls still only make up about 39\% of children attending UNHCR-assisted primary schools, and only about 29\% of the secondary school population.\textsuperscript{70} United Nations research illustrates that ‘refugee girls’\textsuperscript{71} enrollment decreases progressively and “absenteeism amongst girls who are obliged to assist with family chores, is higher than among boys.”

In places like Nepal, participation in education for women refugees is catered for via separate male and female classes. Female classes are held at specific times that do not conflict with women’s responsibilities such as child minding and other household chores.\textsuperscript{72} Some internationally funded agencies also provide self-help projects to assist both female and male refugees. For example, in Kenya women are trained with respect to manual skills such as sewing, agriculture and craftwork.\textsuperscript{73}

In the context of interpreting Article 13 of the Covenant, the Committee of Economic, Social and Cultural Rights has made it clear that:

\begin{quote}
Compliance requires, inter alia, that primary education be completely free, and that there be no discrimination in accessing primary education, specifically on the grounds of sex.\textsuperscript{74}
\end{quote}

\textsuperscript{68} James C. Hathaway, \textit{The Law of Refugee Status}, noted above, 514.
\textsuperscript{73} UN Committee on Economic, Social and Cultural Rights, \textit{General Comment No 11: Plans of Action for Primary Education”} (Geneva: UNHCR, 1999) 60; Supra General comment
Economic Reasons and Employment

An area of overlap between the Refugee Convention and the Economic Covenant is the regulation of women’s work. The supervisory committee has taken a special interest in the plight of migrant women, insisting that they must benefit from this duty to promote gender equality in the workplace in the same way as citizens.75

Claims based on economic improvement are slowly beginning to garner recognition. This is shown by a decision of the Australian RRT, where the Tribunal took judicial notice of the applicants claim that women from Uzbekistan were more likely to suffer economic hardship (due to a declining economy and limited employment opportunities), and were thus more likely to seek refugee status.76

One area that the international refugee tribunals have taken an interesting stance on pertains to socio-economic claims (by women) based on fear of trafficking. Nearly all tribunals have voiced the opinion that despite the unfortunate nature of the circumstances surrounding the claim, its basis is more a form of “personal” persecution (akin to that of a victim of a crime), rather than one linked to membership of a particular social group.77 This lies in opposition to the stance taken by the UNHCR, that “[s]cenarios in which trafficking can flourish frequently coincide with situations where potential victims may be vulnerable to trafficking precisely as a result of [Convention] grounds.”78

Conclusion

Refugee women constitute a “doubly-disadvantaged” category of person. As such, they deserve special protection from the perspective of international law. Indeed, there exists a proper framework of international law and standards which seek to protect refugee rights. This framework,

76 Reference NO2/42226 RRT 30 June 2003 11.
78 See UNHCR, Guidelines on International Protection: The Application of Article 1A (2) of the 1951 Convention and/or Protocol, relating to the status of refugees to the victims of trafficking and persons at risk of being trafficked (Geneva: UNHCR, 2006), para 31.
crucially, includes the Refugees Convention, which is the key international legal document defining the qualifications criteria for “refugee” status.

It is clear that gender, on its own, does not entitle a person to refugee protection in terms of the Refugees Convention. Over time, however, the international community (and various states) have refined their practices in a manner which has facilitated greater protection for women refugees.

While there is some debate regarding the merits of separating women’s rights from universal human rights so as to afford women “special protection”, there appears to be good reason for adopting such an approach. Women constitute the majority of the world’s poor and illiterate and have suffered throughout the course of history from a range of discriminatory and abusive treatment in various parts of the world.

The past 25 years has, as a result, seen international-level progression directed towards addressing the plight of women refugees. Various recommendations by bodies such as the United Nations High Commissioner for Refugees have, during this time, served to assist women in pressing their claims for refugee-status and protection. The UNHCR Policy on Refugee Women, the Guidelines on the Protection of Refugee Women and the Guidelines on Sexual Violence against Refugees are particularly significant in this regard. In fact, there is also a growing body of cases which has developed in this regard. This advancement has also manifested itself in the drafting and ratification-level of international instruments such as the CEDAW and its Optional Protocol. Such documents have contributed towards the establishment of a set of standards which do address some areas which are of direct relevance to refugee women.

The term “persecution” lies at the core of the intersection between refugee law and gender in the context of international human rights law. The various forms of violence that women refugees have been subjected to has resulted in the development of a body of “gender asylum law” which highlights, for example, the appropriate linkages between issues such as rape / sexual violence, female genital surgery, domestic violence and socio-economic considerations, on the one hand, and refugee status on the other. As Anker argues, there is a growing (albeit “fragile”) body of decisions that deal with other forms of violence towards women as infringements of their rights, as well as grounds for granting refugee status.79

The socio-economic rights of refugees are a matter of particular interest and concern. Countries like South Africa, for example, have recently

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79 Anker, “Refugee law, gender, and the human rights paradigm”, noted above, 150.
amended their social security provisioning in a fashion which affords persons with refugee status, including women, with the same range of social assistance benefits as afforded to citizens and permanent residents. Refugees should also be entitled to an expanded form of public health care provisioning, a matter of particular practical relevance for refugee women. It is also possible for all refugees to become permanent residents of the country, assuming that they have remained in South Africa for more than five years as refugees.

Despite such advancements internationally and nationally, there remain significant obstacles relating to implementation which mar the advancements in this area of international law. As has been noted, protection of women refugees has often been put aside, at a practical level, for what administrators and officials consider to be “more important issues”. Countries must be encouraged to ratify instruments such as the Refugees Convention, and thereafter to take active steps to domesticate the key principles contained therein into their domestic law. As the UNHCR Policy on Refugee Women argues, women refugees must be intimately involved in the planning and implementation stages of national policy and legislative developments in this regard. Such interventions, coupled with proper governmental recognition of the plight of, in particular, women and children refugees and asylum-seekers, should have greater probabilities of success. The judiciary, too, has a role to play and its interpretation of international and national law could impact significantly on the meaningful enforcement of women refugee’s rights. This must be coupled with proper civil society and governmental engagement, including, for example, the establishment of refugee rights centres. Interventions of this sort would enhance the accessibility of protective measures for the refugees who require such assistance.

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THE NORMATIVE FRAMEWORK FOR CHILDREN’S RIGHTS IN REFUGEE SITUATIONS

Thoko Kaime*

1. INTRODUCTION

Statistics from the past two decades demonstrate that children tend to constitute the greatest proportion of refugee populations.¹ Given their age and lack of maturity, it has always been recognized that children need special care in refugee situations. However, this notwithstanding, for a long time developments in international refugee law did not reflect the special vulnerability of children. The principal instruments in the international system for the protection of refugees are the 1951 Convention on the Status of Refugees and its 1967 Protocol. Both instruments have played an important role in the articulation of a robust refugee legal framework but at the same time have been very limited in their scope. Goodwin-Gill correctly observes that the first clue as to their limitation lies in the title, which only addresses the status of refugees.² Consequently, issues such as the assignment of asylum, resettlement or indeed durable solutions for particularly vulnerable groups such as women and children were not addressed by these seminal documents. In relation to children, subsequent developments in international law improved practice, particularly by UN-mandated organisations such as the UNHCR. However, it was not until the entry into force of the Convention on the Rights of the Child (CRC),³ that fundamental and profound changes in the protection of children generally⁴ and

³ Due to the similarity of the African Children’s Charter provisions on this subject and those of the CRC, it may be noted that most of the observations made here are applicable to the latter instrument as well.
refugee children especially were brought into the international legal framework.

CRC article 22 provides that:

States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, 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.

2. For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations cooperating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention (emphasis supplied).

While the CRC is not a refugee treaty, refugee children are covered because all CRC rights are to be granted to all persons under the 18 years of age (art. 1) without discrimination of any kind (art. 2). More importantly, the CRC’s focus on durable solutions makes it the standard for the protection of refugee children amongst a fragmented patchwork of legal instruments and policy frameworks that constitutes the international protection for the protection of refugees. Additionally, the CRC has revolutionized work of the UNHCR in respect to children in refugee situations. Since the mid-1990s, the agency’s strategy is to mainstream children’s rights into its programmatic and implementation activities. In this regard, it has progressively built children’s rights into its mandate and implemented policies specifically aimed at realising the CRC’s core principles insofar as they relate to children in refugee situations. UNHCR’s focus on the CRC makes it is clear that for a comprehensive view on how international law protects children who find themselves in refugee situations, it is to the CRC that concluding that “the entry into force of the African Children’s Charter must be welcomed, as it improves the level of protection for children in those countries that have ratified it”.


Ibid.
one must look to determine the extent of protection provided. This is what this chapter attempts to accomplish.

2. THE CRC AS THE BASIS FOR REFUGEE CHILDREN'S RIGHTS AT INTERNATIONAL LAW

The first draft of the CRC was submitted by Poland to the Commission on Human Rights in 1978. This draft was adopted by the Commission's “open-ended” Working Group on the Draft Convention on the Rights of the Child in 1979. After a decade of discussion and refinement in conjunction with various non-governmental organizations, the Working Group adopted its final report on 21 January 1989 and forwarded the report to the Commission on Human Rights for consideration and transmission to the General Assembly. The Convention was adopted unanimously by the General Assembly on 20 November 1989 and quickly came into force on 2 September 1990. The Convention, which applies to ‘every human being below the age of eighteen years’, contains 54 articles, 40 of which makes provision for substantive rights ranging from civil and political to economic, social and cultural rights. It includes typical civil and political rights such as protection from discrimination (art. 2), right to life (art. 6),

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8 Stephen N Achilihu, Do African Children Have Rights? A Comparative and Legal Analysis of the United Nations Convention on the Rights of the Child (Boca Raton, FL: Universal Publishers, 2010), 26: ‘It was open-ended because participation in the drafting process was open to States and non-State actors such as Inter-Governmental Organizations and Non-Governmental Organizations.’


12 The Draft Convention which was annexed to United Nations General Assembly Resolution 44/25 which was adopted without a vote.

13 McGoldrick, The United Nations Conventions on the Rights of the Child, supra note 11, 133: “[T]he Convention covers not only civil and political rights but also social, economic, cultural and humanitarian rights.” It is noteworthy that unlike the case with international human rights instruments which preceded it, the CRC does not reflect the traditional division between socioeconomic rights, on the one hand, and civil and political rights,
right to name and nationality (art 7–8), freedom of expression (art. 13), religion (art. 14), association and assembly (art. 15), and the right to privacy (art. 16). Amongst the economic, social and cultural rights are the rights to health (art. 24–25), social security (art. 26), education (art. 28–29), and the right to play (art. 31). Additionally, the CRC has been further augmented by the adoption of two optional protocols: the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict14 and the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography.15 In a nutshell, the CRC is a very comprehensive treaty that makes provision for almost every aspect of a child’s life. It may rightly be described as forming the core of the international law on the rights of the child.

Given the extensive scope of the Convention, it is useful for explanatory and analytical purposes to classify the rights into categories. In this regard, Thomas Hammarberg has suggested that the Convention may be said to be concerned with the four ‘P’s: the participation of children in decisions affecting them; the protection of children from all forms of discrimination; the prevention of harm to children; and the provision of assistance for their basic needs.16 All these ‘P’s’ are equally important and thus implementation efforts cannot be skewed in favour of one aspect when efforts in the other areas are lagging behind.17 The Committee on the Rights of the Child, which is tasked with monitoring the implementation of the CRC by states parties has also emphasised on the interrelated nature of its provisions.18 Nevertheless, the Committee has elevated non-discrimination, the child’s best interests, survival and development and principle on participation into general principles.19 Consequently, any

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17 A different view has been expressed to the effect that the provisions of the CRC appear to be stronger on the provision of children’s basic needs and on their protection. See Hammarberg, “The UN Convention on the Rights of the Child—and How to Make It Work,” supra note 7, 100.
18 CRC, General Comment No. 12, paragraph 18.
consideration of actions, policies or interventions relating to children must be gauged with reference to these four cross-cutting principles.20

The CRC is important to refugee children because it sets comprehensive standards.21 Virtually every aspect of a child’s life is covered, from health and education to social and political rights. Some of the standards are specific, for example the articles on juvenile justice (arts. 37 and 40), adoption (art. 21) and family rights (arts. 5, 9 and 14.2). Some social welfare rights are expressly qualified by the State’s financial capability and the resources available to it at the relevant time.22 It must, however, be noted that the insufficiency of resources, even when ‘demonstrably inadequate’,23 neither constitutes a plausible nor excusable ground for not ensuring the effective enjoyment of children’s rights.24

Rights to health (art. 24), education (art. 28), and to an adequate standard of living (art. 27) are called “progressive rights” because they increase along with the State’s economic development. However, these social welfare rights are not just principles or abstract goals. Because they are “rights,” the prohibition against discrimination (art. 2) means that whatever benefits a State gives to the children who are its citizens, it must give to all children, including those who are refugees on its territory. Within the African context, this framework is further bolstered by provisions of the African Charter on the Rights and Welfare of the Child (the African Children’s Charter)25 whose strength lies in the extension of protection to

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23 CESCR, General Comment No. 3, HRI/GEN/1Rev.6, paragraph 11; ‘even where the available resources are demonstrably inadequate, the obligation remains for a State party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances.’
24 See CRC, General Comment No. 5, paragraph 8 which requires that State parties must “undertake all possible measures towards the realisation of the rights of the child, paying special attention to the most disadvantaged groups” (emphasis added).
internally displaced children,26 “something which the CRC does not do”27 and in the formal synergies that it creates between itself and other authoritative international instruments.28 This chapter, however, focuses on the normative framework for the protection of refugee children under the CRC alone since the Convention has been ratified by all African states with the single exception of Somalia.29 It examines the relevance to refugee children of the CRC’s underpinning principles especially in relation to the primary responses for assisting and protecting such children. Finally, the role of complementary rights of identity, protection and support are examined. The chapter concludes that the effective protection of refugee children will be possible only if states ensure the rights and protections guaranteed under the CRC for their own children and if they cooperate with international organisations such as UNHCR30 or indeed other governments in assisting refugee children by adopting genuine burden sharing options.

3. General Principles of Protection

There are four cross-cutting principles that may be thought of as underpinning the entire instrument.31 These core principles include (1) the rule against discrimination, (2) the ‘best interests’ rule, (3) the rule promoting the child’s survival and development, and (4) the rule requiring the child’s participation.32 The body charged with overseeing the implementation of the CRC, the Committee on the Rights of the Child,33

26 African Children’s Charter art. 23(4).
27 Viljoen, supra note 4, 225.
28 The interpretative provision of the Charter sanctions the supervisory body (the Committee on the Rights and welfare of the Child) to draw inspiration from international human rights law and other international instruments such as the CRC. See African Children’s Charter, art. 46.
32 General Comment No. 5 (2003), CRC/GC/2003/5, paragraph 12.
33 Established under Article 43 of the CRC, the Committee on the Rights of the Child, which constitutes a body of independent experts, is the primary mechanism that has been
has also identified these principles as constituting the central focus of the rights and duties contained in the Convention and of the reporting system under it. The Committee, therefore, requires that relevant information, including the principal legislative, judicial, judicial and administrative or other measures in force or foreseen; should be provided in respect of the general principles. In addition, states parties are advised to provide relevant information on the impact and application of these principles in relation to the implementation of the other provisions of the Convention. However, the relevance of the general principles transcends their application to the state reporting mechanism. Given their generality and extensive scope, they apply to all considerations relating to the promotion and protection of the rights and welfare of the child, and therefore serve as ideal starting point for any analysis of the substantive provisions of the Convention as well as the situation of children in different contexts.

3.1. The Non-Discrimination Principle

Article 2(1) of the CRC extends all the rights set forth in the instrument to each individual child without any adverse or prejudicial distinction. It stipulates that:

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34 It is noteworthy that in its general guidelines for initial and periodic reports, the UN Committee on the Rights of the Child categorizes as ‘general principles’ the following provisions of the CRC: Article 2 (non-discrimination); Article 3 (best interests of the child); Article 6 (the right to life, survival and development) and Article 12 (respect for the views of the child).

35 General Comment No. 5 (2003), CRC/GC/2003/5, paragraph 12.

36 General Guidelines Regarding the Form and Content of Periodic Reports to be submitted by States Parties under Article 44, paragraph 1(b), of the Convention (2005), CRC/C/58/Rev.1, paragraph 20–21.


38 For an illustration of the normative influence of the best interest of the child principle within the CRC, see the following provisions: Articles 9(1); 9(3); 18(1); 20(1); 21; 37(c); 40(2)(b)(iii).
States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

Although there is no express definition of the word “discrimination” in the CRC, the work of the Committee on the Rights of the Child indicates its construction as “differential treatment in similar cases without an objective and reasonable justification”. The Committee’s reliance on the above definition can be clearly illustrated by its concluding comments in its report on Belgium: “the general principle of non-discrimination in the Convention prohibits differences in treatment on grounds that are arbitrary and objectively unjustifiable”.

Article 2(1) applies to every child and is applicable with reference to all the rights and freedoms guaranteed by the CRC; this has been clarified by the reports of Committee on the Rights of the Child. In other words, it is a non-autonomous provision of the Convention. It may, therefore, only be invoked in relation to the implementation of a right protected by the Convention itself. It has no independent existence, yet it qualifies all of the other substantive provisions as if it were a part of each one. Thus, it governs all the rights and freedoms recognised and guaranteed in the Convention hence its status as a general principle. In other words, every child within a state’s jurisdiction holds all the rights guaranteed under the Convention without regard to political opinion, citizenship, immigration status or any other status.

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39 Woutler Vandenhole, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies* (Antwerpen: Intersentia, 2005), 79. The work of the Committee provides a credible basis by which to infer the nominal definition of discrimination within the meaning of the CRC since the Committee itself is a creature of the CRC.

40 UN Doc. CRC/C/15/Add.178, paragraph 6 (Belgium) cited in WOUTER VANDENHOLE, ibid at 79.

41 UN Doc. CRC/C/15/Add.260, paragraph 35 (Nepal); UN Doc. CRC/C/15/Add.199, paragraph 54 (Romania).


44 See Stephen Achilli, *Do African Children Have Rights? A Comparative and Legal Analysis of the United Nations Convention on the Rights of the Child (2010)* 32 arguing that Article 2 is one of the overarching principles that guide the interpretation of all the other substantive provisions’ (emphasis added).

45 This ground is especially important for the protection of internally displaced children who may become victims due to their association with a particular political group.

In relation to refugee children, the Convention’s position is even more unequivocal and obligates states to ensure that necessary measures are taken to enable refugee children enjoy the rights set forth in the CRC as well as other international human rights instruments to which the states are parties. Thus, refugee children are entitled to the enjoyment of the full range of the rights contained in the Convention.

By ensuring the non-discrimination of refugee children, the CRC has moved the level of protection to a higher plane. It is submitted that this approach takes into cognisance the vulnerability and special needs of the unaccompanied refugee child. Such an approach also augurs well with the best interests approach.

3.2. The Best Interests of the Child

Article 3(1) of the CRC enshrines what is commonly known as the welfare or best interest principle. It provides that:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

The best interest principle is considered as the primary focus of the CRC and appears in a variety of contexts throughout the Convention. In particular, it is used in relation to the child’s right to the enjoyment of parental care and protection (art. 9), with reference to the shared parental responsibility for the upbringing of the child (art. 18), in relation to measures pursued in the case of children who are permanently or temporarily deprived of their family environment (20), in relation to the system of

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47 CRC art 22; African Children’s Charter art. 23(1).
48 In contrast, the 1951 Refugee Convention does not provide exhaustive protection against discrimination. The preamble merely affirms ‘the principle that human beings shall enjoy fundamental rights and freedoms without discrimination’ (preamble para. 1). However, the substantive provisions relating to entitlements water down this affirmation and allow states to discriminate between ‘citizens’ and ‘nationals of a foreign country’ such as refugees (art. 3) and since the OAU Refugee Convention was merely intended to supplement the 1951 Refugee convention, it does not even address the issue. Thus under this framework, states were allowed to discriminate between refugee children and citizen children notwithstanding the vulnerability of the former.
49 Hammarberg, supra note 78, at 99.
adoption or similar practices(21), with reference to children deprived of their liberty (art. 37), and finally; in relation to children subjected to criminal law procedures (art. 40).

However, it is the use of the principle in article 3 which is the focus of the present analysis. The provision is applicable in all actions concerning children.51 It is for this reason that it will be invoked in conjunction with the other provisions of the CRC in order to support, justify or clarify a particular approach to issues arising under the Convention. Indeed, there is no provision in the CRC and no right or freedom recognised therein, with respect to which the principle is not relevant.52

However, although the best interest principle has been a feature of legal development for the past two hundred years, the term ‘the best interests of the child’ has been described as a rather nebulous and ill-defined standard that opens a plethora of considerations and priorities.53 The imprecision that surrounds the concept of the best interests has led some commentators like Mnookin and Elster to declare that the concept is ‘indeterminate’ and that working with it is akin to exercising “Solomonic judgement”.54

The indeterminacy charge is not allayed since the principle does not prescribe the range of factors that must be considered in determining what is in a child’s best interests. However, in response to this charge, it is clear that it would not have been possible or practical to have attempted within the space of an international instrument to incorporate an exhaustive list of core factors applicable to all situations.55 Even if such an exercise were attempted, it would leave unanswered the question as to

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51 It is important to note that article 3(1) of the CRC is formulated in a manner that encourages its wide application to all actions that concern the child. Accordingly, the word ‘concerning’ should be interpreted as encompassing not only actions that directly affect, relate or refer to children, but also those whose consequences may indirectly affect the child. See *Minister for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 128 ALR 353 (per Mason CJ and Deane J): ‘A broad reading of the provisions in Art. 3, one which gives to the word “concerning” a wide-ranging application, is more likely to achieve the objects of the convention’.

52 (AC) CHILIHU, supra note 44, 32.


comparative value which ought to be ascribed to each of the different competing interests.  

Yet, the seemingly expansive formulation of the principle in the Convention is also its most important characteristic. It allows a contextual application of the principle on a case-by-case basis, allowing for a result that is specific to each child. Domestic applications of the principle demonstrate this contextualised approach. In the Constitutional Court of South Africa, Justice Sachs, whilst acknowledging the argument that the best interests principle is prone to criticism “as inherently indeterminate, providing little guidance to those given the task of applying it”, observes thus:

[T]his Court has recognised that it is precisely the contextual nature and inherent flexibility of [the best interests principle] that constitutes the source of its strength. Thus, in *Fitzpatrick* this Court held that the best interests principle has “never been given exhaustive content”, but that “[i]t is necessary that the standard should be flexible as individual circumstances will determine which factors secure the best interests of a particular child.” Furthermore “(t)he list of factors competing for the core of best interests [of the child] is almost endless and will depend on each particular factual situation”. Viewed in this light, indeterminacy of outcome is not a weakness. A truly principled child-centred approach requires a close and individualised examination of the precise real-life situation of the particular child involved. To apply a pre-determined formula for the sake of certainty, irrespective of the circumstances, would in fact be contrary to the best interests of the child concerned (footnotes omitted).

In relation to refugee children, the best interests of the child require that durable solutions be found as quickly as possible. Durable solutions are those which positively contribute to the refugee child’s survival, protection and development and encompass considerations such as the child’s

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57 *S v M* 2008 (1) SA 232 (CC) para 24.
58 *Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 (3) SA 422 (CC); 2000 (7) BCLR 713 (CC). In that case, Goldstone J, writing for a unanimous Court, held that although the substance of the best interests principle had not been given exhaustive content in South African, foreign or international jurisprudence, it was necessary that the standard be flexible because individual circumstances determined which factors ensured the best interests of a particular child.
need for “bodily and mental health, normal intellectual development, adequate material security, stable and non-superficial interpersonal relationships and a fair degree of liberty”.

Indeed the rule may be considered as having two main different but intricately related applications: namely, in the design of government policy-making and decisions made about children on an individual basis. In relation to policy decisions, the best interest principle requires States to analyze how each course of action may affect children. Because the interests of children are not always identical to adults’ interests, and can at times even conflict, the state must carefully separate out the various interests at stake. The government does not have to take the course of action that is best for children, but if any conflicts are identified, the State must make the best interests of children a primary consideration. This rule applies in budget allocations, in the making of laws, and in the administration of the government.

In relation to individual children, the principle requires that when a decision is being made about an individual child, then the child’s best interests must be, at a minimum, a primary consideration. There are some situations where the child’s welfare gets higher consideration. For example, in a case of abuse or neglect, a child can be separated from parents if it “is necessary for the best interests of the child” (art. 7). In an adoption case, the “best interests of the child shall be the paramount consideration” (art. 21). In these cases, how a course of action might affect the child must be looked at closely, which is a requirement similar to that in policy decisions. What can be different in individual cases is that under some CRC articles a child’s welfare must be given priority over that of an adult.

In short, the state is bound to facilitate the quickest possible normalisation of the child’s situation. By championing the best interests approach, the CRC has prescribed a uniform standard relating to the treatment of

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63 VAN BUEREN, ibid 451.
64 VAN BUEREN, ibid 451.
65 VAN BUEREN, ibid 451.
66 Goodwin-Gill, supra note 60, 100.
refugee children and states that are parties to the Convention must ensure that they must comply with this standard.  

3.3.  The Survival and Development Principle

Article 6(1) of the CRC provides that every child has an inherent right to life and that this right must be protected by law. Article 6(2) complements the recognition of this right by obliging states to ensure to the maximum extent possible the survival, protection and development of the child. Since the right to life and the right to survival are essential preconditions to the enjoyment of any of the rights protected in the CRC, they apply in all considerations relating to the promotion and protection of the rights and welfare of the child. In other words, the right to survival and development is a general principle that serves to reinforce the raison d’être of each of the rights enshrined in the Convention.

The right to survival and development of the child is a relatively recent addition to international law. It was suggested to the Working Group on the Draft Convention on the Rights of the Child by India during the drafting of the CRC. Although the right to development had been established at international law by the time the Working Group was considering the

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67 In contrast, the OAU Convention and the 1951 Refugee Convention did not have any provisions requiring adherence to the best interest principle. This lacuna left the discretion of dealing with refugee children to the host state and led to inconsistent and often harsh practices in the treatment of unaccompanied minors.

68 It is notable that the CRC incorporates the concept of ‘child survival’ into its protective norms. This is significant because prior to the CRC child survival was primarily reflected in documents and reports of UNICEF. That this concept ended up constituting a fundamental part of the CRC speaks to the invaluable contribution of various UN organizations to the drafting of the CRC and the coordinated nature of their roles in the legislative process. See Hammarberg, supra note 7, 100.

69 Bueren, supra note 56, at 293.

70 Bueren, supra note 56, at 451: ‘Although the rights in the CRC cover almost every aspect of a child’s life, there are three rights that are so fundamental that they can be thought of as underlying the entire CRC: the “best interests” rule; non-discrimination; and the right to participate. The three rights are so important and so interrelated that it is helpful to think of them as a “triangle of rights”. The three rights of the triangle reinforce each other to reach the objective: “the survival and development of children (art. 6)” (emphasis added).

71 The original proposal which was submitted to the Working Group for consideration read:

The states parties to the present Convention undertake to create an environment, within their capacities and constitutional processes, which ensures to the extent possible, the survival and healthy development of the child. See Draft Convention on the Rights of the Child as adopted by the open-ended Working Group on 16 October 1987, E/CN.4/1988/WG.1/WP1.
The right to development was first recognized, as both an individual and collective right, in Article 22 of the African Charter on Human and People’s Rights, which came into force in 1981. The relevant provision states: ‘All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.’

Consequently, the Working Group included alongside the guarantees to a child’s right to survival and development, a general right to life. The principle was later to be adopted by the CRC Committee as a general principle of the Convention.

The survival and development principle enunciated in article 6 of the CRC engenders two separate but closely related concepts, namely, the right to survival and the right to development. The right to survival encapsulates the right to life in both its civil and political as well as its social, economic and cultural aspects. In this regard, states parties are required to adopt appropriate measures aimed at increasing life expectancy and lowering infant mortality (art. 24:2a), as well as instituting prohibitions against the death penalty (art. 37a), extra-legal, arbitrary or summary executions, and situations of enforced disappearance (art. 37d). States parties’ actions should promote a life of human dignity. In other words, states should fully ensure the right to an adequate standard of living for children including the right to housing, nutrition and the highest attainable standard of health (art. 27).

The right to survival is a dynamic concept and incorporates all the necessary steps that a state party must undertake in order to ensure the healthy development of children. Clearly, then, the duty on states parties to ensure to the maximum extent possible the survival and development highlights particular aspects of the right to life. In other words, the codification of the right to survival represents an acknowledgement that rights which protect aspects of a child’s survival are interrelated and cannot be protected in isolation. Consequently, the CRC reinforces this ideal by making particular provision which protects these interrelated aspects.
The Convention achieves this by including within its ambit protections for basic survival needs such as the right to health (art. 24:1, and 24:2b), the right to adequate nutrition and safe drinking water (art. 24:2), and the right to be protected from customs and practices that are prejudicial to the child's life or health (art. 24:3).

The right to development, on the other hand, refers to the right of individuals, groups and peoples to participate in, contribute to, and enjoy continuous economic, social, political and cultural development in which all human rights can be realised.78 According to the UN Declaration on the Right to Development (the Declaration), the right to development also ‘implies the full realisation of the right of peoples to self-determination’ (art. 1). Its article 2 emphasises the personal nature of the right. It states that “the human person is the central subject of the right to development and should be the active participant and beneficiary of the right to development”. Thus, within the context of the right to development in international law, the right also engenders the concepts of equality of opportunity and distributive justice for all (CRC art. 17 and 27:1). Consequently, it is clear that the children's right to development is not limited to the physical needs of the child but rather its all-encompassing nature emphasises the need to ensure the full and harmonious development of the child, including appropriate focus on the child's spiritual, moral and social growth.79 In this regard, the principle requires that states parties assume wide-ranging obligations which ensure that children will be able to develop their talents and abilities to the fullest potential (CRC art. 29a) whilst preparing them for a responsible life in society with a feeling of solidarity towards the community of mankind (CRC art. 29d).

The right to development is also a dynamic concept that stresses the importance of fostering and nurturing the many dimensions of the child. The CRC concretises this approach by protecting rights and freedoms that enhance the child's developmental attributes (CRC art. 29, 32). These include guarantees relating to the child's right to education (CRC art 28); the right to rest and leisure, to engage in play and recreational activities (CRC art. 32), and to participate freely in cultural life and the

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78 Article 1, UN Declaration on the Right to Development, UN Res 41/128 adopted 4 December 1986; The right to development has also been defined as follows: ‘the right to a process of development in which all human rights and fundamental freedoms can be fully realized.’ See Arjun Sengupta, “Realizing the Right to Development,” Development and Change 31 (2000): 553.

79 CRC, art 27(1); CRC, art 17.
arts (CRC art 31); the right to be protected from all forms of economic exploitation and from performing any work that is likely to be hazardous or interfere with the child’s physical, mental, spiritual, moral or social development (CRC art 32). In addition, the Convention makes special provision for the development of disabled children (CRC art 23). This provision obliges states to provide special care and assistance appropriate to the child’s condition in a manner conducive to the child’s achievement of the fullest possible social integration, individual development and his cultural and moral development (CRC art 23:3).

In relation to refugee children, by recognising the fundamental interdependence of various aspects of the child’s life, the survival and development principle highlights the unity of purpose of the CRC’s substantive as well as procedural provisions.\(^{80}\) The principle does not create new rights for children but merely serves to emphasise the holistic approach that must be followed in finding durable solutions for the survival and development of refugee children.\(^{81}\) Each one of the elements of the child’s survival and development is equally important and states parties should strive to protect them all.

3.4. The Participation Principle

Implicit within the best interests approach is the requirement for individual determination of each particular child’s situation and needs.\(^ {82}\) In order to effectively arrive at such a determination, the child will need to be meaningfully involved and participate in actively.\(^ {83}\) This is an acknowledgment of the importance of children’s participation in decision-making processes, especially concerning matters that affect them.\(^ {84}\) The participation principle flows from the premise that children’s rights need to be recognized in line with the view that they are active subjects of rights rather than passive recipients of protection and care.\(^ {85}\) There are several


\(^{81}\) Thoko Kaime, ibid at 187.


\(^{85}\) G Lansdown, Innocent Insight: The Evolving Capacities of the Child (Florence: UNICEF Innocent Research Centre, 2005), 62; Mark Ensalaco, “The Right of the Child to
participation provisions in the CRC. However, the principal ones are articles 13(1) and 12(1).\textsuperscript{86} Article 13(1) provides as follows:

The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice. Article 13(1) is a notable innovation in the CRC since freedom of expression is a right that was scarcely associated to children and whose application was seldom considered in the context of children's rights.\textsuperscript{87}

The above provision is supplemented by the content of article 12 which expressly enshrines children's participation. Article 12 guarantees that:

1. States Parties 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.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

The use of the word “freely” in article 12 is significant as it indicates that the child can express his/her views without any undue pressure or influence and reserves the right to elect whether or not to exercise this right. It also speaks to the child's expression of views from his/her "own" perspective.\textsuperscript{88} It is important to note that the right of all children to be heard and taken seriously constitutes one of the fundamental values of the CRC.\textsuperscript{89} Indeed, article 12 is one of the four general principles or pillars of the CRC which have been credited for giving the CRC its "soul".\textsuperscript{90} Hence, article 12 would be "as a general rule, require the participation of children in all decisions affecting them",\textsuperscript{17} which the Committee has recognized as an "area of concern".\textsuperscript{16}

\footnotesize{\textsuperscript{86} Other provisions in the CRC which reflect the principle of participation include the following: art 2–3, 5, 13, and 17.
\textsuperscript{87} Van Bueren, supra note 56, 131.
\textsuperscript{88} UN Committee on the Rights of the Child General Comment 12 “The right to be heard” Article 12 of the Convention (Fifty-first session, 2009) UN Doc CRC/C/GC/12, paragraph 22.
\textsuperscript{89} Ibid, paragraph 2.
should not be restrictively construed as a mere right in itself; rather, it should be interpreted broadly and considered in the interpretation and implementation of all other rights in the CRC.

Moreover, article 3 of the CRC requires that every action taken on behalf of the child has to respect the best interests of the child, the latter of which needs to be established in consultation with the child. Thus, the participation principle applies to all matters affecting the child, including judicial and administrative proceedings. It, therefore, cuts across the whole spectrum of issues relating to the rights and welfare of the child. This indicates that children's participation qualifies as a general principle which should be considered in all matters relating to the protections provided by the CRC. In one way or another, nearly every article concerns some aspect of children's participation in society. The CRC's provisions reflect these many aspects of participation. For example, there is social participation in family (arts. 7.1, 10) and community life (arts. 15, 17), and participation of those with special needs, such as disabled children (art. 23).

The participation of children in decision-making helps adults make better choices because they are better informed of the thoughts, feelings and needs of the children. But participation also meets a developmental need. It is through participation that children learn decision-making skills and gain the confidence to use those skills wisely. As children age and mature they have greater participation in decision-making. For purposes of analysis, we can desegregate participation into inputting of information; construction of dialogue; and ultimately, decision-making. The possibility of inputting information allows children their self-expression. For younger children, it is possible to incorporate information input in their play (CRC art 31) such as drawing. Yet, this can be the basis for their

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91 UN Committee on the Rights of the Child, General Comment No. 5, The National Implementation Mechanisms Right of the Child to be Heard (hereinafter General Comment No. 5).
92 General Comment No. 5, para 2.
93 General Comment No. 12, para 71.
94 General Comment No. 12, para 2.
95 General Comment No. 12, para 2.
96 General Comment No. 12, para 26.
97 General Comment No. 12, para 30.
98 General Comment No. 12, para 30.
99 General Comment No. 12, para 29.
participation, provided that adults use the drawings as a source of information about the children's thoughts and feelings in their decision-making. Dialogue, on the other hand, allows children to have opinions and can discuss them with adults. It is noteworthy that when adults give the opinions "due weight", according to the child's age and maturity, then the children are participating in the decision-making process, in accordance with the CRC.

In relation to decision-making, children, especially those at an older age can make some of their own decisions in accordance with their evolving capacities. For example, under national law adolescents may have the right to get married or to join the army. Even though these choices are usually subject to the approval of parents, the right of adolescents to decide what is in their own best interest shows that participation is a continuum: with an increase in age and maturity comes an increase in control over one's life. Clearly, therefore, the participation principle is a lynchpin in the scheme set up by the CRC. Yet, accounts of children's rights often highlight the absence or restriction of these rights for children. In relation to child refugees, children's participation rights require that in the determination of their status and in any aspect of providing durable solutions, the child's views should feature prominently. The body entrusted with the task of finding the durable solutions must solicit the views of the refugee child or determining the child's status and such views must be taken into account in any subsequent decisions relating to the child. The obligation also requires the state to provide refugee children with a guardian or adviser who is well trained in child welfare matters and who will promote decisions in the best interests of the child and positively contribute to the quest for durable solutions.

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100 UN Committee on the Rights of the Child, Right to be Heard, paragraph 28.
101 General Comment No. 12, para 29-30.
102 Mark Ensalaco, supra note 119, at 14.
103 General Comment No. 12, para 2.
105 van Bueren supra note 72, at 365. See also EU, 'Recommendations from the EU seminar on children affected by armed conflict and forced displacement-a child perspective (1–2 March 2001) available at <http://www.unhcr.ch/> [accessed on 30 February 2012].
106 UNHCR Global Consultations (2005) at 3, para. 9.
Thus, the right of participation is critical in determining the best interests of the child and ensuring mechanisms that enable refugee children to exercise this right is the positive step towards affording them effective protection and assistance.108

4. PRIMARY CONSIDERATIONS FOR REFUGEE CHILDREN

The CRC provides a general direction that states parties must take all appropriate measures to ensure that a refugee child receives appropriate protection and humanitarian assistance. Article 22 provides specifically as follows:

1. States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, 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.

2. For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention.

4.1. Appropriate Measures

The direction to take all appropriate measure requires states parties to deploy all their resources including social, economic, political, legal and diplomatic resources in ensuring that refugee children are allowed to enjoy the rights enshrined in the CRC and in order to alleviate the difficult situation in which such children find themselves. There are no limits to

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108 In contrast, neither the OAU Refugee Convention nor the 1951 Convention made any provision for participation rights for refugee children. This inadequacy in the law may have served to further exacerbate the vulnerable position of unaccompanied refugee children.
the nature and scope of such ‘appropriate measures’ and all child refugee situations will need to be assessed on a case by case basis and responses continually evaluated as the refugee situation unfolds. Thus, where children have moved across borders, the host country is obligated to ensure as a basic minimum that essentials such as food, adequate sanitation, and shelter are made available promptly. Additionally, the host country is required to ensure that children who have fled across borders have adequate security and that they are not subject to threats from elements from whom they have fled. Where the host state is unable to do so, it is a requirement to deploy its diplomatic capabilities in ensuring that international help is sourced from other regional or international partners.

4.2. Family Reunification

Where children are separated from their usual caregivers, the CRC makes special provision. Thus, although it gives individual rights to children, it also emphasizes relationships. In this regard, the Convention proclaims the family as “the fundamental group of society and the natural environment for the growth and well-being of...children” (CRC preamble). These affirmations are strengthened by the placement of children's rights within the context of parental rights and duties (CRC art 3, 8, 11, 18). The recognition of the centrality of the family in the upbringing of a child forms the basis of the prioritization of family reunification as a primary response in situations of separation.

International law109 and refugee policy (UNHCR, 1981) also emphasize that the first priority in caring for unaccompanied children is family reunification; it has been stated that ‘UNHCR and many countries consider family reunification a cornerstone of effective refugee protection and successful resettlement programs’.110 This is because children are generally better protected from risks such as sexual exploitation and abuse, military recruitment, child labour, denial of access to education and basic assistance and detention within the context of family protection. Thus, it is not surprising that the CRC advocates family reunion as the first option. However, the most important addition to the protection framework is the

109 See CRC art 22; See also Protocol relating to the Protection of Victims of International Armed Conflicts, adopted 10 June 1977, art. 74; Protocol Relating to the Protection of Victims of Non-International Armed Conflict, adopted 10 June 1977, art. 4(3)(a).
incorporation of the best interest standard in the resolution of the matter. Reunification is thus not an automatic response that should be dogmatically pursued. It is a factor which is subsumed under the inquiry to determine the best interests of the particular child. This is because there will be situations where reunification may not be in the best interests of the child. In this regard, the durability of the relationship between the minor and the family must be carefully assessed to determine whether they should remain together. For example, reunification would not be advisable where the remaining parent or relatives were responsible, partly or otherwise, for the minor’s flight as was the case during the Rwandan genocide when some family members were responsible for murdering or maiming their own kin. Similarly, where a child flees from a social practice such as forced or early marriage or female genital mutilation, and which implicates family members, reunification must be considered with very great circumspection. Further, where a minor has developed a great degree of attachment to a foster family, the disruptive effect of ultimate family reunification must be weighed against the need for continuity and stability.

It is also important to note that reunification does not only entail returning the unaccompanied minor to his or her country of origin but may also involve organizing the reunification around the child if this is in his or her best interests. For example, during the fighting in December 2006 between Somalia’s transitional federal government and Islamist guerrillas, Kenyan authorities forcibly repatriated Somalian refugees (including children) who had crossed the border even though the fighting was still raging. It is clearly not in the best interests of the child to send her back to where hostilities are still going on. This principle of non-refoulement is also emphasised by the CRC Committee. Similarly, if minors are targeted for military recruitment by authorities or other parties in the country of origin, reunification should be organized within the host country or another third party state.

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111 P Gourevitch, We Wish to Inform You that Tomorrow We Shall be Killed Together with our Families: Stories from Rwanda (1998).


113 CRC, General Comment no. 6, Treatment of unaccompanied and separated children outside their country of origin (2005) para 26.
4.3. Alternative Care

Article 22 of the CRC also provides that where parents or legal guardians or close relatives cannot be found, the refugee child must be accorded the same protection as any other child who has been permanently or temporarily deprived of his or her family environment for any reason. The extent of the state’s obligations must, therefore, be sourced from article 20 of the Convention which obligates states to accord special protection and assistance to any child who is permanently or temporarily deprived of his or her family environment. Since the Convention already accords special protection and assistance to all children, the implication from this provision is that children without families are entitled to an additional level of protection and assistance above that of other.

The obligation of states under these provisions is to ensure that children who are parentless or permanently or even temporarily deprived of their family environment must ‘be provided with alternative family care’ which may take the form of adoption, foster placement or placement in suitable institutions for the protection and care of children (CRC art 20:3). Further, when considering such alternative family care for the child, states are required to have the best interests of the child as the primary consideration and to pay due regard to the desirability of continuity in the child’s upbringing and to the child’s ethnic, religious or linguistic background.

In relation to the provision of alternative care for refugee children, it is noteworthy that the CRC demonstrates a preference for placements which maintain the child’s previous, ethnic, religious, cultural and linguistic background (CRC art 20:3). Furthermore, the CRC also prescribes an analogous preference to continuity in the child’s upbringing. However, the most notable aspect of article 20 is that it does not prescribe an overall standard for the choice of placement, leaving the ultimate choice to be predicated on the best interests of the child. Thus, the refugee child’s ethnic, religious, cultural and linguistic background are not the primary consideration, but rather are ‘subsumed under the larger issue whether the particular placement meets his or her best interests’.

Under this obligation, states must put in place effective adoption and foster care arrangements as well as monitoring mechanisms for such

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114 This interpretation is strengthened by the requirement that ‘due regard’ be had to the desirability of continuity in upbringing. Obviously, ‘due regard’ does not preclude a determination that continuity would not be in the best interests of the child, for example, where the security situation in the child’s own country is still unsettled.
This approach is a significant break from past refugee practice whereby considerable weight was accorded to the child’s background/nationality in making placement decisions. The UNHCR notes that the absence of standards applicable to unaccompanied refugee children led to the principle that children belong first to their parents and secondly to their country (see UNHCR, “Refugee children: Guidelines for their protection and care” (1994). State parties cannot now rely on this obsolete principle but must instead ensure the existence of appropriate mechanisms for ensuring that unaccompanied children are accorded treatment which guarantees their best interests.

5. Conclusion

An analysis of the extent of state obligations emanating from the duty to provide protection and assistance to refugee children demonstrates just how onerous the duties assumed under these provisions of the CRC are. The economic and financial implications of guaranteeing these rights to refugee children by states may lead to their totally shirking their duty to protect and provide assistance to child refugees. In many cases, states that host refugee and internally displaced populations have resorted to massing them in camps run by international organizations, and have not paid particular attention to the rights and welfare of the children who find themselves in these dire circumstances. For example, in Uganda and Kenya, the state has pursued a policy of forced relocation or “regroupement” of internally displaced persons, whereby whole communities are made to abandon their usual dwellings and live in camps where there are no or very limited social services. However, the plight of the vulnerable children caught up in problems such as this demands more creative solutions than the mass shepherding of people into camps. There is a duty on states to ensure that their security options do not cause unnecessary distress to child refugees. Problems of implementation are not only present at the national level. Despite the massive refugee problem across the globe
and the elegant rules contained in the CRC, the protection of refugee children is not matched with similarly secure funding. The result is that interventions addressing the plight of refugee children on the African continent are left to international non-governmental organizations, whilst regional and state initiatives are kept at a minimum. However, the immediacy of the various responses required of states demonstrates the necessity of states guaranteeing these rights for their own children. Thus, the duty to protect and provide assistance to refugee children will be discharged more easily if the state already ensures the rights and the protections provided by the CRC for its own children.

Where there are economic, institutional or administrative hurdles in affording protection and assistance to refugee children, it is imperative that states cooperate with other governments and international organizations, instead of overlooking these duties. Cooperation with other agencies such as UNHCR is imperative as they have developed a suite of interventions intended to achieve durable solutions for refugee children. These agencies’ experiences are vital to speedy interventions in favour of refugee children and are therefore excellent partners in the provision of a network of resources in refugee situations. Unless the legal rights of refugee children are properly recognized and implemented, the only guarantee they will have is the continued hardship of their situation.

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